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UEAPME response to the Green Paper on the Review of the Consumer Acquis

COM (2006) 744 final

Introduction.

UEAPME has from the beginning welcomed and supported the Commission, and especially DG Sanco, when it launched in 2004 the review of the Consumer acquis with the objective to better achieve its Better Regulation goals by simplifying and completing the existing regulatory framework.

We fully support the overreaching aim of the Review, which is to achieve a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring the strict respect of the principle of subsidiarity.

General Comments on the Green Paper.

The Green Paper states that "*consumers' confidence in the internal market must be stimulated by ensuring a high level of protection across the EU. Consumers should be able to rely on the equivalent rights and have resort to equivalent remedies if something goes wrong.*"

This statement is quite strange: if there are not yet **equivalent** rights, then this means that the existing directives are not implemented. Or is it the aim to bring the level of consumer protection up to the level of the country with the highest level of consumer protection? Here the Green Paper gives already the impression to extend consumer protection, which was never the (announced) aim of the review.

The Green Paper also states that it sums up the Commissions initial findings. We are wandering what these findings are, apart from some general statements on new market developments, fragmentation of rules and lack of confidence.[1]
Indeed, so far, no general consultation has been launched amongst the stakeholders on the possible shortcomings of the acquis. **Any further review should and can only be based on proper consultation, analysis and proven shortcomings and gaps in the directives concerning consumer protection and a well functioning internal market**.

[1] See e.g. p. 4: "Research on consumer and business attitudes towards existing legislation in the area of consumer protection and its effects on cross-border trade" Research is a big word; in fact it is only a survey.

In addition, the whole Green Paper gives more the impression that it deals with the question "how to increase cross-border" transactions then with consumer protection.
Even more, cross-border transactions are defined in a very narrow and partial sense, namely only as "distance selling".

Apparently "lack of confidence" is a main issue, but also here the Green Paper deals exclusively with distance selling. Distance selling will always suffer from some problems as there are: the distance (which results in higher prices for transport), languages, no personal contact, no-confidence in the payment system,…

We have the strong impression that shortcomings in one or some directives and possible solutions are simply extrapolated and presented as shortcomings and solutions for the whole acquis.

It is indispensable to firstly undertake an analysis (including a business impact assessment and more specifically the possible impact on SMEs) prior to propose any legislative proposal.

Particular problems for SMEs with the implementation of the consumer acquis

The objectives of the main directives in the field of consumer protection are just common sense and deal with the basics. Small enterprises have been, and still are, the natural alliances of the consumers in their concern for quality and service.

However, the main problem with the existing acquis and consequently the greatest weakness is the fact that the SME point of view was never taken into account in the creating of European consumer policy.

This has led to a situation in which important parts of this legislation are not adapted to the needs and particularities of the small enterprises. The negative impact on the competitiveness of SMEs, which are acting mainly on regional or local level, has been completely ignored.

A good example of this is the obligation to indicate not only the selling price but also the price per unit of measurement to facilitate comparison of prices, even if there are no other products to compare with.

Apart from for this example**, lobbying for exemptions for SMEs** has never been a general option for UEAPME. Indeed, exemptions for SMEs in such an important area as consumer protection and safety, could give consumers and the public as a whole, the wrong impression that they are less protected or receiving less quality when the purchase in SMEs. Therefore, legislation should be conceived taking into account the particularities of the overwhelming majority of enterprises, namely the small ones.

An additional problem is that the main assumption of the consumer regulatory framework considers that the consumer has always a weaker position than the trader or, in other words, that the relation between the consumer and the seller is fundamentally unequal.

One can doubt this is still always the case. In any case, in our view it is unjust to build a regulatory framework on this assumption. Nowhere in the acquis is attention paid to the obligations of consumers. The review should also lead to the introduction of a **rule on general duty to act in accordance with the principles of good faith and fair dealing**

which should apply to both professionals and consumers. (Adaptation to new situation: aggression by consumers, fraudulent behaviour of consumers, theft,…)

Having said this, the objectives of the main directives in the field of consumer protection are just common sense and deal with the basics.
Small enterprises have been and still are the natural alliances of the consumers in their concern for quality and service.

QUESTIONNAIRE ON THE REVIEW OF THE EU CONSUMER ACQUIS

1. General Legislative Approach

Question A1: In your opinion, which is the best approach to the review of the consumer legislation?

