THE GREEN PAPER ON THE REVISION OF CONSUMER ACQUIS: SOME OBSERVATIONS

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Abstrakt

Tento příspěvek se věnuje rozboru návrhů způsobu budoucí regulace ochrany spotřebitele v právu ES/EU, které představila Evropská komise v Zelené knize o přezkumu spotřebitelského acquis 8. 2. 2007. V centru zkoumání stojí především návrh Komise vytvořit tzv. horizontální nástroj, tj. jeden předpis představující základ spotřebitelského acquis. V příspěvku jsou kriticky rozebírány jednotlivé varianty podoby a působnosti nástroje a jsou navržena možná řešení.

Klíčová slova

Zelená kniha – spotřebitelské acquis – harmonizace – harmonizační nástroj – vnitřní trh

Abstract

This paper examines Commission proposals of means of future regulation of consumer protection in the law of the EC/EU presented on 8. 2. 2007 in the Green Paper on the Review of the Consumer Acquis. The main concern is focused on Commission proposal to create a so-called horizontal instrument – a single legal act which would form a basis of consumer acquis. This paper critically examines individual alternatives of the form and scope of applicability of the instrument and tries to propose possible solutions.

Keywords

Green Paper – consumer acquis – harmonization – horizontal instrument

Introduction

The need of revision of number of directives in the field of consumer protection in the European Community (so-called consumer acquis) has been known both to professionals and laymen already for many years. The European Commission itself was calling for a change practically from the beginning of the 21st century when it became obvious that the rise of

current number of member states of the European Community (EC) was leading to a principal change of the attitude towards not only consumer protection, but also towards the concept of the single (internal) market as a whole. In connection with the enlargement the Commission presented so-called *Strategy of the Internal Market – Priorities 2003 – 2006*[1], a document in which it presented its idea of a reform of different aspects of the internal market in such a way, that the free movement of the four freedoms would be fully functioning by 1. 5. 2004 and the EC would approach the goals set in the Lisbon Strategy. Subsequently, on 8. 2. 2007 the Commission presented *The Green Paper on the Revision of Consumer Acquis* both to institutions of the EC and to public. In the Green Paper, the Commission summarised existing state of consumer acquis (or better to say of the eight directives regulating consumer protection in the EC)[2], especially the absence of definition of elementary terms and principles of consumer acquis, and suggested three alternatives of future development of legal regulation of consumer protection in the EC law – vertical approach lying in the amendment of individual directives, mixed approach lying in the creation of a so-called horizontal instrument functioning as a general basis of harmonization for all revised directives and preservation of the existing state. Besides that – or independently on suggested approaches – the Commission warned that current state of harmonization in the field of consumer protection – based on minimum harmonization[3] - is not satisfactory, and that it is necessary to set the level of harmonization. Therefore, the Commission suggested three alternative solutions - revision of the acquis together with a complete harmonization, minimum harmonization connected with application of mutual recognition principle and minimum harmonization connected with application of country of origin principle. The aim of this paper is to analyze individual approaches towards the revision of consumer acquis and suggested alternatives of solution of minimum harmonization problem.

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[1] COM (2003) 238 final, Brussels, 7. 5. 2003.

[2] These include Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises**,** Council Directive 90/314/EEC on package travel, package holidays and package tours, Council Directive 93/13/EEC on unfair terms in consumer contracts, Directive 94/47/EC of the European Parliament and the Council on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, Directive 97/7/EC of the European Parliament and the Council on the protection of consumers in respect of distance contracts, Directive 98/6/EC of the European Parliament and the Council on consumer protection in the indication of the prices of products offered to the consumer, Directive 98/27/EC of the European Parliament and Council on injunctions for the protection of consumer interests, Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees. On the other hand, Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market is not supposed to be subject to the revision.

[3] Minimum harmonization is based on the idea that the directive sets only a minimum standard of protection while at the same time the member states are free to adopt a higher level of protection in case they consider it appropriate.

1. Alternatives of future regulation of consumer acquis

1. 1 Vertical approach

As indicated above, vertical approach is based on amendments of individual directives so that they comply with current state of the market and technological progress. In the Green Paper, the Commission supposes an individual revision of each directive. This approach ensures a quality revision of the directives. However, as warns the Commission itself – on the other hand application of this approach in practice would present breach of the principle of process economics. Another weak point of this approach lies in its impact on the practice – amendment of the directives one after another would enable their relative flexibility as the directives would be able to react to partial changes on the market and technological progress quite quickly, but at the same time this „individual approach" to the revision of the acquis would constitute a never-ending work of the EC/EU institutions in the legislative process and the improvement of the current situation would not be really substantial. Revision of the directives would be reached, but the substantial problem – a non-uniform level of consumer protection across the member states of the EC/EU – would remain as the member states themselves would retain the right to decide how much protection they grant to the consumer and in which way they implement the directive.

