

CONSUMER PROTECTION IN THE EC/EU – FROM MINIMUM TO MAXIMUM HARMONIZATION?

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Abstract in original language:

Tento příspěvek se věnuje vývoji principů minimální a maximální (úplné) harmonizace v oblasti ochrany spotřebitele v právu ES/EU. Příspěvek představuje a analyzuje klíčové legislativní dokumenty spotřebitelského *acquis* a snaží se kriticky zhodnotit současné snahy Evropské komise zavést v oblasti ochrany spotřebitele princip úplné harmonizace.

Key words in original language:

Ochrana spotřebitele, ES, EU, spotřebitelské *acquis*, harmonizace.

Abstract:

This paper deals with the development of the principles of minimum and maximum (full) harmonization in the field of consumer protection in EC/EU law. The paper presents and analyses key legislative documents of consumer *acquis* and seeks to critically examine current efforts of the European Commission to introduce principle of full harmonization into the area of consumer protection.

Key words:

Consumer protection, EC, EU, consumer *acquis*, harmonization.

Introduction

The EU consumer policy is often regarded as chaotic, heterogeneous and above all ineffective. Minimum harmonization, the key principle of consumer protection in the EU, is mentioned as the main reason for this state of affairs, and has been repeatedly subject to criticism. One of the last initiatives of the European Commission concerning minimum harmonization has been the so-called Green Paper on the Review of Consumer *Acquis*¹ which tried to seek solutions of the most obvious problems caused by minimum harmonization, i. e. fragmentation of rules on consumer protection among different member states and lack of confidence of both consumers and professionals.² The Commission suggested three different alternatives how to deal with the above mentioned problems, two of them based on minimum, one on maximum harmonization. Following the outcome of public hearing on proposal of the Green Paper, a horizontal legislative instrument based on maximum harmonization and applicable to national and cross-border transactions concerning areas of EU consumer

¹ COM (2006) 744 final, Brussels, 8. 2. 2007.

² For more detailed analysis of the topic see point 3. of the Green Paper on the Review of the Consumer *Acquis* (COM (2006) 744 final, Brussels, 8. 2. 2007).

protection regulated by the eight revised directives³ seems to be the one most preferred by stakeholders across Europe.

The concept of full harmonization has therefore been getting more and more popular as can be further seen in provisions of Consumer Policy Strategy 2007 - 2013⁴ as well as in the 2008 Proposal of a Directive on Consumer Rights.⁵ However, the concept of maximum harmonization in the area of EU consumer protection is not a new one – it already appeared in the Consumer Policy Strategy 2002 – 2006⁶ in which it was presented as a suitable method of regulation for issues related to timeshare and package travel.⁷

Summing up, one can conclude that the maximum harmonization principle seems to be prevailing existing methods of EU consumer protection regulation. It is nonetheless necessary to remark that even if the principle of maximum harmonization definitely prevails, it is not going to rule all issues of consumer protection – as mentioned above, the principle is only supposed to apply areas covered by the eight to-be revised directives (and in the case of the proposal for a directive on consumer rights only by four sector directives). It is therefore questionable whether the adoption and application of maximum harmonization principle in some issues of consumer protection will contribute to more coherent and stronger consumer protection in the EU, or whether the fragmentation of rules will be removed in some areas, but maintain in others. In this paper, the above mentioned question is discussed together with some major developments of the regulation of consumer protection. As for the methodology, it is necessary to add that exclusively documents of the Commission are discussed.

³ 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.

⁴ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – EU Consumer Policy Strategy 2007 – 2013 – Empowering consumers, enhancing their welfare, effectively protecting them, COM (2007) 99 final, Brussels, 13. 3. 2007.

⁵ Proposal in a Directive of the European Parliament and the Council on consumer rights, COM (2008) 614 final, Brussels, 8. 10. 2008.

⁶ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions, - Consumer Policy Strategy 2002 – 2006, COM (2002) 208 final, Brussels, 7. 5. 2002.

⁷ The two directives, 94/47/EC and 90/314/EEC, were expressly mentioned in the Strategy paper. According to part 3.1.2.2. of the Strategy, others were to follow. For more detailed information, see the Consumer Policy Strategy 2002 – 2006, especially part 3.1.

