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# CCBE Response to the Green Paper on the review of the Consumer Acquis

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## I. INTRODUCTION

The Council of Bars and Law Societies of Europe (CCBE) represents, through its member bars and law societies of the European Union and the European Economic Area, more than 700,000 European lawyers. In addition to membership from EU bars, it has also observer representatives from a further six European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

This paper is the response of the CCBE to most questions raised in the Commission document regarding the review of the consumer acquis. The CCBE's remarks follow the order of the questions raised by the Commission in its consultation document.

## II. CCBE RESPONSE on the general legislative approach (Questions A1-A3) regarding the review of the consumer acquis

The CCBE, at its last general assembly on 24/25 November 2006, passed a resolution[1] in full support of the initiative to create a Common Frame of Reference in order to improve the quality and coherence of the existing acquis and future legal instruments in the area of contract law. [2]

The majority of the CCBE believes that the best approach to the review of consumer legislation (Question A1) is a mixed approach combining the adoption of a framework instrument addressing horizontal issues that are of relevance for all consumer contracts with revisions of existing sectoral directives whenever necessary ***(Option 2)***. In this respect, the CCBE welcomes the Commission's ongoing work of the sectoral directives' revision. The horizontal instrument would help to clarify the legal terminology and coordinate provisions between the different instruments existing in the consumer acquis. It would also simplify the consumer acquis and make it at the same time more coherent. In addition, the CCBE believes that the scope of a possible horizontal instrument (Question A2) should apply to all consumer contracts whether they concern domestic or cross-border transactions (***Option 1)***[3]**.** One instrument for all consumer contracts would simplify the consumer acquis considerably for both consumers and enterprises. Enterprises would profit from this through decrease in their compliance costs and through easier trade across the EU, irrespective of where they are established. Consumers could have more confidence in transactions with businesses located abroad.

Finally, the majority of the CCBE believes that the level of harmonisation of the revised directives/the new instrument (Question A3) should provide for any revised legislation to be based on full harmonisation ***(Option 1)***[4]**.** Full harmonisation would lead to more legal security for consumers, because they could rightfully expect the same level of protection across the EU. More legal security and a decrease of compliance costs would be a good result for enterprises which could expect the

[1] Please find the CCBE Resolution on European Contract Law at: http://www.ccbe.org/en/comites/contract_en.htm.

[2] The Commissioner Meglena Kuneva at the EU Presidency Conference on Contract Law in Stuttgart on 1 and 2 March 2007 noted that the Commission will continue to work on this long-term project and that the most directly concerned Commissioners, like her colleagues Franco Frattini – Vice-President and Commissioner for Justice, freedom and security, Gunther Verheugen – Vice President and Commissioner for enterprise and industry and Charlie McCreevy – Commissioner for Internal market and services, will ensure the success of the CFR exercise.

[3] Opinion expressed by a minority of the CCBE: Option 1 under certain conditions (UK), please see: http://www.lawsociety.org.uk/influencinglaw/europeanlaw/lobbyingtheeu/policyinresponse.law?FUNCTION=print

[4] Opinion expressed by a minority of the CCBE for Question A3: no agreement to any option (UK).

same regulatory requirement abroad as in their home country. Yet, this is subject to the important caveat that maximum harmonisation measures should not reduce the protection available to the consumer beyond an acceptable level.

Finally, the Commission might want to consider that where any existing directive is revised it should be republished in full, or some form of "consolidated" version of the directive should be published.

## III. Specific Questions raised in the Green Paper

**Question B1: How should the notions of consumer and professional be defined?**

The definition of "consumer" and "professional", going beyond the present consumer acquis, seems to be vital for any future harmonisation. However, any such definition must take into account its relevant scope, i.e. whether it should include or exclude SMEs and certain legal persons, such as societies or non-profit clubs. Further consideration should also be given to the question on how to deal with the various problems relating to "dual use" of a good purchased by a professional which may also be used by him in his capacity as consumer and vice versa.

**Question B2: Should contracts between private persons be considered as consumer contracts when one of the parties acts through a professional intermediary?**

***Option 2:*** The notion of consumer contracts would include situations where one party acts through a professional intermediary.

