

Summary of Advisory Report: *Consumer rights in the internal market*

Foreword

In June 2009, the Committee for Consumer Affairs (CCA) of the Social and Economic Council of the Netherlands presented an advisory report on the European Commission's proposed Directive on Consumer Rights. This CCA consists of the representatives of the main business and consumer organisations in the Netherlands, and independent members. The report offers a response to the request for advice submitted by the Dutch Secretary of State of Economic Affairs and the Dutch Minister of Justice. The concluding section of the report responds to the questions posed in the request for advice and is given in full below.

1. Introduction

The European Commission has proposed a new Directive on Consumer Rights at a time when Europe's economy has fallen into a deep recession and the market's confidence is being sorely tested. The proposal may help remove obstacles to cross-border trade for both consumers and traders, and in doing so contribute to revitalising the economies of the Member States and restoring confidence.

2. Scope of the Directive

Desirability of extending European consumer law

The request for advice begins by asking whether the CCA considers it desirable and proportional for European consumer law to be extended to other sectors, in view of the principle of subsidiarity and the Directive's objective. If not, to which sectors does the CCA believe the Directive should be restricted?

In the opinion of the CCA, extending the scope of the Directive would be in keeping with its objective, which is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by "fully harmonising the key aspects of consumer contract law which are relevant for the internal market". There are reasons, however, to exercise due caution in doing so.

On the one hand, the CCA does not advocate extending the Directive's scope to healthcare contracts. Given the importance of healthcare, the differing definitions applied by the Member States in the healthcare sector, and the differing ways in which the healthcare sector is organised in the Member States (under private and/or public law), the CCA wishes to see healthcare contracts excluded from the future Directive on Consumer Rights.

With respect to the rental and/or purchase of immovable property, the CCA notes that part of this sector is already covered by the Directives that will be incorporated into the new Directive on Consumer Rights. It also notes that sales contracts for immovable property are excluded from the new Directive. The CCA would agree with this, but

would also – contrary to the present proposal – favour applying the standard contract terms set out in Chapter V of the proposal to contracts concerning the sale of immovable property.

On the other hand, the CCA does advocate extending the scope of the new Directive in another direction, that is for the new Directive to cover noteworthy general consumer rights for all types of contracts relating to travel and accommodation.

Domestic consumer contracts as well?

The Ministers have asked the CCA whether it is desirable for the European Union to draw up rules concerning domestic consumer contracts, and whether the law-makers at European level are in fact authorised to do so. They also ask whether it is desirable for the draft Directive to cover both cross-border and domestic consumer contracts.

The CCA considers that there are two reasons why the new Directive should cover both cross-border and domestic consumer contracts. First of all, distinguishing between the two categories is basically not compatible with the aim of creating an internal market; secondly, the distinction would not always be easy to maintain in practice owing to technological advances.

Service contracts and information requirements

The Ministers have asked whether the CCA considers the partial application of the Directive to service contracts desirable and coherent. They have also asked the CCA's opinion on the overlap between the information requirements defined in the proposal and the information requirements set out in various other Directives.

The CCA appreciates that the information requirements also cover service contracts in the proposal for the Directive; this will encourage standardisation in the quality of services, an issue in which self-regulation can play an important role. It notes that applying the definition given in the proposal of "service contract" will extend the scope of the new Directive to cover a wide variety of contracts between professional service providers and consumers.

With respect to a number of specific service contracts, the CCA would like to see the following clarified:

- If Member States decide that Directive 2008/48/EC on Credit Agreements for Consumers should also apply to credit agreements of less than EUR 200 and more than EUR 75,000, the question is which Directive will apply to credit agreements in these categories: the Directive on Credit Agreements for Consumers or the new Directive on Consumer Rights?
- Clarification is also needed of the relationship between the proposal and other Community rules in the financial sector.
- With respect to distance contracts, there is still confusion concerning the status of downloading music, books, software, and so on: is this or is this not covered by the future Directive?

With respect to electricity, the question is whether this should be defined as a good within the meaning of the Dutch Civil Code and rulings by the European Court of Justice, or as a service as suggested in the proposal for the Directive.

The CCA supports the notion that consumers must have adequate information allowing them to make a well-considered decision concerning a contract, but it also considers that a number of the information requirements set out in the proposal are less relevant to consumers' everyday, non-durable purchases. According to the CCA, stating in the proposal that the "context" also plays a role in this regard is only a source of confusion. That confusion can be mitigated by means of self-regulation, which will establish the "context" for each industry.

The CCA is in favour of reducing the number of information requirements, but counterbalancing that by including possible sanctions for the Member States in the Directive with respect to the remaining information requirements. The sanctions can fall under both administrative and private law.

3. Degree of harmonisation; balance between high level of consumer protection and competitiveness of businesses

The fourth and fifth questions in the request for advice concern the full harmonisation approach that the European Commission envisages for the new Directive. The Ministers have asked the CCA whether it regards full harmonisation of consumer contract law under the Directive possible and desirable, and if not, in which areas of the law it considers full harmonisation not to be possible and/or desirable. The Ministers have also asked whether the CCA considers that the European Commission has successfully balanced a high level of consumer protection against business competitiveness in its proposal, and if not, what aspects of consumer protection should be boosted or what burdens on businesses should be reduced.