1. 2 Mixed approach

Content aspects of the horizontal instrument

At first sight, mixed approach offers the most suitable solution of current situation. However, also this approach is not problem-free. In case this approach to the revision of consumer acquis is chosen, a so-called horizontal instrument would be created. When giving reasons for creation of this instrument, the Commission states that one of the main problems of current directives on consumer protection is an ambiguous definition of crucial terms such as „consumer" and „professional"[4] in individual directives. Therefore, the Commission supposes that the directive on unfair terms[5] could provide basis for the instrument due to its „horizontal character"; second part of the instrument could be dedicated to purchase contracts as the most common types of consumer contracts. At the same time, the instrument would „remove" basic

[4] I. e. entrepreneur or merchant on the other side of the contractual relation.
[5] Directive 93/13/EEC.

institutes of consumer law – such as the length of cooling-off periods or the possibility to exercise the right of withdrawal – from the individual directives.[6]

Let us try to think about the very idea of creating the horizontal instrument. We can surely agree with the Commission that currently there is no unambiguous definition of terms „consumer" or „professional" although these are crucial for regulation of consumer protection; actually, even in Czech law we can encounter unambiguous use of these terms.[7] It is therefore necessary to create one definition applicable to all eight revised directives. However, the question is whether the method suggested by the Commission – i. e. „incorporation" of above mentioned institutes from the directives – is the best one. On the one hand, the Commission states that *common problems might ... be systematically regulated by the horizontal instrument*[8]; on the other hand, if there is no real systematic processing of the instrument, this „incorporation" will not constitute any great change in comparison with current state. Another question arising here is how the directives would appear after having been „reduced" – it is quite clear that it would be necessary to rewrite their text to avoid practical problems of the member states while implementing the directives. The solution I suggest is to „remove" issues common to all directives (i. g. already mentioned right of withdrawal) from the directives and at the same time to revise them in such a way to make applicable to all directives. The alternative suggesting to regulate in the horizontal instrument e. g. the sample institute of withdrawal only for directives on consumer protection in respect of distance contracts or on unfair terms in consumer contracts, but not for directives on package travel, package holidays and package tours or on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis which would retain their own withdrawal regulation. I am aware that prospective critics might oppose this method of incorporation of basic institutes into the harmonization instrument, arguing that it resembles unification more than harmonization; on the other hand, such regulation would undoubtedly increase legal certainty of member states during implementation and – subsequently in the praxis – also of consumers and „professionals."

[6] P. 8 of the Green Paper.
[7] Compare e. g. different definitions of „spotřebitel" (= consumer) in the provision of § 53 paragraph 3 of the Czech Civil Code and in the provision of § 2 paragraph 1 letter a) of Act. No. 634/1992 Collection of Laws as amended – on consumer protection.
[8] P. 8 of the Green Paper.

Another aspect of suggested method is incorporation of purchase contracts into the instrument. The Commission states in the Green Paper that – bearing in mind that the most common and widespread type of consumer contracts is the purchase contract – directive on sale to consumers[9] would be included in the instrument. The Commission further maintains that – while consumer directives would be partially or completely repealed - such method of revision would contribute to decrease of number of consumer acquis.[10] We can agree with the Commission to that extent that after the incorporation of directives concerning purchase contracts the volume of consumer acquis shall decrease.

However, the suggested method contains some difficulty. If we take the above mentioned structure of the horizontal instrument – with the first part containing general institutes - as a basis for our critics, we can hardly imagine the second part being specialized purely in purchase contracts and the concerned directives completely or partially repealed. It is not quite clear which criterion would be the main one for the choice of directives concerning purchase contracts. The directive to protect the consumer in respect of contracts negotiated away from business premises, for instance, applies both to purchase contracts, entered into under the terms anticipated in the contract, and to contracts on provision of services. In the given case – following the proposal of the Commission – would be part of the directive concerning exclusively purchase contracts repealed (or actually moved into the horizontal instrument), while the part concerning contracts on service provision would be preserved. Another questionable phenomenon which might be influenced by the intention of the Commission to include purchase contract in the instrument is so-called timesharing which represents a combination of several contract types and it can not be subsumed under purely one contract type. At the same time, it is beyond any doubt that timesharing contains characteristics of a purchase contract; actually, directive 94/47/EC e. g. in Slovak language version uses terms „kupujúci“ and „kúpe práva“, the same applies to e. g. English language version using terms „purchaser“ a „purchase of a right“, which means both „acquirer/acquisition“ and „purchaser/purchase“ in its narrower sense.[11] The method proposed by the Commission would on the one hand decrease the number of the directives; however, it

