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Public consultation - Green Paper on policy options for a European contract law

Chapter 1: Introduction

Please refer to the public consultation on the Green Paper from the European Commission on policy options for progress towards a European Contract Law for consumers and businesses, with a deadline for feedbacks of 31 January 2011. We hereby present the views of The Consumer Council of Norway (CCN).

CCN agree with the aim of the European Commission, that citizens should be able to take full advantage of the internal market.

However, we do not believe that the Green Paper on a European Contract Law is the right way forward. Unfortunately, the Green Paper, in our opinion, suffers from several defects and weaknesses.

We believe the Commission overrates the positive impact a harmonized European Contract Law will have on the Internal market, while on the other hand it underrates both the difficulties and the complexity of the task and the inevitable risk of European consumers losing existing rights. Generally, The Commission seems to over-value the importance of contract law as a dealmaker or dealbreaker.

The Green Paper suffers in our opinion from a fundamental lack of preparatory work. The proposal is based on assumptions, not evidence. There is no market analysis which examines and defines the problem. All we know is that the Commission believes that the potential of cross-border e-commerce is "partly unfulfilled" and that the Commission assumes that this may be caused by legal fragmentation. This assumption alone clearly cannot justify the highly ambitious project of creating a European contract law.

A recent survey of November 2010 shows that cross-border transactions in the Nordic countries "explodes" see point 2.4 below. This may be an indication that the unfulfilled potential of the Internal market, at least partly, may be due to the fact that it is an immature market. It may therefore be recommendable to study market developments in the longer terms, to be able to separate real market

barriers from mere consequences of a immature market. Such a problem analysis is in our opinion necessary in order to be able to propose adequate measures.

Furthermore, there is no cost-benefit analysis of the proposed options in the Green Paper. A thorough cost-benefit analysis, including an impact assessment of the options, must be considered essential and mandatory. CCN believes an analysis will show that the benefit of any of the options is at best marginal, and furthermore, that the costs of total harmonization of European contract law, are considerable. In our opinion, the overall impact will for sure be negative.

The basic premise of the Green Paper is that differences between national contract laws constitutes significant markets barriers. The Consumer Council of Norway does not share the Commission's view in this matter. The Commission has not provided any documentation to support its view, in spite of being strongly encouraged to do so for a number of years. On the contrary, the Commission's own research (EUROBAROMETER 292 (2008)) shows that only 16% of vendors believe that harmonised regulations would significantly increase their cross-border activities, and it also appears that harmonised regulations do not matter much to buyers. See point 2.1 below.

EUROBAROMETER 2008 demonstrates that other obstacles, such as a lack of internet access, lower confidence when consumers do not encounter the seller face-to-face, language difficulties, and a lack of information about cross-border trade, are the greatest barriers to consumers. We also believe that unlawful vertical restraints (from producers and suppliers) may explain why some traders do not sell cross-border. See point 2.2.

The Commission refers to a report showing that, for 61% of cross-border e-commerce offers, consumers were not able to place an order mainly because businesses refused to serve the consumer's country. The Commission seems to suggest that legal fragmentation is part of the reason for this. There is, however, no basis for such an assumption, as the Report does not say why traders refused to serve the consumer. See point 2.3.

Looking into the Commissions idea of creating a European contract law in order to boost cross-border consumer transactions, we are very disappointed by the lack of consumer focus in both the Draft Common Frame of Reference and the Expert Group set up by the Commission, see chapter 3 below. Unfortunately and surprisingly, it seems to us as if consumers and consumer law have been lost in the process.

Consumer Law is part of contract law, but is at the same time, in many aspects, different from contract law. The motives behind consumer law differs substantially from those of general contract law (due to the imbalance between the parties in consumer transactions), and there are important differences between provisions required for consumer protection and provisions appropriate more generally in contract law. These important differences are surprisingly not reflected in the DCFR or The Expert Group's task.