This option is favoured in order to ensure that the required consumer protection is also afforded in those instances where otherwise there could be a circumvention by simply acting trough an intermediary.[5]

**Question C: Should a horizontal instrument include an overarching duty for professionals to act in accordance with the principles of good faith and fair dealing?**

***Option 1***: The CCBE believes that the horizontal instrument would certainly provide that under EU consumer contract law professionals are expected to act in good faith.

However, the CCBE furthermore believes that the concept of good faith and fair dealing is no doubt essential for both parties to any contract, not only for the professional. Therefore, it might be hard to find a solution that could be accepted by all Member States, as the basic concept of trust and confidence, good faith and fair dealing and the respective implications of the precedents so formulated by the courts of the Member States differ considerably. Thus, more time to evaluate them and possibly arrive at a common understanding is needed. The same applies with regard to the unfairness test for unfair terms of contract. [6]

[5] Opinion expressed by a minority of the CCBE: Option 1 (UK).
[6] Opinion expressed by a minority of the CCBE: Option 2 (DK, IE, UK).

**Question D1: To what extent should the discipline of unfair contract terms also cover individually negotiated terms?**

***Option 3***: Status quo – Community rules would continue to apply exclusively to non-negotiated or pre-formulated terms.

The CCBE is mindful that the principle of freedom of contract is the essence of laws of all Member States. Therefore, it seems, at present, doubtful whether the EU Rules of Unfair Terms should be extended to apply also to negotiated terms, as any such solution would affect the concept of freedom of contract. Furthermore it would be impractical as well, since it may create a situation where consumers would not be prepared to take responsibility for terms which they had negotiated and thus to take less, rather than more, care in their transactions. There is also major uncertainty as to what the term "individually negotiated" actually comprises.

The CCBE has taken into account the problems relating to the discipline of unfair terms and has come to the conclusion that the status quo should be maintained, i.e. Community rules should continue to apply exclusively to non-negotiated terms and thus should not include individually negotiated terms. [7]

**Question D2: What should be the status of any list of unfair contract terms to be included in a horizontal instrument?**

On this question, there was no majority view taken by the CCBE. The following options were supported (by at least two delegations):

***Option 3****:* Please see answer to D1; due to the principle of freedom of contract and its importance to contract law in all Member States, parts of the CCBE cannot yet make a final recommendation whether the list of unfair terms should be extended beyond its present scope.

or

***Option 4***: a combination of options 2 and 3: some terms would be banned completely, while a reputable presumption of unfairness would apply to the others.

The Annex to the Directive on Unfair Terms contains certain clauses deemed to be unfair. On the basis of this Annex it seems appropriate to decide that some clauses should be considered null and void under any circumstances, e.g. any disclaimer in case of personal injuries being due to negligence of the debtor ("black list"), whilst others could be categorised as being unfair under certain circumstances only ("grey list"). This distinction will serve the required consumer protection in view of the fact that the European Court has held that the interpretation of the clauses contained in said Annex shall be left to the jurisdiction of the Member States only (ECJ 01.04.2000, case C-237/02 (Freiburger Kommunalbauten), [2004] ECR I-3403) [8]

**Question D3: Should the scope of the unfairness test of the directive on unfair terms be extended?**

***Option 2***: The CCBE proposes to maintain the status quo of the unfairness test of the Directive on Unfair Terms so that it is kept in its present form. It has proven to be satisfactory instrument in day-to-day practice.

[7] Opinions expressed by a minority of the CCBE: Option 1*(*IT*) /*Option 2 (AT).
[8] Opinions expressed by a minority of the CCBE: Option 2 (IE)/Option 1(UK).

