A New Consumer Law for Europe?
Conference held in Vienna on 22 January 2009

On 8 October 2008 the European Commission presented a Proposal for a new Directive of the European Parliament and of the Council on Consumer Rights.[1] It aims at revising four existing directives on consumer protection, i.e. the directives on contracts negotiated away from business premises[2], on unfair terms in consumer contracts[3], on distance contracts[4] and on consumer sales and guarantees[5]. Unlike proposed in the Green Paper of February 2007[6], the Proposal does, however, not attempt a comprehensive reform of consumer contract law.[7]
The implementation of the proposed directive would have far-reaching implications on consumer contract law in Austria and the whole of Europe. One of the most significant changes brought about by the Proposal is the abandoning of the approach of minimum harmonisation in favour of full harmonisation: According to Art. 4 of the Proposal, the Member States are no longer permitted to maintain or adopt domestic regulations diverging from those laid down in the Proposal even if they would achieve a higher a level of consumer protection.
The first conference on the Proposal in the German-speaking area was initiated and organised by Professors *Brigitta Jud* and *Christiane Wendehorst* of Vienna University and was held at the Austrian Ministry of Justice on 22 January 2009. The first part of the conference was dedicated to a general introduction to the Proposal by *Johannes Stabentheiner* of the Austrian Ministry of Justice and *Karl-Heinz Oehler* of the German Ministry of Justice. In his paper *Stabentheiner* gave an overview of the preliminary works, underlying ideas and aims of the Proposal as well as the substantive changes it would bring about. He concluded on a critical note especially regarding the concept of full harmonisation and also the point in time chosen for a further reform of consumer sales law as Member States only recently had had to remodel the rules on non-conformity under the Consumer Sales Directive. *Oehler* pointed in particular to possible problems regarding the right of withdrawal and information duties. He supported *Stabentheiner* in suggesting a "differentiated harmonisation" approach as an alternative to full

[1] COM(2008) 614 final.
[2] Council Directive 85/577/EEC, OJ L 372, 31.12.1985, pp. 31–33.
[3] Council Directive 93/13/EEC, OJ L 95, 21.4.1993, pp. 29–34.
[4] Directive 97/7/EC of the European Parliament and of the Council, OJ L 144, 4.6.1997, pp. 19–27.
[5] Directive 1999/44/EC of the European Parliament and of the Council, OJ L 171, 7.7.1999, pp. 12–16 .
[6] Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final of 8 February 2007.
[7] The Proposal does for instance not cover the directives on package travel (90/314/EEC, OJ L 158, 23.6.1990, pp. 59–64), timeshare (94/47/EC, OJ L 280, 29.10.1994, pp. 83–87), injunctions (98/27/EC, OJ L 166, 11.6.1998, pp. 51–55) and distance marketing of consumer financial services (2002/65/EC, OJ L 271, 9.10.2002, pp. 16–24).

harmonisation which both regarded as problematic. Under the differentiated harmonisation approach it would have to be decided for each issue separately whether full harmonisation, minimum harmonisation or non-harmonisation was suited best.

Martin Schmidt-Kessel of Osnabrück University then considered the Proposal within the context of European law harmonisation. He stated that the Europeanisation of private law as well as the development of the *acquis communautaire* and the preference of full harmonisation have resulted in a rise of quality standards pertaining to Community legal acts. According to *Schmidt-Kessel* the Proposal does not meet the required quality standards as it lacked coherence and left quite a number of issues unaddressed. Thus, for instance the provisions on restitution after a contract has failed, on the passing of risk as well as on damages in case of non-conformity met with criticism. *Schmidt-Kessel* also objected to the fact that academic drafts have not been taken into consideration in the drafting of the Proposal. He thus concluded that, given the on-going discussion concerning the Common Frame of Reference, the new Proposal comes at the wrong point in time.

This introductory part was followed by five papers focusing on different areas provided for in the Proposal and outlining the implications a possible transposition of the Proposal would have on Austrian law. *Wilma Dehn*, Judge at the Vienna Court of Appeal, presented a paper on the general information duties as specified in the Proposal. She pointed out that the Proposal imposed general information duties on the trader independent of the respective form of marketing, thus going beyond the scope of the existing directives. According to *Dehn* there is, however, need for clarification as to whether the consumer notion does – under certain circumstances – also extend to legal persons and whether contracts concluded in the process of opening up a trade and contracts involving elements of sale as well as the provision of services also fall under the scope of the Proposal. She further criticised that, in determining the content of specific information duties, also the specific needs of the individual consumer had to be taken into consideration rather than focusing solely on the characteristics of the product. *Dehn* also indicated that it could have far-reaching implications for domestic contract law how the failure to provide information was dealt with and that the issue therefore required further clarification.