As far as we can see, important consumer provisions are absent in the DCFR, for instance the provision on joint liability for credit providers, such as credit card companies, for faulty goods and services, see point 3.2. The lack of consumer focus in both the DCFR and the Expert group will make the outcome of the process less useful to future consumer law legislators than intended.

The serious flaws pointed out above prevents an objective and informed choice between the proposed options. CCN must at this stage advise against all options. See chapter 4. The optional Instrument, which we understand is the Commission's preferred option, will in our opinion be detrimental to consumer interests.

The Green Paper must be seen in the context of the Consumer Directive, which is currently discussed in The Parliament and The Council. The proposed total harmonization of rules regulating sales of goods and unfair contract terms has proven to be highly controversial. With this Green Paper the

Commission puts forward policy options which means an even more extensive total harmonization than the Directive. In our opinion, it should be recommended that further work on the Green Paper is put on hold until the Consumer Directive debate is finished.

Chapter 2 A Green Paper based on false assumptions? The need for a cost-benefit analysis..

2.1 No evidence that legal fragmentation is a significant barrier to cross border trade

Will a European Contract Law significantly boost the Internal Market? Contrary to what the Commission claims both in The Green Paper and in the proposal for the Consumer Directive, the Eurobarometer 2008 does not prove that differences between national regulations are an important obstacle to cross-border trade. On the contrary, the survey(s) indicate that regulatory differences have little impact on this kind of commerce.

With respect to whether the absence of harmonised regulations constitutes a trade barrier for *buyers*, it is striking that Eurobarometer 2008 does not contain a single question that addresses the issue directly. There are therefore no grounds whatsoever for saying that the absence of harmonised regulations constitutes a trade barrier for buyers. In fact, Gøsta Petri of the Commission admitted this at a consultation meeting organised by the Ministry of Justice and the Police and the Ministry of Children and Equality in Oslo on 12 January 2009. There he acknowledged that harmonised regulations were not particularly important to consumers.

With respect to whether the absence of harmonised regulations is a trade barrier for *vendors*, there is only one question in Eurobarometer 2008 that directly addresses the issue; see appendix 1. Over 7000 business leaders were asked what impact harmonisation of regulations in the 27 EU member states would have on the cross-border sales of their businesses. Only 16% of them answered that it would lead to a big increase. In total, 74% said that harmonised regulations would make little or no difference. The figures are largely the same as the equivalent figures for 2006¹; see figure. It is the view of the Consumer Council that this does not support the Commission's claim that the current system of minimum harmonisation constitutes a major barrier to trade. On the contrary, the survey gives us reason to believe that a move towards total harmonisation would have a very limited impact on cross-border e-commerce.

There are also some methodological weaknesses with the survey that are worth mentioning. The business leaders were given the option of answering "increase a lot", "increase a little", "decrease a little", "decrease a lot" and "don't know". They were not given the option of saying "no change". In spite of that, a full 41 percent of respondents chose to answer "no change" without prompting, rather than saying "don't know". According to CCN chief analyst Terje Isachsen, when as many as four out of ten people give "no change" as an unprompted response, this is a strong indication that there is a widespread belief that differences between national legislations do not affect cross-border trade.

2.2 Reluctance to engage in cross-border transactions is due to other factors (than legal fragmentation)

What Eurobarometer 2008 did show, however, was that a number of other factors, which had nothing to do with harmonisation, were important to buyers. Lack of Internet access is clearly a key factor. In general, consumers have greater confidence in vendors they meet face-to-face than in online retailers. This is true of both domestic and international companies. Language is another important barrier (only 33% of consumers are willing to make a purchase in a foreign language). The lack of information about cross-border trade is also something of a barrier (21%).

A survey from Statistisk Sentralbyrå (Statistics Norway) of December 2010 shows similar results, see http://www.ssb.no/emner/10/03/sa_ikt/sa_118/sa_118.pdf

¹ In spite of the Commission changing the question from asking about the "proportion" of cross-border sales in 2006 to the "level" of cross-border sales in 2008.