The CCA observes that the full harmonisation approach envisaged by the European Commission for the new Directive leaves very little scope for domestic policy in the harmonised areas. In its view, full harmonisation of consumer contract law can stimulate cross-border trade and should therefore not be omitted. Quite apart from the level of consumer protection, the advantage to consumers of full harmonisation is that it reassures them that they will enjoy the same legal protection in every Member State and can more easily make comparisons when there are price differences between the same or similar products in different Member States.

For the CCA, however, acceptance of full harmonisation depends on it resulting in a high level of consumer protection and on it not leading to extra red tape for businesses. It has therefore assessed the proposal for the Directive according to three criteria:

1. Does the proposal offer a high level of consumer protection?
2. Does the proposal impose new obligations and create unnecessary impediments for businesses?
3. Does the proposal promote the free movement of goods and services?

The CCA questions whether the proposal for the Directive in fact meets the first criterion, that is the high level of consumer protection required under the Treaty, when it comes to non-conformity. A second example is the proposal to introduce a black list of unfair contract terms (terms banned up front) and a grey list of such terms (terms presumed to be unfair) (see below). According to the second criterion, the information requirements imposed on businesses do represent unnecessary extra red tape for businesses in some situations.

As to whether the European Commission's proposal succeeds in striking the right balance between a high level of protection for consumers and the competitiveness of businesses, the CCA would like clarification of various aspects of the proposal. The CCA's assessment as to that balance is therefore provisional in nature. Viewed from the perspective of current Dutch consumer legislation, the CCA considers some aspects of the proposal for the Directive inadequate as regards the level of consumer protection offered. In its advisory report, the CCA presents a reasoned package of measures that will go to improve the balance in the Directive. The CCA also believes that businesses are being asked to do more than is desirable or necessary within the context of the information requirements, even bearing in mind the importance of information for consumers.

In view of the exceptions mentioned and considering the broad scope of the Directive, the CCA generally concurs with the Directive's full harmonisation approach.

4. Electronic commerce

The CCA has been asked whether the proposal for the Directive takes sufficient account of the specific circumstances of electronic commerce and anticipated future trends in this area, and whether the proposal contains provisions that may impede electronic commerce. The Ministers have also asked the CCA whether it believes the Directive should apply to a private party who offers products for sale on the Internet, either occasionally or on a regular basis.

In the CCA's opinion, the current text of the proposal is unclear, and this means that insufficient account may be taken of current and future trends and developments in electronic commerce. In particular, the CCA is concerned about whether or not the new Directive will cover the downloading of data files. The European Commission must define the status van downloadable products more precisely. It is also unclear whether an update of purchased software is regarded as a service (after-sales service) or a product.

The CCA believes that the Directive should not apply to a private party/consumer who offers products for sale on the Internet, whether occasionally or on a regular basis. That would mean that the Directive offers protection to one consumer while forcing another to comply with its requirements for traders. It also does not correspond in the least to the definition of a "trader", that is "any natural or legal person who is acting for

purposes relating to his trade, business, craft or profession”. The Directive is sufficiently clear on this point, according to the CCA, but there should be more emphasis placed on this matter in the Preamble. As soon as a private party/consumer is listed with the Chamber of Commerce,¹ however, then it should be clear that this person must be regarded as a trader.

5. Other questions

Withdrawal period

The Ministers ask whether the CCA concurs with a withdrawal period of fourteen days. They also ask whether the proposal for the Directive sufficiently protects the consumer against high-pressure selling.

The CCA does concur with the length of the withdrawal period, which has now been set at fourteen calendar days for all contracts covered under the new Directive (where applicable). In addition, defining the withdrawal period in terms of calendar days rather than working days is a positive move, given the differences between the Member States with respect to public and religious holidays.

One criticism that the CCA does have concerns the differing starting points of the withdrawal period, depending on the type of contract. This makes the Directive unnecessarily complex. The CCA proposes aligning the Directive with the Academic proposal for a Common Frame of Reference for European Contract Law on this issue. The CCA also proposes more equilibrium between the time periods to be observed when exercising the withdrawal right. Consumers should return products and traders should reimburse payments more quickly.

The CCA observes that the proposal for the Directive extends the right of withdrawal to situations in which the consumer has invited the trader to visit his home. It concurs with this extension, because it may reduce the buying/selling pressure on consumers and give them more time to compare prices and examine further information. At the same time, the CCA would like to protect traders against situations in which consumers might abuse the right of withdrawal — for example when a trader provides immediate performance in response to a consumer’s urgent request for repair — by increasing the number of exemptions to the right of withdrawal defined by the proposal for the Directive.

Standard Contract Terms

The question is whether the CCA considers it desirable to tackle unfair standard contract terms at European level, assuming the full harmonisation approach is applied. In particular, the CCA was asked to examine how the black (unfair contract terms) and grey (presumably unfair contract terms) lists in the Dutch Civil Code are used in actual practice.