**Question E: What contractual effects should be given to the failure to comply with information requirements in the consumer acquis?**

***Option 1***: The cooling-off period, as a uniform remedy for failure to comply with information requirements, should be extended, e.g. up to three months, as such time span is considered to reasonably reflect the needs of appropriate consumer protection**.**
There are two good reasons to prescribe the same remedy for breaches of obligation relating to any type of pre-contract information. The first is simplicity. The second is that it is difficult to see why information relating to, e.g., price should be treated differently from information relating to, e.g., description: can the two types of information be readily distinguished conceptually? At the same time, the distinction between pre-contractual information on the one hand, and contractual information on the other, should be preserved. Option 2 would undermine this distinction. [9]

**Question F1: Should the length of the cooling-off periods be harmonised across the consumer acquis?**

***Option 1:*** The CCBE favours one single cooling-off period for all cases when the consumer directives grant consumers a right to withdraw from the contract and that such cooling-off period should be 14 calendar days, as is already now the case in almost all Directives.

A single cooling-off period would lead to greater clarity for the consumer. Legal uncertainty would be avoided in case of overlaps between the various Directives of the consumer acquis.

**Question F2: How should the right of withdrawal be exercised?**

***Option 2****:* One uniform procedure for the notice of withdrawal across the consumer acquis should be established in order to mitigate any difficulties in exercising such a right.

This could function as an incentive for consumers to enter into cross-border transactions and undertake purchases in another EU member state. The uniform procedure should be straight forward, simple and thereby easy to exercise for any consumer. Furthermore, the introduction of an obligation to return the goods might be worthwhile to consider as well.

**Question F3: Which costs should be imposed on consumers in the event of withdrawal?**

***Option 2***: The existing options would be generalised: consumers would then face the same costs when exercising the right to withdrawal irrespective of the type of contract.
This again, would lead to greater clarity for both the consumer and also for enterprises.[10]

[9] Opinion expressed by a minority of the CCBE: Option 2 (IE).
[10] Opinion expressed by a minority of the CCBE: Option 3 (FR).

**Question G1: Should the horizontal instrument provide for general contractual remedies available to consumers?**

***Option 2***: A set of general contractual remedies available to consumers in the case of a breach any consumer contract would be provided. These remedies would include: the right of a consumer to terminate the contract, to ask for a reduction of the price and to withhold performance.
However, attention might have to be paid to the fact that the particular remedy would presumably depend on the nature of the breach and possibly also the nature of the particular consumer contract.[11]

**Question G2: Should the horizontal instrument grant consumers a general right to damages for breach of contract?**

On this question, there was no majority view taken by the CCBE. The following options were supported (by at least two delegations)[12]:

***Option 1***: Status quo: the issue of contractual damages would be governed by national laws, except when provided for in the Community acquis (e.g. package travel).
A general right to damages for consumers should be introduced and it should be provided that these damages should cover both the purely economic (material) damage and the moral losses.

***or***

***Option 2****:* A general right to damages for consumers would be foreseen - they
would be able to claim damages for all breaches, irrespective of the type of breach and the nature of the contract. It would remain up to the Member States to decide what types of damages could be compensated.

**or**

***Option 3****:* A general right to damages for consumers would be foreseen and it
would be provided that these damages should at least cover purely economic (material) damages that the consumer has suffered as a result of the breach. Member States would then be free to regulate non-economic loss (e.g. moral damages)

**Question H1: Should the rules on consumer sales cover additional types of contracts under which goods are supplied or digital content services are provided to consumers?**

***Option 4***: Combination of Option 2 and 3 (=Extension of scope to additional types of contracts and digital content services).

Directive 99/44 of 25 May 1999 limits its scope of application to tangible movable items and expressly excludes electricity, gas, and water unless in a set package.

The CCBE thinks that consumer protection must not be limited to tangible movable items, but must extend to living animals and digital contents services.[13]

[11] Opinion expressed by a minority of the CCBE: Option 1 (AT, DK, UK).
[12] Opinion expressed by a minority of the CCBE: Option 4 (IE).
[13] Opinions expressed by a minority of the CCBE: Option 3 (AT, DE, IR)/Option 1 (DK, UK).

