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Green Paper on the Review of the Consumer Acquis (COM (2006) 744)

The Swedish Consumers' Association has been invited to comment on the Commission Green Paper on the review of the Consumer Acquis. Recognising the immense importance of the Paper on the future legal protection of European consumers, our answers to the questions provided in Annex 1 are set out below.

1. General Legislative Approach

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

In answering this question it is imperative to make absolutely clear our favouring of a thorough review of the consumer legislation, and that we therefore do not view Option 3, maintaining the status quo, as a plausible alternative.

Remains then Options 2 or 3, taking a vertical or horizontal approach respectively to the problematic issues. Whilst we acknowledge the fragmentation of legislation as a major obstacle to ensuring consumer confidence as well as preventing the full realisation of cross-border trade, we are at the same time keen on making sure that this must not lead to consumer protection becoming a secondary objective. In other words, the primary objective of a review of the consumer legislation must remain ensuring high levels of consumer protection, not merely the encouragement of intra-state trade. Notwithstanding that, it is self-evident that the two issues are intimately intertwined; a high-level of consumer protection in the form of transparent rules are likely to boost consumer confidence, in the end leading to an increase in cross-border transactions being conducted. However, we maintain still that there is a crucial distinction to be made between allowing consumer protection to be guiding and letting pure market objectives overshadow the approach to the legislative review.

There is no doubt that certain issues contained in the Green Paper are suitable to become fully harmonised. These include the withdrawal period, the method of calculation and its consequences. Other questions such as the definition of the consumer and the trader could be easily harmonised. However, for an extension of the horizontal instrument to new cross themes such as a general fairness clause, remedies or damages in case of breach of contract, it would be necessary to abandon

the idea of a definitive regulation but at the same time use the approved method of minimum harmonisation in conjunction with the principle of country of destination to avoid compromising existing national standards.

In conclusion, therefore, we favour an approach where horizontal and vertical instruments are combined. However, in connection to what has been mentioned above, we wish to emphasise the importance of not allowing 'horizontal' considerations become overriding; removing trade obstacles in the form of a fragmented consumer legislation might well be a desirable objective, but it must never come at the cost of high-level consumer protection.

2. Scope of a Horizontal Instrument

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

In crucial aspects, Question A2 bears great similarities to Question A3. The bulk of our answer stands therefore to be found in the answer to the following question. Nonetheless, the present question commands sufficient importance to deserve a individual answer, albeit shorter one. In essence, we would favour the option identified as Option 1; we largely agree with the conclusion that Option 2, making instruments applicable to cross-border contracts only, is likely to increase fragmentation as consumers would in such a case have to be aware of two separate sets of rules. However, we would at the same time wish to attach a caveat to our acceptance of Option 1 over Option 2, in that the former is only favourable if it means that a high level of consumer protection is ensured. The connections to both the above and the below questions are obvious: we do favour a horizontal approach (as well as maximum harmonisation, see below), but only if it ensures sufficient levels of protection. If this cannot be guaranteed, we cannot accept that a horizontal approach is necessarily preferable, nor that it should be extended to apply beyond cross-border contracts.

Option 3 adds nothing to what has been stated above and is therefore not commented on.

3. Degree of Harmonisation

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

As a starting point, we support full harmonisation when it comes to consumer legislation; fully harmonised rules do not only mean that substantive obstacles to the free movement of goods and services are removed, but also that consumers can easily access the entire European market with the knowledge that whatever protection is afforded to them within their national legal framework they will also enjoy when engaging in cross-border trade.

However, and here lies the crux of much of the debate in this area, this presupposes that the protection afforded means a 'high level' of protection. The fact that Europe, at least up until recently, has considered that a high level of protection is not possible to reconcile with maximum harmonisation, is clearly evidenced by the fact that most of the legislation in the area of consumer protection has been designed as minimum measures. The question becomes, therefore, what has changed that means that maximum harmonisation is now possible?

Presumably, the main reason for previously allowing minimum harmonisation in this area has been the fact that the scope of consumer protection has been greatly varying between member states. Incidentally, Sweden has traditionally belonged to the group of countries with more highly developed legal frameworks. The other Scandinavian countries can also be sorted in this column. Are these differences that have previously existed now extinguished? If they are, there is nothing to prevent that the revision of the consumer law acquis is to proceed with the motive of fully harmonising the rules on consumer protection. However, if they still remain, and we are not entirely convinced that they do not, we can never accept maximum harmonisation, at least not as a general approach, where this is likely to lead to diminished protection for Swedish consumers.