¹ In the Netherlands, every natural or legal entity that starts up a business must first register with the Chamber of Commerce Trade Register.

The CCA basically supports European-level rules tackling unfair standard contract terms under the full harmonisation approach. Compared with existing legislation in the Dutch Civil Code, however, the European Commission's proposal requires modification on this point, according to the CCA. That applies, for example, to:

- the right to terminate a contract, on the black list of the Dutch Civil Code but omitted from the Directive's lists;
- price increases, on the black list of the Dutch Civil Code but the grey list of the proposal for the Directive;
- the subjects "formal requirements" and "cross-selling", on the grey list of the Dutch Civil Code but omitted from the European lists.

A number of the contract terms on the European black and grey lists also need clarification, for example with respect to the topics cancellation, exoneration, tacit renewal, choice of court and alteration of the contract.

If the negotiations in Brussels ultimately do not result in the changes requested by the CCA, then the CCA does not rule out the possibility that the Netherlands will require scope to regulate standard contract terms at domestic level.

Non-conformity

Here too, the Ministers have asked the CCA whether it is desirable to define European-level rules with respect to non-conformity, assuming that the full harmonisation approach is applied.

In essence, the CCA's response to this question is positive. However, it would prefer a different regime to the one described in the proposal, that is a system that guarantees more parity between the rights and obligations of the trader on the one hand and the consumer on the other than the proposal describes. Such a system should prevent disagreements between the trader and the consumer, or ensure that the disagreement concerned is an appropriate one.

The CCA agrees with the two-year fixed time limit, during which the trader is legally liable for any lack of conformity with the contract.² However, a hardship clause should also be introduced to prevent unfair situations, stating that the time limit applies unless it is unreasonable and unfair for the trader to invoke the expiry of the time limit.

In connection with the foregoing, the CCA suggests two changes to the proposal where it concerns the burden of proof and how that is distributed between the trader and the consumer during the two-year time period:

1. extend the period within which a lack of conformity with the contract is presumed to have existed from six months after the time when the risk passed to the consumer (proposal for the Directive) to two years, and...

² It should be noted that the Dutch Civil Code prescribes a general standard or system according to which a product can be shown not to conform to the contract even after more than two years, in certain instances (for example consumer durables). According to this system, the consumer may then invoke the legal consequences of non-conformity.

2. ... at the same time reduce the trader's burden of proof during that two-year period, in the sense that he must demonstrate that the lack of conformity did not yet exist when the product was sold. It would then be up to the consumer to provide evidence to the contrary, if necessary.

The CCA would also like to see a number changes made to the relationship between the trader and the consumer with respect to sanctions (or legal remedies, as the proposal for the Directive calls them). To prevent situations where a lack of conformity is repeatedly remedied by means of a repair, emergency or otherwise, the Directive should restrict the number of repairs permitted. The parties should also be able to agree on the repair throughput time, and the trader's liability period should be interrupted while the product is being repaired. A guarantee should also be issued on the repaired part.

In the CCA's view, it should be possible to reduce the price or terminate the contract if the trader cannot reasonably be expected to repair or replace the product free of charge. If the contract is terminated, the parties should search for a equitable manner of cancelling any performance already delivered. According to the CCA, the body of the text or the Preamble of the new Directive should suggest that the consumer pay the trader compensation for use, this representing a fair resolution if the contract is terminated.

Finally, the CCA can agree with the proposed period for consumers to notify the trader of a lack of conformity within two months of the date of detection of this lack of conformity, but wishes also here to add a hardship clause.

In its advisory report, the CCA discusses the relationship between the nonconformity rules and commercial guarantees, as this relationship may be confusing for both traders and consumers, especially where the transferability of guarantees is concerned. The CCA supports the grey list contract term obliging the trader to demonstrate, in a given situation, that it is fair to limit the transferability of a commercial guarantee. The CCA views this contract term in conjunction with the contract term in the proposal for the Directive stating that the guarantee statement must set out, where applicable, that the commercial guarantee cannot be transferred to another party.

Second-hand goods

First of all, the CCA considers that the difference in the liability period and the expected life-span of a new or second-hand product should be more clearly emphasised in the Directive (for example in the Preamble). The two are often confused with one another in Dutch legal practice. To avoid such confusion, and because a defined period would clarify things for both traders and consumers, the CCA considers the proposed shorter liability period for second-hand goods (one year instead of two) to be justified, when based on a contract between trader and consumer. It also recommends introducing a hardship clause similar to the one described above for the two-year period.

Delivery and passing of risk

The Ministers have asked the CCA whether the proposal for the Directive suggests feasible, desirable and comprehensive rules for delivery and the passing of risk, and what implications these rules will have for actual practice if they are transposed into the Dutch Civil Code.

In both cases, the CCA prefers the existing rules in the Dutch Civil Code, which are a closer reflection of actual practice. It calls on the Government to bend the proposal for the Directive in the direction of the Dutch Civil Code during the negotiations in Brussels.