Option 2: A mixed approach combining the adoption of a framework instrument addressing horizontal issues that are of relevance for all consumer contracts with revisions of existing sectoral directives whenever necessary.

UEAPME is most in favor of the mixed approach as it is described in option 2, with emphasis on "whenever necessary".

2. Scope of a Horizontal Instrument

Question A2: What should be the scope of a possible horizontal instrument?

Option 1: It would apply to all consumer contracts whether they concern domestic or cross-border transactions.

Option 1 gives more certainty and clarity to SMEs and does not create competitive disadvantages. The other options will create discrimination between selling techniques.

3. Degree of Harmonisation

Question A3: What should be the level of harmonisation of the revised directives/the new instrument?

Option 1: The revised legislation would be based on full harmonisation complemented on issues not fully harmonised with a mutual recognition clause.

But only under condition that the full harmonisation only concerns the directives.

4. Horizontal Issues

4.1 Definition of "consumer" and "professional"

Question B1: How should the notions of consumer and professional be defined?

Option 1: An alignment would be made of the existing definitions in the acquis, without changing their scope. Consumers would be defined as natural persons acting for purposes which are outside their trade, business or professions. Professionals would be defined as persons (legal or natural) acting for purposes relating to their trade, business and profession.

An extension of the definition as proposed by option 2 would lead to legal uncertainty.

4.2 Consumers acting through an intermediary

Question B2: Should contracts between private persons be considered as consumer contracts when one of the parties acts through a professional intermediary?

Option 1: Status quo: consumer protection would not apply to consumer-to consumer contracts where one party makes use of a professional intermediary for the conclusion of the contract.

There are no reasons at all to extend consumer protection, on the contrary. Legislation should protect the weakest party, not "the consumer" as such.

4.3 The concepts of good faith and fair dealing in the Consumer Acquis

Question C: Should a horizontal instrument include an overarching duty for professionals to act in accordance with the principles of good faith and fair dealing?

Option 3: A general clause would be added which would apply both to professionals and consumers.

This principle is already part of many national legislations and has the advantage that it is clear and fair for both parties.

4.4 The scope of application of the EU rules on unfair terms

Question D1: To what extent should the discipline of unfair contract terms also cover individually negotiated terms?

Option 3: Status quo – Community rules would continue to apply exclusively to non-negotiated or pre-formulated terms.

The need to protect consumers is only necessary when the consumer is not able at all to influence the content of the contract. Indeed the two parties have the possible to negotiate and thus, are informed about the content of the contract.

4.5 List of unfair terms

Question D2: What should be the status of any list of unfair contract terms to be included in a horizontal instrument?

Option 1: Status quo: To maintain the current indicative list.

As opinions diverge on this topic, UEAPME opts in this stage for a status-quo.

4.6 Scope of the unfairness test

Question D3: Should the scope of the unfairness test of the directive on unfair terms be extended?

Option 2: Status quo - the test of unfairness would be kept in its present form.

The scope of the unfairness test should certainly not be extended.

4.7 Information requirements

Question E: What contractual effects should be given to the failure to comply with information requirements in the consumer acquis?

Option 3: Status quo: The contractual effects of failure to provide information would continue to be regulated differently for different types of contract.

The question is drafted in a too general way and the given options are not nuanced. Nevertheless we are of the opinion that on this issue the status-quo should be maintained.

4.8 Right of withdrawal

Question F1: Should the length of the cooling-off periods be harmonised across the consumer acquis?

Option 1: There would be one cooling-off period for all cases when the consumer directives grant consumers a right to withdraw from the contract, e.g. 14 calendar days.

The different cooling-off periods lead to confusion. Different cooling-off periods discriminates also between selling methods. In any case the cooling off period should be defined in calendar days, as this way of definition cannot lead to national differences. But 14 calendar days is too long and unacceptable. It should also be clear that the right to withdraw can not be extended to other types of contracts!

Question F2: How should the right of withdrawal be exercised?

Option 2: One uniform procedure for the notice of withdrawal across the consumer acquis would be established.

Also here for reasons of clarity and legal certainty one uniform procedure would be preferable.

Question F3: Which costs should be imposed on consumers in the event of withdrawal?

Option 3: Status quo: The current regulatory options would be maintained.

