Brigitta Jud/Christiane Wendehorst

Position Paper

Vienna Conference on the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, COM(2008) 614 final

A group of leading experts in Consumer Law and European Private Law from Austria and the neighbouring countries convened in Vienna on 22 January 2009 in order to discuss the Commission's Proposal for a new Directive on Consumer Rights of 8 October 2008 [COM(2008) 614 final]. The conference, initiated and directed jointly by *Brigitta Jud* and *Christiane Wendehorst* from Vienna University, was held on the premises and with the generous support of the Austrian Ministry of Justice (*Bundesministerium für Justiz*). More than 150 academics and stakeholders had followed the invitation to attend.

Throughout the conference, there was vast appreciation of the Commission's move towards a more coherent and less fragmented European consumer contract law. Participants were equally united in their respect for the Commission's preference of harmonisation over unification or mutual recognition, and the majority also agreed in principle with the need for a higher degree of harmonisation in order to facilitate cross-border marketing, in particular for SMEs. However, the experts unanimously expressed their deep concern about possible impacts on the current legal landscape in Europe, about the general regulatory approach taken by the Proposal as well as about many details of the provisions contained therein.

The main speakers at the Vienna conference were:
Dr *Wilma Dehn*, judge at the *Oberlandesgericht* for Vienna
Professor Dr *Georg Graf*, University of Salzburg
Professor Dr *Brigitta Jud*, University of Vienna
Professor Dr *Meinhard Lukas*, University of Linz
Karl-Heinz Oehler, German Ministry of Justice
Professor Dr *Martin Schauer*, University of Vienna
Professor Dr *Martin Schmidt-Kessel*, European Legal Studies Institute, Osnabrück
Professor Dr *Johannes Stabentheiner*, University of Linz, Austrian Ministry of Justice
Professor Dr *Christiane Wendehorst*, LL.M. (Cantab.), University of Vienna

The conference closed with a panel discussion that gave a voice to stakeholders from consumer organisations, industry and commerce, the Bar and the judiciary.

I. Position within the European Legal Landscape

(1) Considering the dimension of incoherence and fragmentation in the current *acquis communautaire* and the ambitious goals proclaimed by the Commission in earlier documents, the Proposal falls well short of expectations and is a mere torso (*Oehler, Stabentheiner*). It contains but few horizontal elements and may rather be described as a succession of four vertical sections, leaving out fields

with a much higher potential for horizontalisation (*Wendehorst*), in particular timesharing, consumer credits and distance marketing of financial services (*Schauer*, *Stabentheiner*).

(2) Given that many Member States have only recently reshaped their national sales laws in order to integrate the minimum standards set by Directive 1999/44/EC, another far-reaching revision of consumer sales law comes at the wrong point in time (*Stabentheiner*). Several choices made by Directive 1999/44/EC, for instance the right of redress against a previous seller where the final seller is held liable for lack of conformity of the goods, have now been abandoned even without any reason being given (*Schmidt-Kessel*).

(3) It comes as a surprise that the CFR project, once initiated and generously funded by the Commission itself, is not even mentioned, let alone the results of many years of research submitted in the DCFR taken into consideration (*Oehler*, *Schmidt-Kessel*).

II. General Regulatory Approach

(4) Contrary to the apparent meaning of Article 249(3) of the EC Treaty, full harmonisation deprives national legislators not only of the option of providing a different level of consumer protection, but also of practically any common regulatory technique (*Wendehorst*). This vastly increases the required standard of legislative perfection at Community level (*Schmidt-Kessel*).

(5) Within the harmonised field, this means more thorough impact assessment (e.g. practicability of the order form, cf. no. 21), better coordination with concurring Community instruments (e.g. the Services Directive), avoidance of vague provisions with unforeseeable implications (e.g. Article 27 on damages, cf. no. 24) and a coherent approach to general concepts and recurring themes (e.g. to restitution, which needs to take place in no less than seven different cases covered by the Proposal) (*Schmidt-Kessel et al.*).

(6) According to the concept of “differentiated full harmonisation”, full harmonisation must be restricted to aspects where the benefits for the internal market clearly outweigh the costs (*Oehler*, *Stabentheiner*). This is the case with issues like the length of the withdrawal period or the form in which the right of withdrawal must be exercised by the consumer. Contrastingly, full harmonisation must be avoided where

- (a) there is an eminent need for Member States to respond quickly to new unfair practices (e.g. new standard contract terms, new distance marketing strategies, cf. no. 29; *Stabentheiner*);
- (b) the outline of the harmonised field itself is vague, making the implications for national contract law largely unforeseeable (e.g. the implications full harmonisation of precontractual information has for rules on contract formation and negotiation under domestic law, cf. no 9; *Dehn*, *Wendehorst*);
- (c) the results achieved will necessarily diverge anyway, due to their dependence on the domestic legal context (e.g. qualification of contract terms as unfair, cf. no. 28; *Graf*); or
- (d) matters of general contract law are concerned, provoking paradox constellations where the level of protection for non-consumer customers is higher than that for consumers (e.g. concerning pre-contractual information, cf. no. 10; *Dehn*) or consumer protection in non-harmonised fields is stricter than in harmonised fields (e.g.

individually negotiated contract terms compared with pre-formulated terms, cf. no. 29; *Graf*, *Stabentheiner*). As Member States will seek to remedy such inconsistencies by lowering the level of protection for non-consumers or in non-harmonised fields, directives would indirectly reach out to matters for which Community competence is disputed (*Wendehorst*).