1. THE MINIMUM HARMONIZATION PRINCIPLE IN EU CONSUMER POLICY

It is well known that consumer protection in the EU⁸ is ruled by the principle of minimum harmonization which enables the member states to maintain their own – higher – standards while introducing into their national law minimum standard of protection required by the EU. The legal basis for minimum harmonization in matters of consumer protection is set in Art. 153 of the Treaty establishing the European Communities (TEC) which expressly reads in its subparagraph 5 that *measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.*⁹

The provision of Art. 153 TEC clearly demonstrates the core of minimum harmonization principle – the member states are allowed to maintain their own national rules on consumer protection on the condition that EU (or more precisely spoken Community) rules are respected. Moreover, national measures must observe the Community ones and must be in compliance with the TEC, i. e. especially must not constitute obstacles to the internal market and free movement of the so-called four freedoms. Problems in the area of EU consumer protection, caused by minimum harmonization, are well-known and widely discussed; apart from the ones mentioned above in the text, as some more negative results of minimum harmonization divergences in laws applied to business-consumer commercial practices and heterogeneous use of self-regulation and codes of conduct can be named.¹⁰

2. DEVELOPMENT OF THE PRINCIPLES OF MINIMUM AND MAXIMUM (FULL) HARMONIZATION

The European Commission has been quite active in naming and seeking for solution of problems connected with minimum harmonization; however, consumer policy did not get the necessary attention of the Commission earlier than at the turn of the 20th and 21th century.¹¹ One of the very first Commission documents on consumer protection was Consumer Policy Action Plan 1999 – 2001;¹² nevertheless, the Action Plan just stated needs for better consumer

⁸ More correctly spoken, we should speak about Community (not EU) consumer policy as the EU itself has no legal power to legislate in the matter, but for simplification, the term EU consumer policy will be used.

⁹ The whole provision of Art. 153 reads as follows: 1. In order to promote interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic safety of consumers, as well as promoting their right to information, education and to organize themselves in order to safeguard their interests. 2. Consumer protection interests shall be taken into account in defining and implementing other Community policies and activities. 3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through: a) measures adopted pursuant to Article 95 in the context of the completion of the internal market; b) measures which support, supplement and monitor the policy pursued by the Member States. 4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt measures referred to in paragraph 3 (b). 5. see the provision supra in the text.

¹⁰ See The Green Paper on European Union Consumer Protection, COM (2001) 531 final, Brussels 2. 10. 2001.

¹¹ Actually, this fact is not that surprising as the Directorate General for Health and Consumer Protection (the so-called DG SANCO) was not created until 1999.

¹² COM (98) 696 final, Brussels, 1. 12. 1998.

protection in the EU and did not even express the principle of minimum harmonization.¹³ Therefore, the 2001 Green Paper on European Union Consumer Protection¹⁴ can be regarded as the first Commission document dealing with minimum harmonization. The Commission not only named the most burning issues of consumer protection but also presented two possible solutions – a specific approach based on the adoption of a series of further directives or a mixed approach of a comprehensive framework directive, possibly supplement by targeted directives where necessary.¹⁵ The first option is actually based on updating of existing directives and perhaps adoption of new and highly specified ones. On the one hand, such approach is already a known and established method of regulation of consumer protection. On the other hand, it is quite obvious that when adopting the specific approach, the existing problems caused by minimum harmonization could not be solved. The other option is based on an adoption of a framework directive which would be comprehensive and technology-neutral and would harmonize national fairness rules for business-consumer commercial practices.¹⁶ According to the 2001 Green Paper, the framework directive should not substitute existing sector-specific directives; it should rather build a set of rules applicable to all cross-border business-consumer relations in the internal market and removing all possible restrictions not covered by sector-specific directives.

The idea of creating a framework directive which would cover issues inherent to all possible problems regulated by individual and specified directives shows a shift in the viewing of consumer protection in the EC/EU. Comparing the attitude taken in the Action Plan (in which the Commission made quite clear that the issue of consumer protection in Europe is a new one and as such will be regulated rather on an administrative level than a legislative one) and in the 2001 Green Paper, one can observe a certain level of change. Whereas in the former document the Commission did not even mention minimum harmonization and put administrative cooperation and informal relations between businesses and consumers (based probably to a great extent on self-regulation) in the first place, in the latter one it expressly spoke about insufficient level of consumer protection and troubles caused by heterogeneous rules across Europe – a result – in the Commission's point of view – of minimum clauses in directives on consumer protection. It also proposed a framework directive; nevertheless, there was no notice of maximum harmonization.