4. Horizontal Issues

4.1 *Definition of "consumer" and "professional"*

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

As is identified above, the crucial issue is making sure that the fundamental concepts of 'consumer' and 'professional' is defined, and that that definition applies across the entire field of consumer law. That the contrary has up until now been the case, is difficult to describe as anything as massive failure for the European legislature. We therefore strongly support the initiative of creating a coherent definition of these crucial concepts.

As far as the precise content of the definitions is concerned, we have some difficulties in understanding why the wider view should *not* be favoured. We believe it to be important that the definition is capable of encompassing such situations as when a professional in a certain situation acts both in the course of his business and as a consumer. The example given above with the doctor purchasing a car which he utilises primarily for private purposes, i.e. as a consumer, but nonetheless occasionally uses the car for visiting patients is much cited and amicably illustrates the point. In our view, the doctor should in the eyes of the law be viewed, adopting Option 2, as a consumer.

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?

For the reasons given in the preamble, it is our view that contracts between private persons where one of the parties is acting through an intermediary should be considered to be consumer contracts. For the sake of the party not enjoying the benefit of the professional advice, and therefore is typically in an even greater need of protection, the law should view this as a consumer situation.

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?

The introduction, or not, of a general principle of good faith in European contract law is a highly complex and much disputed one. We are not at this early stage of the consultation ready to deliver a fully reasoned answer to the question and would therefore wish to decline to answer.

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

4.4.1 *Extension of the scope to individually negotiated terms*

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

We strongly favour an approach making the Directive on Unfair Terms applicable to all terms. The distinction between terms that are non-negotiated and those that are individually negotiated is of little value in practice; as is recognised above the reality is that consumers have only very limited possibilities to influence what goes into contracts, regardless of whether the terms are subject to negotiations or not. Thus, we therefore find ourselves in favour of Option 1 outlined below.

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?

The key point in creating list of unfair contract terms, is making sure that the list actually provides real assistance to the evidential situation of consumers', at the same time not putting unreasonable demands on professionals. Of course, the most important point of discourse if the actual contents of the list, regardless of which method is chosen. However, as a matter of principle, we would like to advance Option 4, a combination of a list of rebuttable and conclusive presumptions, as an interesting alternative.

4.6 *Scope of the unfairness test*

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

In line with what has been stated above in connection with the question on negotiated terms, it would seem appropriate to also widen the test of unreasonableness. We would however wish to stress that we are not seeking to interfere with the freedom of contract that should be enjoyed between capable parties; parties must be allowed to contract on whatever terms they see fit. Nonetheless, where certain factors interfere to disrupt the positions of parties, especially where one party falls within the definition of a consumer, certain

mechanisms must be in place to protect. It is difficult to see why that mechanism should not be extended to access all core terms of a contract, including the subject matter of the contract and the adequacy of the price.

4.7 *Information requirements*

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

The lack of information is probably the greatest problem facing consumers engaging in distance selling activities. The requirements suffer from a lack of remedies available to consumers in the case of breach, completely removing the initiative to comply with the requirements. Thus, a strengthening of the remedies available to consumers would therefore seem an appropriate course of action. In particular, for certain breaches in the providing of information the consumer ought to be allowed to treat the professional as being in breach and withdraw from the contract. However, it is clear that only in the case of certain fundamental breaches should this remedy be available. Allowing the consumer the benefit of a prolonged cooling-off period could therefore act as a supplementary remedy in the case of such 'non-crucial' breaches. In conclusion, therefore, we favour Option 2 as outlined.

4.8 *Right of withdrawal*

4.8.1 *The cooling-off periods*

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

We fully agree with the proposition that a harmonisation of the so-called cooling-off periods is much needed. Further, we favour a method where a coherent number of days is given cross the field of consumer law, enabling consumers in all situations be fully aware of their rights. In particular, we believe the transparency that follows from such an approach to be of such great importance so as to override the fact that different periods could be desirable for different types of contracts. Option 1 is therefore our desired alternative.

4.8.2 *The modalities of exercising the right of withdrawal*

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

Despite the existence of uniform rules regulating the cooling-off period across the Member States, this is likely to be of little practical importance to consumers wishing to exercise the right of withdrawal within the period if the rules regulating the actual withdrawal is not uniform, or at least easily accessible. Option 1 can therefore be discarded at the outset.

As much as we do favour the situation of consumers, we do not however recognise Option 3 as providing a good alternative; not only does it place an overly burdensome duty on the professional, it is also likely to cause all different kinds of

evidential difficulties. Instead, a harmonised cooling-off period, as envisaged by Option 2, provides a reasonable solution to the problem.