Statistics Norway sums up the results like this:

“ The most common reasons for not engaging in e-commerce is undramatic. Almost half of those who do not engage in e-commerce, argue that they prefer to buy face-to-face. 33% respond that they have no need for online shopping. Such factors cannot be viewed as representing a problem, neither for the respondents nor those responsible for the services. Responses about difficulty in finding the webpage, lack of confidence, lack of knowledge, concerns about payment security and /or personal security, suggests that there may be basis for improving methods or information to potential customers. Such factors are mentioned by 5 to 23 percent of those not engaging in e-commerce”.

Besides this, a few consumers have informed CCN that they are not able to buy from traders in other EEA countries due to competition restrictions imposed by their suppliers, i.e. the consumers are informed by the traders that their suppliers do not accept the traders selling outside of their designated territory. In our experience, restrictions goes beyond what is accepted under the block exemption on vertical agreements (Commission Regulation 330/2010), by imposing restrictions also on the passive sales of the traders.

The CCN is satisfied that the new guidelines on vertical restraints gives better guidance for consumers and traders on what restrictions on internet sales is considered as restrictions on passive sales, and therefore hard-core. However, we believe that many traders and suppliers are either unaware of their rights and obligations under the competition rules, or, in case of the suppliers, they deliberately take the risk of not complying with the rules. Such practice may hinder cross-border sales substantially. The CCN therefore calls on the Commission, together with national competition authorities, to use its effort both to inform the industry and to enforce the competition rules on vertical restraints. We believe that such efforts will have a more important impact on enhancing cross-border sales, than severe reductions on consumer rights.

2.3 Why does 61 % of cross-border offers fail?

In the Green Paper, The Commission refers to a report showing that, for 61% of cross-border e-commerce offers, consumers were not able to place an order mainly because businesses refused to serve the consumer's country. CCN Chief Analyst Terje Isachsen, has studied the report "Mystery Shopping Evaluation of Cross-Border E-Commerce in the EU". His conclusion is that there is nothing in the report (results or interpretations) that indicates that legal differences between states is the reason, or part of the reason, why 61% of cross-border offers fails. The Report does not say why traders refused to serve the consumer.

In other words, the report gives no basis whatsoever for the conclusion that the existing minimum harmonisation directives creates barriers to trade. Consequently, the conclusion of the Commission, i.e. that maximum harmonisation will increase cross-border sales, is not a valid deduction of the report.

According to Mr. Isachsen, the Commission's conclusion may only be valid if it refers to background material not published in the report, that is interviews with representatives of the different traders on why cross-border offers fails. CCN therefore calls on the Commission to reveal the background material, including the names of the traders.

Furthermore, we already know from the Eurobarometer 2008 that, even if total harmonisation was possible and actually existed, traders in general would not be very interested in increasing their cross-border sales. See table 28a and 29a. This indicates firstly that it should come as no surprise that many cross-border offers fails, and secondly that this is due to other factors than differences in national legislations.

2.4 A failed market or an immature market?

A recent survey of November 2010 shows that cross-border transactions in the Nordic countries “explodes”. This may be an indication that the unfulfilled potential of the Internal market, at least partly, may be due to the fact that it is an immature market. The “explosion” has taken place despite

legal fragmentation, which may strengthen the impression that legal fragmentation is no important barrier to cross-border trade.

From a press release from DIBS Payment Services av 9. november 2010:

"Cross-border e-commerce exploding

This years survey shows that e-commerce patterns of buying and selling are internationalized: Half of Norwegians now buy also from foreign e-businesses. Since last year the percentage of Norwegians shopping cross-border has increased from 39% to 53% for Norwegians, from 34% to 51% for Danes, from 32% to 43% for Finns and from 25% to 33% for Swedes. This is a very swift change in less than a year and is the result of the search for lower prices and new products".

Similar results can be found throughout Europe. The survey from Statistics Norway of December 2010 mentioned above in point 2.2 shows in figure 7.4.1 a significant increase in e-commerce i all European countries from 2006 to 2009 (with the exception of Iceland).