3. FROM MINIMUM TO FULL HARMONIZATION

Activities of the Commission in the field of consumer protection continued by the Consumer Policy Strategy 2002-2006. In this document, the Commission defined a high common level

¹³ The Action Plan – being the first communication from the Commission to other institutions in the field of consumer protection on EU level – demonstrated the realisation that consumer protection constitutes a new EC/EU policy. However, the Plan is rather proclamatory and highlights the need of cooperation between businesses and consumer. At the same time, the Commission calls for a better administrative cooperation with the member states and mentioned a need for some kind of framework to manage such cooperation on a base of non-legislative issues. For more detailed information, see the Action Plan (bibliographic information under note 11 supra).

¹⁴ For bibliographic information see note 10 above.

¹⁵ Par. 3.2 of the Green Paper, p. 10.

¹⁶ Par. 3.4 of the Green Paper, p. 11.

of consumer protection across the EU as one of the mid-term objectives of the new consumer policy strategy.¹⁷ Based on the results of the 2001 Green Paper, the Strategy warned that the application of principle of mutual origin without sufficient degree of harmonization is not appropriate for some consumer protection issues, namely services.¹⁸ In relation to existing EU legislation on consumer protection the Commission focused mainly on the directives on timeshare and on package travel and package holidays¹⁹ for which it – for the first time in the legislative history of EC/EU consumer policy - proposed full harmonization to prevent further fragmentation of the internal market and variations of consumer protection rules across Europe. The Commission also proclaimed to report on implementation of several of the existing directives, which require it²⁰ - thus it indicated that full harmonization might not stop at the two directives mentioned above. This step – however in reality perhaps rather proclamatory – can be definitely regarded as positive as it demonstrates several important things concerning the relation of the Commission – or more broadly the EU – to consumer policy. Firstly, it is a clear evidence that the EU is aware of the problems caused by minimum harmonization attitude in the field of consumer protection and at the same time that it is willing not only to name such problems, but also to deal with them. Secondly, it proves a changing character of EU consumer policy – it is obvious that from a supplementary field of Community (and EU) activity, consumer policy has developed into if not that important (in comparison with other policies), at least independent area of EU activity. Even though consumer protection belongs to fields that do not fall within exclusive powers of the EC/EU, the Strategy showed the shift of attitude, namely the realization that sheer coordination of activities of the member states is not sufficient and that a Community action (and thus a strong one) is needed. The chosen method of full harmonization also demonstrates a strong will to overcome possible objections of those member states which rely on the minimum clauses in directives on consumer protection and do not wish to maintain or introduce more stringent rules. However, we should not be too optimistic as there is still a long way from words to action.

As already mentioned above, one of the recently most discussed Commission documents regarding consumer protection was the Green Paper on Revision of the Consumer Acquis. In comparison with previous Commission documents, the Paper was revolutionary because it tried to encompass the issues regulated so far by eight different directives and it offered several various solutions, differing from preservation of current state of affairs, creation of a so-called horizontal instrument covering the main definitions and institutes applicable to all issues concerned to different levels of harmonization, one of them being the full one. As usual, the Commission asked general public as well as professionals in the field and stakeholders to express their opinion on suggested models of future regulation of consumer acquis. The message which resulted from the public hearing was quite clear – an adoption of a horizontal legislative instrument applicable both to domestic and cross-border transactions, based on full targeted harmonization, preferably combined with revision of existing sector

¹⁷ Par. 3.1 of the Strategy, p. 8.

¹⁸ Par. 3.1.2.1 of the Strategy, p. 9.

¹⁹ Directives 94/47/EC and 90/314/EEC.

²⁰ Par. 3.1.2.2, p. 9-10.

directives.²¹ The chosen solution once again reflects the shift of perception of consumer issues in Europe and proves that full harmonization together with some kind of framework legislative instrument (the so-called horizontal instrument, in the words of the 2007 Green Paper) is inevitable. It can be optimistically assumed that the points taken by the Commission already in the 2001 Green Paper and 2002 Consumer Policy Strategy were the right one as the key ideas (i. e. the need for full harmonization, however in the Strategy meant only for two sector directives, and an adoption of a framework directive proposed in the Green Paper) not only appeared in the new Green Paper on the Review of the Consumer Acquis, but also – and particularly – were approved by the stakeholders and general and professional public as the best model for regulation of the issues of consumer protection.