**Question H2: Should the rules on consumer sales apply to second-hand goods sold at public auctions?**

***Option 2***: No, they would be excluded from the scope of Community rules.

The CCBE is of the opinion that specific rules should apply to the sale of second-hand goods, as the sales of such goods has considerable importance to so optimize the concept of appropriate consumer protection. A significant number of goods sold second-hand at public auction will in fact be sold by consumers. One cannot reasonably expect the auctioneer to vouch for such matters as quality of the goods. Furthermore, the nature of auction sales prohibits the use of ordinary remedies known from the Sales Directive.[14]

**Question I1: How should delivery be defined?**

***Option 3***: Delivery should mean, by default, that the consumer takes physical possession of the goods, but the parties can agree otherwise. However, the European Commission would need to take note that the definition of delivery is not consistent in all jurisdictions.
Attention might be also paid to cases where the consumer wrongfully refuses to accept delivery.[15]

**Question I2: How should the passing of the risk in consumer sales be regulated?**

***Option 1***: The passing of the risk should be regulated at Community level and be linked to the moment of delivery.
A regulation of the passing of the risk would lead to legal certainty especially for enterprises when undertaking cross-border transactions. However, the definition of delivery needs to further clarified at European level, e.g. as linked the physical possession, unless otherwise agreed by the parties. Another important issue here is who shall arrange and pay for needed insurance coverage. This may very well be undertaken by the enterprises and they can include the costs in the price for the goods. What may be foreseen by the enterprises is time and place for the disposal of the consumer (Q I1 above) [16]

**Question J1**: **Should the horizontal instrument extend the time limits applying to lack of conformity for the period during which remedies were performed?**

***Option 2***: The horizontal instrument should provide that the duration of the legal guarantee is extended for a period during which the consumer was not able to use the goods due to remedies being performed.

In addition, the CCBE believes that provided that a guarantee undertaking has been entered into between a professional and a consumer, then it is appropriate that the consumer should benefit from this guarantee undertaking during the entire period of such guarantee and should not be deprived of its benefits due to any defects of the good to be remedied under the guarantee.

[14] Opinion expressed by a minority of the CCBE: Option 1(IE, IT).
[15] Opinions expressed by a minority of the CCBE: Option 4 (UK) /Option 2 (DK, IT).
[16] Opinion expressed by a minority of the CCBE: Option 2 (UK).

**Question J2**: **Should the guarantee be automatically extended in case of repair of the goods to cover recurring defects?**

***Option 2:*** The duration of the legal guarantee would be extended for a period to be specified after the repair to cover the future re-emergence of the same defect.

The CCBE recommends that the duration of the legal guarantee should be extended for a period during which the consumer was not able to use the goods due to the remedies being performed. The CCBE strongly supports the position that the duration of the legal guarantees should be extended for another two years after the repair of the defective good to cover the future re-emergence of the same defect. Lacking such extension the consumer would be deprived of its rights under the guarantee, and by the same token the professional having breached its guarantee undertaking would profit from the shortcomings of its undertaking in case there were a re-emergence of the same defect.

**Question J3**: **Should specific rules exist for second hand-goods?**

***Option 2***: A horizontal instrument would contain specific rules for second hand goods: the seller and the consumer may agree on a shorter period for liability for defects in second hand goods (but not less than a year, unless the nature of goods would demand a shorter period). Second-hand goods (and the suppliers of such goods –from sellers of classic cars to charity shops) vary so greatly in their nature that inflexible general rules are unlikely to produce an acceptable result.
Second-hand goods should be treated differently from "new" goods. We say that this is especially so in view of the fact that many second-hand goods are sold by consumers and not tradesmen, and so there is greater equality of arms. Even when the second-hand goods are sold by intermediate tradesmen like auctioneers, the goods should still be treated differently for the reason that it would be unfair to fix contractual liability on the intermediary. In English law, auctioneers will not be liable for such matters as quality of the goods if they disclose their principal. On this reasoning, there may be complications where a tradesman in the course of his business sells his own second-hand goods to a consumer, not as an intermediary. Nonetheless, we would say that it is right to treat second-hand goods as *sui generis* for the sake of uniformity.

Therefore, the CCBE is of the opinion that Art. 7 Section 1 of the Sales Directive already offers the correct and appropriate solution being in line with the above proposal.