[9]The directive in question is directive 1999/44/EC. For more detailed Commission proposal see p. 8 – 9 of the Green Paper.
[10] P. 10 of the Green Paper.
[11] However, one can not overestimate the argumentation based on above mentioned language versions. In the Czech language version, for instance, the directive uses terms „nabyvatel“ and „nabytí práva“, i. e. „acquirer/acquisition of the right.“ Therefore, even when different language versions of EC/EU regulations are supposed to be identical, practice shows significant differences.

would not make their implementation easier for the member states as the legal regulation would be split into several secondary rules.

In my opinion there are two prospective solutions – either to repeal all eight revised directives completely and form the horizontal instrument into one umbrella directive regulating all issues so far regulated by individual directives (while such directive would contain apart from a general part common for all parts of legal regulations also specialised chapters due to individual directives so that it would gain structure of a typical national legal act), or to create the instrument only as a general basis for all eight directives (i. e. to preserve only the first part of the instrument proposed by the Commission) and rest of the issues leave in the directives. It is nevertheless clear that the second alternative would require also a vertical action to revise each directive individually if necessary.[12] It is therefore questionable whether such attitude would provide a substantial improvement in the practice when - in comparison to current state - the combination of a horizontal instrument with general basis and a need of vertical actions would perhaps constitute a bigger burden both for the EC/EU and the member states.

Scope of the instrument

Let us think now about the scope of the instrument. The Commissioned proposed three prospective alternatives in the submitted Green Paper – the horizontal instrument could apply both to national and cross-border transactions, to purely cross-border transactions or to all distance contracts (no matter whether national or cross-border).

The idea a universal applicability of the instrument to all consumer transactions carried out within one or more of the eight revised directives seems appears to be the best one. However, the Commission itself warns that even in such case there will remain some areas (e. g. financial services or insurance sector) which will keep their specific rules without applicability of the instrument. This opinion is quite true; however, it is questionable whether the existence of those „independent" areas really constitutes an obstacle for an effective consumer protection within the EC/EU. One can not disagree that in every situation – no matter what the level of harmonization is – there will maintain areas not regulated by the

[12] Also the Commission notes this – compare p. 9 of the Green Paper.

consumer acquis. It seems therefore perhaps too ambitious to try to harmonize all acts somehow concerning the consumer – even laymen easily understand that such goal is unreachable. If the Commission is able to accept this idea, it is possible to consider the applicability of the instrument to all transactions (no matter whether national or cross-border) concluded in the framework of the eight directives constituting the revised acquis.

The proposal of the applicability of the instrument only to cross-border contracts is reasonable on the one hand, as the internal (single) market of the Communities is based exactly on the idea of a free movement of the four freedoms across the borders. However, one must ask whether such restriction would not cause deformation of the market – if the instrument grants more protection to consumers only in case of cross-border transactions, one can easily imagine the reluctance of the consumers to conclude riskier contracts (typically e. g. contracts negotiated away from business premises or timesharing contracts) in „his" state. With some amount of fantasy, one can imagine that - in case the instrument is applicable only to cross-border transactions – the volume of international trade would rise while the national market would become dependant on the external demand. I therefore believe that it is necessary to reject the idea of the applicability of the instrument only to cross-border contracts as inconvenient.

The proposal of universal applicability of the instrument to all distant contracts – no matter whether national or cross-border - seems interesting. If this alternative prevails, the problems with distinguishing between national and international (Community) market would be solved. At the same time, it is highly probable that legal certainty of all parties of consumer contractual relations would rise. However, such case would require a perfect and uniformly performed harmonization of the instrument in all member states so that consumer protection becomes really equal within the EC/EU. This, in my opinion, is impossible, and therefore the objection arises that such scope of applicability is suitable more for a regulation than for the horizontal instrument which is a means of harmonization. We can conclude here that the universal applicability of the instrument to all consumers´ transaction appears the most suitable – however, also the most difficult to realize.

1. 3 No legislative action (preservation of current state)

The last proposal was to preserve current state of the consumer acquis. It is clear that this alternative is neither clever nor desirable. As indicated in the introduction (and as the Commission itself emphasized in the first parts of the Green Paper), the current situation in the area of consumer protection based on the principle of minimum harmonization causes discriminatory and unbalanced consequences, when consumers and professionals have no certainty they are going to be treated equally across the member states. Therefore we must conclude that preservation of the current state would not only represent no improvement of a current state, but it would also represent a shift back.

