EC Commission Presents a Proposal for a Directive on Consumer Rights

On 8 October 2008, Commissioner Meglena Kuneva (DG Health and Consumers) presented a new Proposal for an EC directive on consumer rights (COM(2008) 614) (see the Consumer Acquis webpage).

The proposal aims to revise four existing directives on consumer contracts (the cornerstones of EC legislation in the field: Dir. 85/577/EEC on contracts negotiated away from business premises, Dir. 93/13/EEC on unfair terms in consumer contracts, Dir. 97/7/EC on distance contracts, Dir. 1999/44/EC on consumer sales and guarantees) merging them into a single horizontal instrument based on full-harmonisation (i.e. Member States cannot maintain or adopt provisions diverging from those laid down in the Directive), which regulates the common aspects "in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps".

The minimum harmonisation approach (i.e. Member States may maintain or adopt stricter consumer protection rules), adopted in the previous EC legislation in the field, was abandoned in order to avoid fragmentation in the level of consumer protection in the Member States (Impact Assessment Report, p. 8):

> *The effects of the fragmentation are felt by business because of the conflict-of law rules, and in particular the Rome I Regulation, which obliges traders not to go below the level of protection afforded to foreign consumers in their country. As a result of the fragmentation and Rome I, a trader wishing to sell cross-border into another Member State will have to incur legal and other compliance costs to make sure that he is respecting the level of consumer protection in the country of destination. These costs reduce the incentive for businesses to sell cross-border, particularly to consumers in small Member States. Such costs are eventually passed on to consumers in the form of higher prices or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level.*

Quite interestingly, under a conflict-of-laws perspective, one of the main concerns of the Commission was to achieve a sound coordination between the proposed directive and the Rome I Regulation.

All the policy options which were assessed to draft the proposed legislation took into account the recent adoption of the regulation on the law applicable to contractual obligations (see the 6 options listed in the Explanatory Memorandum of the Commission, p. 5, and analysed in the Impact Assessment Report, p. 16 ff., and in the Annexes, p. 18 ff.):

1. *Policy option 1: Status Quo or baseline scenario, including the effects of Rome I and forthcoming legislation.*
2. *Policy option 2: Non legislative approaches, including information campaigns and financial contributions and the effects of Rome I.*
3. *Policy option 3: Minimum legislative changes (harmonisation of basic concepts where benefits clearly outweigh costs), including the effects of Rome I.*
4. *Policy option 4: Medium legislative changes (including PO 3 plus and the effects of Rome I).*
5. *Policy option 5: Maximum legislative changes (including PO 4 plus far-reaching proposals granting new consumer rights as well as the effects of Rome I).*
6. *Policy option 6: Minimum legislative changes (PO 3) or Medium legislative changes (PO 4) combined with an internal market clause applying to the non-fully harmonised aspects (such as general contract law aspects outside the scope of the Consumer Acquis).*

The latter option (insertion of an internal market clause) was excluded, since it was considered to be in contrast with the protective conflict rule of Art. 6 of the Rome I Regulation (Impact Assessment Report, p. 24):

> *[A]n alternative to full harmonisation was put forth in the form of a minimum harmonisation approach combined with an Internal Market clause. This approach has been discussed during the consultation process.*
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> *Such an Internal Market clause could have taken the form of a mutual recognition clause or of a clause on the country of origin principle for the*

aspects falling within the scope of a future Directive and not subject to full harmonisation. A mutual recognition clause would give Member States the possibility to introduce stricter rules in their national law, but would not entitle a Member State to impose its own stricter requirements on businesses established in other Member States in a way which would create unjustified restrictions to the free movement of goods or to the freedom to provide services. A clause based on the country of origin principle would give Member States the possibility to introduce stricter consumer protection rules in their national law, but businesses established in other Member States would only have to comply with the rules applicable in their country of origin.

Both variants of the Internal Market clause met considerable opposition from several categories of stakeholders. […] Regulatory fragmentation combined with the Internal Market clause would achieve legal certainty for traders, but not for consumers, who would be subject to different laws with different levels of protection.

Finally, an Internal Market clause which would systematically subject the contract to the law chosen by the parties (which will normally be the law designated as applicable under the trader's standard contract terms) or to the law of the country of origin (i.e. the country where the trader is established) goes against the newly-adopted Rome I Regulation on the law applicable to contractual obligations. Indeed the clause would contrast with Article 6(1) of the Rome I Regulation, which provides that the law applicable to consumer contracts, in the absence of a choice made by the parties, is the law of the country where the consumer has his habitual residence (i.e. the law of the country of destination). It would also be in contrast with Article 6(2) of the Regulation which provides that the law chosen by the parties (e.g. the law of the country of the trader) cannot deprive the consumer of the protection granted by the law of his country of residence. Such an Internal Market clause would not be acceptable by the great majority of Member States, as evidenced by the public consultation on the Green Paper.

The text of the new directive, in the current version proposed by the Commission, should not, *prima facie*, interfere with the application of the conflict rules of the Rome I Regulation, avoiding problems such as those arising from the e-commerce directive or from clauses inserted in the previous consumer directives (see for

instance Art. 6(2) of Directive 93/13 on unfair contractual terms). See Recital no. 10 and no. 59:

> *(10) The provisions of this Directive should be without prejudice to Regulation (EC) No 593/2008 of the European Parliament and of the Council applicable to contractual obligations (Rome I);*
>
> *(59) The consumer should not be deprived of the protection granted by this Directive. Where the law applicable to the contract is that of a third country, Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) should apply, in order to determine whether the consumer retains the protection granted by this Directive.*