Certainly not option 1. No attention is paid to the costs enterprises have in the case of withdrawal. The question is not clear? Does it concerns existing possibilities of withdrawal or

does the Commission wants to broaden the scope? In the given circumstances we opt for option 3.

4.9 General contractual remedies

Question G1: Should the horizontal instrument provide for general contractual remedies available to consumers?

Option 1: Status quo: the existing law provides for remedies limited to the particular types of contracts (i.e. sales). The general contractual remedies would be regulated by national law.

4.10 General right to damages

Question G2: Should the horizontal instrument grant consumers a general right to damages for breach of contract?

Option 1: Status quo: the issue of contractual damages would be governed by national laws, except when provided for in the Community acquis (e.g. package travel).

5. Specific rules applicable to Consumer Sales

5.1 Types of contracts to be covered

Question H1: Should the rules on consumer sales cover additional types of contracts under which goods are supplied or digital content services are provided to consumers?

Option 1: Status quo: i.e. the scope of application would be limited to sales of consumer goods, with the only exception of goods which are still to be produced.

5.2. Second-hand goods sold at public auctions

Question H2: Should the rules on consumer sales apply to second-hand goods sold at public auctions?

No common opinion could be reached.

5.3 General obligations of a seller – delivery and conformity of goods

Question I1: How should delivery be defined?

Option 4: Status quo: the term delivery would not be defined.

The definition of delivery depends on the kind of contract.

5.4 The passing of risk in consumer sales

Question I2: How should the passing of the risk in consumer sales be regulated?

Option 1: The passing of the risk would be regulated at Community level and be linked to the moment of delivery.
So far, every Member State has its own rules on the passing of the risk. In order to harmonise, UEAPME is in favour to regulate the passing of the risk at Community level and be linked to the moment of delivery, but only if the parties haven't agreed otherwise.

5.5 Conformity of goods

Question J1: **Should the horizontal instrument extend the time limits applying to lack of conformity for the period during which remedies were performed?**

Option 1: Status quo: no changes would be made.

Question J2: **Should the guarantee be automatically extended in case of repair of the goods to cover recurring defects?**

Option 1: Status quo: The guarantee would not be extended.

Question J3: **Should specific rules exist for second hand-goods?**

Option 2: A horizontal instrument would contain specific rules for second hand goods: the seller and the consumer may agree on a shorter period of liability for defects in second hand goods (but not less than one year).

5.6 Burden of proof

Question J4: **Who should bear the burden to prove that the defects existed already at the time of delivery?**

Option 1: Status quo: During the first six months it would be up to the professional to prove that the defect did not exist at the time of delivery.

5.7 Remedies

Question K1: Should the consumer be free to choose any of the available remedies?

Option 1: Status quo: consumers would be obliged to request repair/replacement first, and ask for a price reduction or termination of contract only if the other remedies are unavailable.

5.8 Notification of the lack of conformity

Question K2: Should consumers have to notify the seller of the lack of conformity?

Option 1: A duty to notify the seller of any defect would be introduced.

5.9 Direct producers' liability for non-conformity

Question L: Should the horizontal instrument introduce direct liability of producers for non-conformity?

Option 2: A direct liability for producers would be introduced under the conditions described above.

5.10 Consumer Goods Guarantees (Commercial guarantees)

Question M1: Should a horizontal instrument provide for a default content of a commercial guarantee?

Option 1: Status quo: the horizontal instrument would contain no default rules.

Question M2: Should a horizontal instrument regulate the transferability of the commercial guarantee?

Option 1: Status quo: the possibility to transfer a commercial guarantee would not be regulated by Community rules.

Question M3: Should the horizontal instrument regulate commercial guarantees limited to a specific part?

Option 1: Status quo: the possibility to provide commercial guarantee limited to specific part would not be regulated by the horizontal instrument.

6. Other issues

Question N: Is/are there any other issue(s) or area(s) that requires to be explored further or addressed at EU level in the context of consumer protection?

Yes, the main 3 problems for SMEs with the acquis are:

1. Directive 1998/6/EC on consumer protection and the indication of prices and products offered to consumers.

We fully support the aim to allow the customer to have a sure picture of the price that he will have to pay for the product.