2 Proposed levels of harmonization

2.1 Full harmonization thanks to revision of the acquis

According to the first proposal of the Commission, the acquis should be completely revised which would lead to full harmonization of consumer protection rules. As a consequence, member states would not be allowed to apply stricter rules in the area of consumer protection than the ones set of Community level. Such method leaves no space for manipulations of the member states, which ensures same level of consumer protection and the same requirements for professionals across the EC/EU. However, one might – quite correct – argue that full harmonization is just one step from unification which is according to the EC Treaty not allowed in the sphere of consumer protection. The main argument of full harmonization as such is, however, that it is contrary to current wording of Art. 153 par. 5 of the EC Treaty which enables member states to adopt stricter measures than the ones adopted by the Community in case such measures are in accordance with the Treaty and notified to the Commission. We can see that full harmonization requires some amendments of the Treaty, on the other hand its impact on the practice seems – after some inconveniences – positive as it promises to remove discrimination and legal uncertainty of consumers and professionals.

2.2 Minimum harmonization and mutual recognition principle

Application of the principle of mutual recognition together with maintenance of minimum harmonization enables the member states to keep their own (national) higher level of protection (as compared to Community level). At the same time it requires that member states

do not create unreasonable obstacles for entrepreneurs (professionals) from other member states when providing goods or services to consumers on their territory. Such level of harmonization is thus quite advantageous for those member states which wish to maintain high level of consumer protection; however, they are not allowed to impede foreign professionals to enter into contracts with national consumers without particular reason if the former ones fulfil requirements of the state they are established in. Some more critics shall follow in the following section of this paper.

2.3 Minimum harmonization and country of origin principle

Country of original principle combined with maintenance of minimum harmonization suppose – again – possibility for the member states to keep higher level of national consumer protection. At the same time professionals would be required to observe national rules of the country they are established in which the "host" member state would have to respect. As far as minimum harmonization combined either with mutual recognition principle or country of origin principle is concerned, its first weak point is the maintenance of minimum harmonization itself. As indicated above, minimum harmonization does not seem a suitable method in the field of consumer protection, as it causes non-equal position of consumers and professionals across the EC/EU. Furthermore, the conception of both mutual recognition and country of origin is in my opinion not applicable to consumer matters. We can hardly expect member states to refrain from creating obstacles to consumers or – especially – professionals from other member states to the access to their national markets. This applies especially to principle of country of origin, the big issue being here also the reluctance of more protectionist member states to accept professionals from other member states with less strict rules (stemming from the minimum standard set by Community rules). Therefore, the conception of full harmonization together with revision of the acquis appears to be the most suitable one, although one might argue that full harmonization hardly leaves any space for the activity of member states and – if adopted – requires amendment of the EC Treaty.

Conclusion

I tried to present both strong and weak points of individual methods of solution of current situation. We can conclude that consumer acquis in its current version does not meet requirements of consumers and professionals entering into mutual relations on the common

market. We have seen that vertical action, i. e. revision of individual directives, does not appear as a suitable solution. Neither does maintenance of current state – minimum harmonization and zero revision. Therefore I recommend choice of the so-called mixed approach and creation of horizontal instrument which shall form general definitions and institutes for all eight revised directives, which would at the same time included into special part of the instrument. The instrument should be universally applicable both for national and cross-border consumer transactions so that same level of protection in the EC/EU is ensured. As far as suitable level of harmonization is concerned, we have seen that minimum harmonization combined either with mutual recognition principle or country of origin principle do not deal with the weakest point of current state of consumer protection in Community law – minimum harmonization and reluctance of the member states to allow professionals from less strict member states to enter their markets. Therefore, full harmonization seems the best choice even when it requires amendment of the EC Treaty and leaves little space for the activity of the member states.

Literature, legal regulations:

[1] Green Paper on the Revision of Consumer Acquis, COM (2006) 744 final, Brussels, 8. 2. 2007, available at: http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf

[2] Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises

[3] Council Directive 90/314/EEC on package travel, package holidays and package tours

[4] Council Directive 93/13/EEC on unfair terms in consumer contracts

[5] Directive 94/47/EC of the European Parliament and the Council on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis

[6] Directive 97/7/EC of the European Parliament and the Council on the protection of consumers in respect of distance contracts

[7] Directive 98/6/EC of the European Parliament and the Council on consumer protection in the indication of the prices of products offered to the consumer

[8] Directive 98/27/EC of the European Parliament and Council on injunctions for the protection of consumer interests

[9] 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees

[10] Internal Market Strategy – Priorities 2003 – 2006, COM (2003) 238 final, Brussels, 7. 5. 2003, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0238:FIN:EN:PDF
[11] Treaty Establishing the European Community

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