Chapter 3. Consumers and Consumer Law getting lost in the process?

3.1 Introduction

The Green Papers main purpose is to ease cross-border transactions between businesses and consumers. As we understand it, the Commission's perceived problem is consumer transactions and the fragmentation of contract law relevant for consumers. In this context, a focus on consumer contract law could have been expected. Unfortunately, the focus of both the DCFR and the Expert Group set up by the Commission to adapt the DCFR is general contract law.

CCN therefore fears that the consumers are lost in the process of setting up a (toolbox for) European contract law.

3.2 Lack of consumer focus in the DCFR

According to its introduction paragraphs 4 and 6, the DCFR is an academic, not a politically authorized text. The purpose of the DCFR is to serve as a possible model for a political CFR. Paragraph 6 states that:

"The purpose of the CDFR

6. A possible model for a political CFR. As already indicated, this DCFR is (among other things) a possible model for an actual or "political" Common Frame of reference (CFR). The DCFR presents a concrete text, hammered out in all its detail, to those who will be deciding questions relating to a CFR. A "political" CFR would not necessarily, of course, have the same coverage and contents as this academic DCFR".

Consumer Law is part of contract law, but is at the same time, in many aspects, different from contract law. The motives behind consumer law differs substantially from those of general contract law (due to the imbalance between the parties in consumer transactions), and there are important differences between provisions requires for consumer protection and provisions appropriate more generally in contract law.

This important difference is, surprisingly, not reflected in the DCFR. Consumer Law is rarely mentioned in this extensive text, primarily in the Introduction paragraph 40, where the conclusion is that consumer law should not be dealt with separately:

"Nor can the DCFR contain only rules dealing with consumer contracts. The two groups concur in the view that consumer law is not a self-standing area of private law. It consists of some deviations from

the general principles of private law, but it is built on them and cannot be developed without them. And "private law" for this purpose is not confined to the law on contract and contractual obligations. The correct dividing line between contract law (in this wide sense) and some other areas of law is in any event difficult to determine precisely. The DCFR therefore approaches the whole of the law of obligations as an organic entity".

CCN fears that Consumer Law provisions and traditional consumer law motives (protection of the weaker party etc.) will drown in an enormous civil law project like the DCFR/CFR.

All vital consumer protection rules should of course be part of both the DCFR and any future (political) CFR. For instance, the vital provision stating that credit providers, such as credit card companies, do carry joint liability for faulty goods and services when consumers purchase goods/services, is not part of the DCFR. This is a highly valuable consumer protection rule in many European countries, among them UK and the Nordic countries. Another important consumer provision in many countries is the right to go directly to the producer (and other earlier links in the sales chain) in the event of defects.

We might have missed something, but as far as we can see, these two provisions are not part of the DCFR. If this is correct, it means that DCFR must be supplemented following a separate "consumer examination".

3.3 Lack of Consumer Focus in the Expert Group

CCN are disappointed by the setting up of the Expert group and the group's task. In this important political process of turning the DCFR into a CFR, there is no separate focus on consumer contract law and there is no mention of consumer protection principles. In our opinion, consumer contract law and consumer protection principles should have been the group's principle task. Furthermore, we find it inappropriate that there are no legitimate consumer representatives in the Group.

In fact, the task of the Expert group, like the DCFR, scarcely mentions consumers or consumer law, see Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law. Paragraph 8 reads:

"The group should assist the Commission in preparing a proposal for a Common Frame of Reference in the area of European contract law, including consumer and business contract law, using the Draft Common Frame of reference as a starting point and taking into consideration other research work conducted in this area as well as the Union acquis. The group should, in particular, help the Commission select those parts of the Draft Common Frame of Reference which are of direct or indirect relevance for contract law, and restructure, revise and supplement the selected content".

The lack of consumer focus in both the DCFR and the Expert group means that the outcome of the process will be less useful to future consumer law legislators than intended. In our opinion the results of the Expert Group will need to go through a "consumer adaptation", including both consumer law and consumer policy principles.