Meinhard Lukas of Linz University dealt with off-premises contracts. Unlike doorstep selling contracts, off-premises contracts as defined in the Proposal also cover contracts where only negotiations have been held off premises. According to *Lukas* this definition is too broad and will lead to problems in practice as it could also apply for example to a taxi ride. Furthermore, the definition also covers contracts initiated by the consumer. This would also have

implications on every-day situations in which there is clearly no danger of the consumer being overwhelmed, e.g. when buying a newspaper on the street. To avoid this unfortunate effect every-day contracts involving only small amounts should be excluded from the scope of application. *Lukas* also anticipated that order forms and standard withdrawal forms would cause further problems in practice. Finally, in particular the rule under which a consumer does not have to pay for services provided before the end of the withdrawal period (Art. 17(2) 3rd sentence) raised criticism.

In the ensuing paper *Martin Schauer* of Vienna University analysed the provisions on distance contracts. While he approved of the fact that an organized distance sales or service-provision scheme is no longer a relevant prerequisite, he pointed at the same time to a number of ambiguities in the proposed text. According to *Schauer*, it is for instance not clear whether online auctions are covered by the scope of the Proposal, whether it is mandatory for the trader to provide a standard withdrawal form on his website, or whether the consumer has to pay for prior use when withdrawing from the contract. *Schauer* also pointed out that the fact that the trader is entitled to withhold payment for up to thirty days and in any case until the consumer has sent back the goods puts the consumer in a less favourable position than if the general principles of the law of restitution applied under which he would have to return the goods only on restitution of payment. Finally, he criticised that some rules, for example those on the exemptions from the right of withdrawal in Article 19(1)(d) ("vin en primeur"), were tailored only to suit specific cases.

In her presentation on consumer sales contracts *Brigitta Jud* first appreciated that core issues of the Consumer Sales Directive, for instance the definition of lack of conformity or the consumer's legal rights and their hierarchy, have remained unchanged. She criticised, however, that in case the trader failed to deliver the goods it was not clear whether under the Proposal the consumer may also demand performance or only reimbursement of payments. Also, it remained unclear whether the provisions on non-conformity also extended to the delivery of goods entirely different from the goods contracted for as well as to third-party rights and claims that would adversely affect the buyer. Clarification was further required as to Article 28(1) which, if taken literally, seemed to stipulated that remedies could be exercised infinitely if only non-conformity became apparent within two years. *Jud* severely criticised the provision according to which the trader now has up to thirty days to deliver the goods regardless of whether it is a distance contract or not; this would put the consumer at a significant disadvantage as compared to his position under present Austrian law. *Jud* was also particularly critical of Article 27(2) which seemed to lay down a strict liability regime for any

damage ensuing from non-conformity. Finally, *Jud* pointed out that the Proposal left a number of issues unanswered, e.g. whether the consumer had – apart from the legal rights provided for in the Proposal – also claims based on mistake or contractual liability.

Georg Graf of Salzburg University was no less critical of the Proposal in his paper on contract terms. He criticised in particular that it depended on a domestic legal context whether a contract term was to be classified as unfair: According to the Proposal a contract term is no longer unfair in itself but has to be assessed in each case taking into account the circumstances of the specific contract. *Graf* also criticised that the Proposal employed very wide concepts which ensued the danger that construction in the various Member States differed. This could only be counterbalanced by a greater involvement of the ECJ which would however in the end mean that the ECJ as court of last instance was deciding matters of domestic contract law – a result that was not desirable either. *Graf* pointed out that in its Annex III the Proposal presumed some contract terms to be unfair unless the trader proved otherwise. In some Member States this could lead to the paradox situation that consumers were better protected against individually negotiated clauses than against per-formulated contract terms (cf. e.g. Art. 6(1) of the Austrian Consumer Protection Code).

The last paper, presented by *Christiane Wendehorst*, dealt with the issue of transposing the prospective Directive. After an analysis of the general options the legislator had in transposing a directive into domestic law, she reached the conclusion that full harmonisation did not only prevent the national legislator from providing for a diverging consumer protection standard but also divested it of nearly all commonly used law-making techniques. Nearly the only choice left to the Member States was whether to provide for consumer private law in several special laws, in a separate consumer code or in the civil code itself. Given the high frequency of revisions of directives as well as the trend towards full harmonisation, *Wendehorst* emphasised the advantages of modular structures. As regards Austrian consumer private law, she asserted an urgent need for law reform independently of whether the proposed directive were to come into force or not. Under the circumstances a consumer contract code with modular structure was the most convincing solution according to *Wendehorst*.

Following the presentations, a panel discussion involving representatives of consumers, traders and the legal professions took place. Also the opinions voiced in this discussion were critical of the Proposal as it stands.

The papers delivered at the conference have been published as a book.[8] In addition, the outcomes of the conference have been submitted to the European Commission in the form of a Position Paper.[9] In order to provide information on current developments in the field a platform has been set up which is accessible at http://consumer-rights.univie.ac.at/.

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[8] *Brigitta Jud/Christiane Wendehorst* (ed.), Neuordnung des Verbraucherprivatrechts? (Vienna 2009).

[9] Published together with the conference papers see above fn. 8.