The objectives of the principle of the indication of the prices are threefold:
- to safeguard the interest of the consumers against abuses, by giving them, as far as possible, a clear and direct information about the price. The aim is to allow the customer to have a sure

picture of the price that he will have to pay for the product and it should allow him, without or with the lowest possible pressure, to be ascertained about the asking price. Thereby it is assumed that the announced price is also the asking price in reality.
- to protect competitors against less scrupulous traders;
- to ensure price competition.

However, the rules concerning the indication of prices are very complex, not only at the European level but also even more at national level.
This is due to the variety of products and services, national customs and the impossibility to catch this diversity in simple rules.
As a consequence the rules are not always applied, not deliberately, but due to their complexity. The introduction of the obligation to indicate the selling price and the price of unit of measurement has certainly not simplified the situation.
One of the problems with the directive is that it has introduced a general rule (indication of the selling price and the price of unit of measurement of products), which has absolutely no sense for a lot of products, as there is no link between the price of these products and any kind of unit of quantity.
The main problem is however that the obligation to indicate the price of unit of measurement constitutes for small retailers a very high administrative burden and often imposes heavy costs.

- Firstly the administrative burden for the retailer is not in proportion with the advantage it brings to the consumer. The motives of a consumer to buy in small shops are completely different from those in a supermarket. In addition, the indication of the unit price for the limited assortment of small shops offers not at all an additional value to the consumer, due to the fact that there is often no choice between different brands and consequently price comparison is not possible.

- The obligation constitutes also a competitive disadvantage for the small retailers towards the big retailers. Larger retailers have the necessary technical equipment and logistics to indicate the unit price in an automated way, while small retailers have to do this manually. Itinerant traders have the same problem. Fulfilling the obligation is very time consuming and expensive for a small retailer.

- Both technical (no scanning or computer systems) as well as practical reasons (small retailers do not belong to a commercial group) lead to problems in fulfilling the obligation of double pricing.

- Small enterprises and especially small retailers play an important and irreplaceable role in the fabric of villages and cities and are essential for the social and economic cohesion.

The European Commission, European Parliament and the Council have recognised these problems by adopting Directive 98/6/EC, which states "*the obligation to indicate the unit price may entail an excessive burden for certain small retail businesses under certain circumstances*." Article 6 allows the Member States to waive the obligation for a transnational period. However the problems and barriers for small retailers still remain. **That is why UEAPME urges to make the derogation for small retail businesses permanent. The definition of "small retail business" should be left to the Member States.**

2. **Directive** 1999/44/EC on certain aspects of the sale of consumer goods and associated **guarantees.**

The main problem is here the right of redress of the final seller, (especially small) retailers and installers.
The directive in its article 4 contains a provision, designed essentially to ensure that SMEs have a legal basis on which to work with suppliers. It entitles in principle the final seller to pursue remedies against the persons liable in the contractual chain.
In practice however, the suppliers/producers do not consider themselves liable for two years (mainly one year or less).
In addition their liability starts also from the time of delivery to the retailer/installer, reducing thereby noticeable the liability period as there is often a time period of a couple of months between the delivery to the retailer/installer and the delivery/installation to the final consumer.

In Finland for example the professional organisation of the installers has been able to conclude an agreement with the suppliers. In the Netherlands, however, such an agreement has been forbidden by the competition authorities as a cartel.

In the time the ESC stressed that "*issues regarding legal and commercial guarantee arrangements and after-sales service should not be viewed in isolation as consumer problems alone, but considered part of the chain manufacturer-wholesaler-retailer. Greater attention must therefore be paid to relationships within the marketing chain, in particular, the unsatisfactory contractual or de facto situation in which retailers often find themselves with regard to their suppliers. The options open to retailers for gaining redress from the person in the marketing chain responsible for a defect is generally a crucial consideration in how far they are willing to go to find a solution acceptable to their customers.*"

We can only support this analysis. Unfortunately, the actual wording of article 4 does not fulfil its objectives.

A possible solution could be a redrafting of article 4.

3. **Directive** 97/7/EC on the protection of consumers in respect of **distance contracts.**

Concerning this directive UEAPME is in favour of a maximal harmonization, due to the more direct competition between companies that use distance contracts, especially e-commerce.
For example the prohibition to ask for any payment before the delivery of the goods in some countries discriminates the local retailers, towards foreign ones, as there is more direct competition between them.

Brussels, May 2007

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