4.8.3 *The contractual effects of withdrawal*

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

To make certain that consumer confidence is maintained at the highest possible level, we find it difficult to support the differences between Member States when it comes to costs relating to withdrawal from a contract. It might well be reasonable to have the consumer bear the cost of returning the item or good, but suffice at this stage to conclude that Option 3 described below, maintaining the status quo, is not a feasible alternative.

4.9 *General contractual remedies*

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

As a part of any greater revision of the Community framework of consumer legislation, it is natural that the issue of creating general rules on available remedies surfaces. Of course, to a great extent it is also a product of the greater ambition of creating a general European Code on Contract law. If however looked upon in isolation, we are at the moment leaning towards maintaining the present system where individual remedies are afforded to individual types of contracts. In our opinion, the primary focus of the consumer law acquis ought to be a critical survey of the remedies contained in the individual directives, not the creation of more general rules. These are, albeit intimately intertwined, primarily a question for the work on the European Contract law Code. Surely, as the work with the Contract Code progresses, the issue is likely to resurface in the future. However, and until then, it ought to be separated from the work with the consumer law acquis. At present, therefore, we are in favour of Option 1.

4.10 *General right to damages*

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

As has been explained above, we favour a separation of the general legal and the consumer specific issues, between the consumer law acquis and the work with the European Contract Code. As with remedies above, the issue of damages is one of general importance which we do not consider fit to be included in the limited scope of the consumer law acquis. In particular, to regulate the heads of contractual damages that should be recoverable is likely to lead to difficulties given the differences that exist in how these are treated by different Member States today. For now, therefore, we favour a maintaining of the status quo, as described by Option 1.

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 to consumers?

Allowing contracting parties to avoid the protection afforded to consumers by simply drafting their transaction as a lease or hire agreement, in lieu of the sale that it might possibly be, is not a satisfactory solution. The filling in of obvious gaps in the network of consumer protection falls neatly into the ambit of the consumer law acquis, and we believe that the present is a good example of such a gap. We therefore strongly favour an extension of the scope of application of the Directive to additional types of contracts under which goods are supplied to consumers.

5.2 *Nature of the goods*

Question H2: Should the rules on consumer sales be extended to cover additional types of goods?

The topic of consumers and their relation to digital material, in particular rights of consumers' in the digital world, is something the Swedish Consumers' Association have been heavily involved with in the past and in the present. It is an issue that can be characterised both by its importance and its complexity. At this stage, we are ready to conclude that it is clear beyond doubt that a major deficit in consumer protection exists where consumers purchase and download digital material. The legal framework as is stands today is not apt to deal with these questions and something needs to be done. We are however not ready to say definitely that a simple extension of the scope of the existing rules provides a sufficient solution. As is recognised above, digital material and data is in many respects 'different' than e.g. a car or a sweater, and might require specific rules.

5.3 *Second-hand goods sold at public auctions*

Question H3: Should the rules on consumer sales apply to second-hand goods sold at public auctions?

In our view, the exception for public auctions has to be characterised as a minor one. It is also one that appears slightly difficult to motivate. Surely reasons exist, or at least did exist, for its inclusion. However, the uncertainty it has caused for both consumers and businesses provides sufficient motive to have it removed. We thus find ourselves in favour of Option 1.

5.4 *General obligations of a seller – delivery and conformity of goods*

Question I1: How should delivery be defined?

Essentially we agree with the notion that an extension of the consumer protection in the way envisaged requires a definition of delivery. Which definition is adopted is however more difficult. For consumers in general, anything but physical possession is likely to constitute 'delivery' in the proper sense of the word. Nonetheless, can it be said to be fair towards businesses to have them bear the risk of late or non-delivery where the goods are placed at the consumer's disposal, in accordance with the contract? Our answer to that question, not given without some hesitation, is that it is not. To meet the demands of both consumers' and their counterparts, the law must adopt a more flexible approach. We therefore favour Option 2 over Option 1. As far as Option 3 is concerned, it would risk becoming without meaning as it is likely that a different definition of 'delivery' would as good as always be included in standard form contracts, invariably provided by the professional.

5.5 *The passing of risk in consumer sales*

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

As is described above, the issue of risk and when it passes between seller and buyer is to some extent linked to the question of delivery. However, risk is also something that is treated differently in different legal systems. For example, risk is in this paper described as being synonym with the passing of property; when risk passes so does property in the good. With respect for the drafters of the present paper, that is in many European legal systems not an accurate description of the law. For example according to English law, to a large extent the governing law of the mercantile world, risk and property are two completely separate issues; the passing of the risk does *not* mean that the property in the good has passed. More than anything else, the example evidences the difficulties involved. Further, this makes the issue very difficult to regulate in any Community legal instrument. In essence, as much as any of the issues that have been discussed previously, risk is very much a question that forms an essential part of the European Contract Code and the thereto connected work. In our view, that is also where it belongs.