III. Some Issues in Detail

A. Subject matter, definitions and scope

(7) The definition of "consumer" in Article 2(1) fails to address any of the controversial issues, in particular the question of how to deal with cases where a person is acting for purposes only partly related to her trade, business, craft or profession (dual use) and the classification of purposes related to a person's employed work and to private asset-management (*Jud*, *Wendehorst*).

(8) Some of the definitions in Article 2 still leave ample room for speculation. For instance, it remains unclear whether contracts combining the provision of services and the sale of immoveable property are covered or not (*Dehn*), as Article 2(3) only mentions the combination of services and the sale of movable items. Similarly, Article 2(4) is ambiguous as to the question whether contracts for the sale of gas, water and electricity count as service contracts or fall without the scope of the Proposal (*Wendehorst*).

B. General Consumer Information

(9) Chapter II is the only truly horizontal element of the Proposal and potentially interferes with general contract law on a very broad scale, which is a strong argument against full harmonisation, cf. no. 6(d). In any case, the implications for domestic rules of contract negotiation and formation (e.g. precontracts, formal requirements, minimum content) as well as of *culpa in contrahendo* must be fully clarified (*Dehn*).

(10) Within the catalogue of information requirements, some items need to be reformulated. Especially Article 5(1)(a) is too narrow, focussing as it does on the characteristics of the product and neglecting the individual needs of the particular consumer which become apparent in the circumstances. In the light of full harmonisation, Member States might even be prevented from holding the trader liable for giving no answer or a false answer to questions posed by the consumer in as far as the questions go beyond the characteristics of the product itself (*Dehn*).

(11) Article 5 should mention a transparency requirement similar to that provided in Article 31(1) and (2) for pre-formulated contract terms. On the other hand, clarification is needed whether Member States are prevented from imposing presentational requirements for pre-contractual information, as they are for contract terms according to Article 31(4) (*Dehn*).

C. Distance and Off-Premises Contracts

1. General provisions

(12) Pursuant to Article 9(f), the trader must inform the consumer of the fact that he is contracting with a trader and will therefore benefit from the protection afforded by the Directive. It remains unclear what this information might add to the

information concerning the right of withdrawal which the trader must provide already under Article 9(b) in accordance with Annex I, and why this kind of information is restricted to distance and off-premises contracts (*Schauer*).

(13) The trader's right to withhold reimbursement of payments for up to thirty days and in any case until the consumer has sent back the goods, as provided for by Article 16, places the consumer at a manifest disadvantage (*Lukas, Schauer, Stabentheiner*).

(14) The provisions on the effects of withdrawal fail to make sufficiently clear whether restitution may include remuneration for the use of goods delivered to the consumer, as Article 17(2) addresses only liability for diminished value of the goods, and who bears the risk of the goods being lost on their way back to the trader (*Schauer*).

(15) Article 17(2), 3rd sentence, which provides that the consumer shall bear no cost for services performed during the withdrawal period, will mean in practice that traders refuse to provide services within a period of fourteen days after conclusion of the contract, no matter how urgently the consumer is in need of the services contracted (*Lukas*).

2. Provisions restricted to distance contracts

(16) The Proposal has opted for a broad definition of distance contract, dropping the requirement of an organised distance sales or service-provision scheme. This enhances clarity and legal certainty, in particular in the context of internet platforms and similar schemes run by a third party, and for this reason many experts endorse the new definition (*Schauer*). On the other hand, traders not specialised in distance marketing cannot be expected to comply with the information requirements set out in Article 9 or to handle cases of withdrawal, and might therefore no longer be willing to deliver goods or provide services e.g. upon a phone call from the consumer, causing inconvenience to many consumers, especially to the sick and elderly (*Jud, Wendehorst*).

(17) Article 19(1)(a), which provides that the consumer loses his right of withdrawal once the trader has begun performance of a service with the consumer's express consent, fails to protect the consumer from abusive practices that have recently become common in the context of unsolicited phone calls and disguised charges for services offered on the Internet: The consumer will request immediate provision of the service in the majority of cases, ignorant as he usually is of the legal consequences. Apart from that, there must be a clear definition of what "express" consent on the part of the consumer may mean in distance communication, for instance whether deliberate triggering of the trader's performance by clicking a box on a website may suffice (*Wendehorst*).

(18) Exceptions from the right of withdrawal as narrowly defined as in Article 19(1)(d) concerning *vin en primeur* tend to make the law incoherent and should be replaced by exceptions which reflect the underlying principle, in this particular case the aleatoric nature of the transaction (*Schauer*).

(19) It is unclear whether, for distance contracts concluded on the Internet, a withdrawal form on the trader's website is optional, as suggested by the wording of Article 14(2), or obligatory, as suggested by Annex I, A, 4 (*Schauer*).