Chapter 5 The options of the Green paper

As pointed out in the Introduction, due to what we see as severe defects in the preparation of the Green Paper, the Consumer Council of Norway finds it inadvisable to choose any of the proposed options.

Options 5 to 7 means total harmonization of European contract law. Besides being of no purpose (see point 2.1), this is in our opinion an over-ambitious project which is not in conformity with the principles of subsidiarity and proportionality. Furthermore, we believe the project will be detrimental to consumer interests. The level of consumer protection and legislative flexibility will both inevitably

be reduced. The drawbacks of total harmonization are well known from the Consumer Directive discussions and do not need to be repeated in detail here.

The lack of consumer focus in both the DCFR and the Expert Group, renders it impossible for CCN to accept the outcome of the process as an official toolbox for legislators of consumer law (options 2 and 3).

For the same reasons, we are also sceptical of publishing the results of the Expert Group to be used as inspiration for consumer law legislators (option 1). We believe the results of the Expert Group will need a "consumer adaption" made by consumer law experts before being used as a source of inspiration in consumer law matters.

CCN also believes that the "Optional Instrument" (option 4) will be detrimental to consumers. The concept of the instrument is not totally clear, but we believe the intention is that consumers may agree to give away the protection offered by Rome 1 article 6, which states that consumer are guaranteed the level of protection of their home country. Instead, the consumer may agree to be protected by another system of law, the "optional instrument".

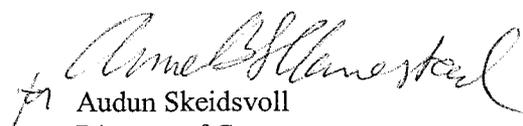
CCN is in favour of consumer choice, but not when it comes to consumer protection. Provisions of consumer law have always been, and must continue to be, mandatory. Giving every consumer the choice between different systems of consumer law is not in consumer interest. It is unrealistic that consumers have the knowledge to make an informed choice between different consumer law systems.

Chapter 6 Conclusion

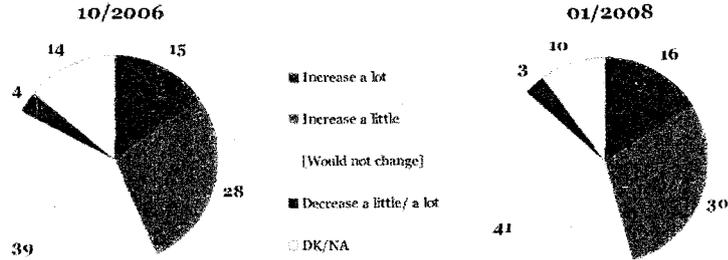
There are fundamental defects in the Green Paper, especially regarding the preparatory work, which makes it difficult and inadvisable to choose between the proposed options. There is a strong need for a thorough cost-benefit analysis of the proposed options. CCN believes this will show that the benefit of any of the options is at best marginal, and furthermore, that the costs of total harmonisation of European contract law, are considerable. The overall impact will be negative. Furthermore, the lack of consumer focus in the process, means that the results of the Expert Group will need to go through a "consumer adaption" before it can serve as inspiration for consumer legislation. The "Optional Instrument" means wiping out the fundamental consumer protection principle of mandatory law and this will for sure be detrimental to consumer interests.

Yours faithfully


Randi Flesland
Director


Audun Skeidsvoll
Director of Consumer
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Graph 33. If same provisions of the laws [...] throughout the 27 EU countries, the proportion of your cross-border sales would...



Q12(2008). If the provisions of the laws regulating transactions with consumers were the same throughout the 27 member states of the EU do you think that the level of your cross-border sales would ...
 Q16(2006). If the provisions of the laws regulating transactions with consumers were the same throughout the 25 member states of the EU do you think that ... (a) the proportion of your cross-border sales would ...
 Base: all respondents. % by EU27 in 2008 and EU25 in 2006

The table below shows that the perception that there would be increased cross-border activity is consistent, regardless of the amount of cross-border trading experience. However, those not trading