5.6 *Conformity of goods*

5.6.1 *Introduction*

5.6.2 *Extension of time limits*

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

The fact that the Directive does not regulate the suspension or interruption of the two-year period in the event of repair, replacement or negotiations between seller and consumer is in our view another good example of obvious defects in the legal framework which shows the immense value of the consumer law acquis. Thus, without hesitation we support Option 2.

5.6.3 *Recurring defects*

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

The same considerations as was presented above is equally applicable to the present question; the guarantee should be automatically extended and we favour Option 2.

5.6.4 *Second-hand goods*

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

In our view the present framework provides a reasonable solution for both consumers and professionals. In particular, we do not see any advantage in altering the rules, and therefore favour Option 2.

5.7 *Burden of proof*

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

We find ourselves in agreement with the Commission's conclusion that a reversed burden of proof, where it is for the professional to show that the defect did not exist at the time of delivery for the entire duration of the legal guarantee, as long as this is compatible with the nature of the goods and the defects. In conclusion, as long as the alleged defect does not fall within what is normally described as wear and tear, the burden of proof is placed upon the party who possesses the relevant information and the particular expertise, i.e. the professional.

5.8 *Remedies*

5.8.1 *Introduction*

5.8.2 *The order in which remedies may be invoked*

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

In relation to the question of remedies, we have already declared our hesitance towards the creation of a horizontal set of general remedies. However, it is nonetheless clear that the issue of remedies is a factor of great importance in relation to consumer confidence. In particular, the sequence of remedies is something many consumers perceive as being a problem. Nonetheless, it is our opinion that allowing consumers to freely choose from any of the available remedies, for any type of defect in the good, provides a very blunt solution to the problem. It becomes simply unreasonable if the consumers were to be allowed to cancel the contract, despite the possibly trifling nature of a specific breach. Option 3 outlined below does, as we understand it, provide a middle path in this respect, making reduction of the price available to the consumer as of right, but maintaining

termination of the contract within a second tier only available where the first set of remedies are unavailable.

5.9 *Notification of the lack of conformity*

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

Even though the abolishing of the notification period is appealing from a consumer point of view, we are ready to concede that it is perhaps necessary to maintain a functioning system. Surely, for small size businesses the notification period is of little assistance but it is probably of immense value for large corporations and their ability to keep track of any outstanding obligations. Further, it does not place an unreasonably burdensome obligation on consumers to require them to make the professional aware of their complaint within a reasonable period of time. Nonetheless, that does not mean that it is without difficulties where different Member States introduce periods of varying length within which the complaint must be raised. Thus, while we favour the maintaining of the period as such we urge that it be harmonised to maintain consumer confidence.

5.10 *Direct producers' liability for non-conformity*

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

For Sweden and the Swedish consumers the question is of slightly diminished importance, as Swedish law allows direct action to be taken against the producers. However, to allow and support the growth of cross-border trade we welcome the proposition to introduce rules to that effect at EU level.

5.11 *Consumer Goods Guarantees (Commercial guarantees)*

5.11.1 *Content of the commercial guarantee*

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

If a professional chooses to offer an additional guarantee on top of the statutory rights afforded to consumer, not uncommonly as part of advertising or similar to attract consumer to purchase a particular product, it is in our view reasonable to in law make sure that this promise contains something of substance. Option 2 described below, where some sort of default minimum requirements for these types of guarantees are introduced, provides a reasonable solution to the issue.

5.11.2 *The transferability of the commercial guarantee*

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

While we recognise the value of making commercial guarantees valid upon transfer in the hands of a subsequent buyer, any such regime must also make it possible for professionals to regulate their own liability if desired. Option 2, introducing a mandatory transfer of the guarantee to subsequent buyers, is therefore not something we can support. Instead, introducing the transfer as a default rule provides a better solution.

5.11.3 *Commercial guarantees for specific parts*

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

Along the same line of thinking as was argued above, producers should not be able to make wide promises which are not more closely defined until typically a claim on the guarantee is refused. Producers should have the benefit of choosing what part of a product is covered by a particular guarantee, but it is only fair that when this is not clearly specified, as a default position the guarantee is taken to encompass the entire product. This is a practice that must be dealt with strongly, and we therefore favour Option 3.

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