**Question J4**: **Who should bear the burden to prove that the defects existed already at the time of delivery?**

***Option 1***: Status quo: During the first six months it should be up to the professional to prove that the defect did not exist at the time of delivery.

Art. 5 Sec. 3 of the Sales Directive offers the right perspective for issues related to the burden of proof. The current period is a compromise solution intended to make it relatively easy for the customer to prove his case during the first six months without imposing an open-ended obligation on the supplier in relation to goods which may have simply deteriorated with age or misuse. Given the range of products to which it may apply, the current provision seems to strike an appropriate balance.

**Question K1: Should the consumer be free to choose any of the available remedies?**

***Option 1***: Status quo: consumers would be obliged to request repair/replacement first, and ask for a price reduction or termination of contract only if the other remedies are unavailable.[17]

**Question K2: Should consumers have to notify the seller of the lack of conformity?**

***Option 1***: A duty to notify the seller of any defect should be introduced.

However, in terms of consumer protection, any such duty to notify shall not cause the consumer to loose its remedies for any breach of contract imputable on the professional, but rather should by guided by the general principal of contributory negligence. The CCBE recommends however that the notification should be made within a "reasonable time".

**Question L: Should the horizontal instrument introduce direct liability of producers for non-conformity?**

On this question, there was not majority view taken by the CCBE. The following options were supported (by at least two delegations)[18].

***Option 1***: Status quo: no rules on direct liability of producers would be introduced at EU level.

**or**

***Option 2***: A direct liability for producers should be introduced.
The Commission is obliged by virtue of Art. 12 of the Sales Directive to investigate whether such direct liability should be introduced to the benefit of the consumer. Taking this into account the CCBE believes that such approach should be favoured as it will serve the interests of the consumer and will not be detrimental to the professional in view of Art. 4 of the Sales Directive.

**Question M1: Should a horizontal instrument provide for a default content of a commercial guarantee?**

On this question, there was not majority view taken by the CCBE. The following options were supported (by at least two delegations)

***Option 1***: Status quo: the horizontal instrument would contain no default rules.
Any requirement to set out the terms of the guarantee is arguably adequately covered by general law provisions such as the prohibition on the making of misleading statements. This is not seen as a particularly controversial point since businesses could (and doubtless would) choose to protect themselves by ensuring that the default rules do not apply. With matters such as this it is more likely to be the detail than the principle which is controversial.

**or**

***Option 2:*** Default rules for commercial guarantees would be introduced.

[17] Opinion expressed by a minority of the CCBE: Option 2 (FR).
[18] Opinion expressed by a minority of the CCBE: Option 4 (IE).

**Question M2: Should a horizontal instrument regulate the transferability of the commercial guarantee?**

***Option 3***: The horizontal instrument should provide for the transferability as a default rule, i.e. a guarantor would be able to exclude or limit the possibility to transfer a commercial guarantee.

This approach seems to be warranted as any guarantee undertaking is a voluntary act of the professional and not required by operation of the law. Hence, the CCBE is of the opinion that the guarantor should also be in the position to limit the transferability of its guarantee undertaking.[19]

**Question M3: Should the horizontal instrument regulate commercial guarantees limited to a specific part?**

***Option 1***: Status quo: the possibility to provide commercial guarantee limited to specific part would not be regulated by the horizontal instrument.

Manufacturers of complex goods of the type envisaged in the Green Paper are unlikely to be materially disadvantaged by a requirement to set out any limits to a guarantee clearly. [20]

**Question N: Is/are there any other issue(s) or area(s) that requires to be explored further or addressed at EU level in the context of consumer protection?**

The CCBE proposes that the legal problems relating to the consumer credit market should be addressed at EU level in the context of better consumer protection.[21]

[19] Opinions expressed by a minority of the CCBE: Option 1(UK)/Option 2 (ES).
[20] Opinion expressed by a minority of the CCBE: Option 3 (IE).
[21] Opinion expressed by a minority of the CCBE: Further suggestions (FR): professional liability, mandatory insurance schemes.