3. Provisions restricted to off-premises contracts

(20) The scope of application concerning off-premises contracts is excessively wide, hampering also everyday transactions which are much to the consumer's convenience, like buying a newspaper on the street. There must at least be an

exception for low-value transactions where full performance is made on the spot by both sides. Furthermore, the definition of "business premises" has to be refined, leaving not the shadow of doubt that e.g. contracts made with a taxi driver or with a public transport provider are not covered by the Proposal (*Lukas*).

(21) The formal requirement for the consumer to sign an order form makes off-premises transactions much too cumbersome (*Lukas*). Besides, there is no rational explanation why the consumer shall receive a copy of the order form only when it is not on paper, as suggested by Articles 10(2) and 12(2). Paper order forms would be used in the vast majority of cases, which means that consumers would not normally receive a copy and would therefore not be in a position to check the information at a later point in time or to use the standard withdrawal form (*Wendehorst*).

(22) The definition of off-premises contract in the Proposal fails to include the notorious *Kaffeefahrt* constellation, where the consumer goes on an excursion of a mainly touristic nature which is organised by a trader and, during the excursion, is exposed to a sales event on this trader's or another trader's business premises (*Wendehorst*).

D. Sales Contracts

(23) Article 22(2) seems to suggest that, where the trader fails to deliver the goods, the consumer may not resort to other remedies except for reimbursement of payments made in advance, in particular that the consumer may not demand performance or damages. Compared with the rights of non-consumer buyers under almost any domestic contract law, this would put the consumer at a manifest disadvantage (*Jud*).

(24) Although the Explanatory Memorandum (sub. 3) states that the Proposal should not interfere with the award of damages, Article 27(2) leaves ample room for speculation. Possibly, it is only meant to prevent the consumer from claiming damages for losses for which he has already been compensated through a remedy chosen under Article 26 (*Schmidt-Kessel*). However, it would also allow for the interpretation that national law may not award damages for losses that could in principle be compensated through remedies under Article 26. Equally, one might read it as an imperative for national law to award damages for all kinds of subsequent loss, including non-pecuniary loss, without any further requirement such as fault. Interpretations of the latter kind might largely disrupt the contract laws in the Member States (*Jud*).

(25) Article 24 fails to clarify whether the rules on non-conformity extend to the delivery of goods entirely different from the goods contracted for or to the delivery of a different quantity of goods or to third party rights and claims that would adversely affect the buyer (*Jud*).

(26) According to Article 21(3), Chapter IV does not apply to spare parts replaced by the trader when he has remedied the non-conformity of the goods by repair. This seems to be inconsistent with the rule under Article 28(2) which provides that in the case of replacement a new two-year period will begin to run. It is also irreconcilable with Article 26(4) which provides that the consumer may resort to any of the remedies under Article 26 where repair of the goods has ultimately failed. In case Article 21(3) simply leaves the issue of non-conformity of spare parts for the Member States to decide upon, it should say so explicitly (*Jud*).

(27) The Proposal should make explicit that the effects of rescission must be fleshed out by domestic law. It should also make explicit, as does Directive 1999/44/EC,

that the Member States may introduce rules on prescription, provided the latter are not incompatible with Article 28 (*Jud*).

E. Contract Terms

(28) Full harmonisation in the field of unfair contract terms will never lead to uniformity of results, for, within the ambit of the "grey" list in Annex III and the general clause in Article 32, the classification of a contract term as unfair depends on the domestic legal context, cf. no. 6(c). Where full harmonisation fails to fulfil its main function anyway, the Community legislator must abstain from restraining Member States any more than is necessary (*Graf*).

(29) In addition, full harmonisation deprives Member States of the flexibility to respond quickly to new abusive standard contract terms and extend the "grey" and "black" list of contract terms in Annexes II and III according to the situation in the particular State, cf. no. 6(a). Even if Member States' courts are free to classify a term as unfair under general clauses implementing Article 32(1), they might prefer to adapt the lists for the sake of legal certainty (*Stabentheiner*).

(30) In some Member States, full harmonisation might even create the paradox situation that protection against individually negotiated clauses is stricter than protection against pre-formulated clauses, cf. no. 6(d) (*Graf*), indirectly forcing these States to lower the level of consumer protection even outside the harmonised field. In Austria, for example, certain terms, even when individually negotiated, are ineffective in all circumstances under sec. 6(1) Konsumentenschutzgesetz. This might have to be changed should the Proposal come into force (*Stabentheiner*).

IV. Concluding remarks

The concerns and comments listed above were formulated by the experts in their presentations, during discussions and shortly after the conference in executive summaries. Even though some questions of interpretation and very few substantive issues, essentially the concept of full harmonisation as such and the new definition of distance contracts, remained controversial, the experts were near-unanimous in their assessment of the Proposal in general and of the individual provisions. Their views were endorsed by the vast majority of academics and stakeholders attending the conference.

The points raised in this paper are neither finalised nor exhaustive and still need to be refined in the course of a Europe-wide debate. They are not meant to be a political statement against the new Directive, but an academic contribution to the shared quest for better law-making.