The trend was further strengthened in recent Commission documents on the topic, the EU Consumer Policy Strategy 2007 – 2013 and the Proposal for a Directive on Consumer Rights. In the Strategy, the Commission expressly referred to the previous Strategy (the 2002 – 2006 one) and its concept of full harmonization and declared the will to use full harmonization as a means of consumer protection regulation. According to the new Strategy, each regulatory problem and the need for any proposals will continue to be judged on its own merits and the full range of regulatory instruments considered. If legislative proposals are identified as the appropriate response, targeted full harmonisation of consumer protection rules at an appropriately high level will tend to be the Commission's approach.²²

In Art. 4 of the proposed directive, full harmonization is clearly expressed²³ and the member states are officially discouraged from any action breaching this principle. Nevertheless, as the Commission itself admits in the explanatory memorandum to the directive in par. 56, traders can offer consumers contractual arrangements going beyond the protection offered by the directive. This is on the one hand clear, as the impossibility to impose duties on individuals by directives belongs to one of the key principles of EU law. On the other hand, one can ask a rather philosophical question whether full harmonization in the field of consumer protection (or in any other area of EC/EU activity) is really possible. We can imagine full harmonization *de iure*, but it is highly questionable *de facto* as professionals (traders) from different member states will keep on offering different contractual conditions (and – not to be mistaken – this is their right which should be fully respected). Another painful issue in this aspect is the scope of planned full harmonization. Unlike the 2007 Green Book, the proposed directive is aimed at four directives connected mainly with sales of goods and services, namely directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, directive 93/13/EEC on unfair terms in consumer contracts, directive 97/7/EC on the protection of consumers in respect of distance contracts and directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. The idea is obvious, that is to create a framework for logically bound issues; it is nonetheless surprising that the proposed directive ignores issues of timeshare and package holidays. Naturally, these fields

²¹ For detailed outcome see Commission Staff Working Paper: Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis.

²² Part 4, p. 16.

²³ The article reads as follows: *Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.*

are quite specific and cannot be subsumed under categories of pure sales of goods and services, on the other hand, they were the first issues to be regulated by full harmonization (as results from the Consumer Policy Strategy 2002-2006) and still no development in this area can be observed. Furthermore, even if a general framework for sales of goods and services is created, it is highly questionable whether the area will be fully covered – what about for example the directive on e-commerce²⁴ and others, which concern sales, even to a smaller extent? The wording of Art. 4 also leaves some doubt as to the time period it is focused on. As V. Mak warns in her example of Product Liability Directive²⁵ and case Commission v. France,²⁶ maximum harmonization would [...] apply also to pre-existing legislation, precluding national laws from diverting from the Directive's regime.²⁷ The example dealt with a different directive, but the wording of Art. 4 of the proposed framework directive is clearly calling for an interpretation of the European Court of Justice. Current wording of Art. 4 – taking into consideration the fact that it is based on maximum, not minimum harmonization – looks certainly retroactive.

4. CONCLUSION

Summing up, full harmonization is not a new means of regulation of EU consumer protection as a brief overview of relevant Commission documents on consumer protection showed. Within time, the notion of full harmonization has varied from a mere idea in Consumer Policy Strategy 2002-2006 to a proposal for a framework directive actually built on full harmonization, even if only for consumer contracts. The idea per se is a good one as maximum harmonization has the potential to remove problems caused by minimum harmonization and above all is capable of creating a similar, if not the same, level of consumer protection across Europe. However, if the method presented in the last Consumer Policy Strategy and the proposed Directive on Consumer Rights is adopted, a certain level of uniformity of rules can be achieved, at least in the field of consumer contract law (or more correctly spoken, in most aspects of consumer contract law). Still, there are many issues of consumer protection not covered and not to be covered by full harmonization, and these are going to be fragmented even in the future. It is nevertheless a necessary consequence of a fact that consumer policy belongs to harmonized and not unified fields of EC/EU activities.

Literature:

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- Consumer Policy Action Plan 1999 – 2001, COM (98) 696 final, Brussels, 1. 12. 1998

²⁴ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

²⁵ 85/374/EEC.

²⁶ Judgement of the European Court of Justice of 25. 4. 2002, C 52/00.

²⁷ See Mak, V. Review of the Consumer Acquis: Towards Maximum Harmonization? European Review of Private Law, 2009, Vol. 17, No. 1, pp. 55-73. Once again it must be noted that the case dealt with the Produkt Liability Directive; in my opinion, however, the remark is applicable to the proposed framework directive as it concerns full harmonization.

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