



CCBE POSITION ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON CONSUMER RIGHTS DIRECTIVE COM(2008) 614/3

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I. Introduction

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

At the outset, the CCBE would like to stress that any new legal instrument regarding European contract law should be coherent with other legislation in this field. It will not be possible to achieve legal certainty without co-ordinating existing legal concepts represented in the various directives of the consumer acquis. This is also of great importance for the future Common Frame of Reference which will function as a tool-box for the (European) legislator or even as a future optional instrument.

In its response to the Commission Green Paper on the review of the consumer acquis, the CCBE approved¹ on March 30, 2007 that the level of harmonisation of the Directives No. 85/577/EEC (off-premises contract), No. 93/13/EEC (unfair terms of contract), No. 97/7/EC (distance selling contracts) and No. 1999/44/EC (consumer sales) should provide for a revised law to be based on full harmonisation. For the full CCBE response to the Green paper on the review of the consumer acquis, please see:

http://www.ccbe.org/fileadmin/user_upload/NTCdocument/en_contract_law_ccbe1_1183717868.pdf

The majority² of the CCBE believes that such full harmonisation, as outlined in the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights – COM (2008) 614/3 (hereinafter “Proposal” – please see the Annex on specific Articles of proposal) - would lead to more legal security for consumers, because they could rightfully expect the same level of protection in all EU Member States. Legal security as a result of such full harmonisation would lead to a decrease in compliance costs, as enterprises will be entitled to expect the same regulatory requirements abroad as at home.³

The Proposal is seen by the Council of Ministers in close conjunction with the Common Frame of Reference⁴ (please see the Guidelines by the Council of 4-5 June 2009 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/108356.pdf) of which the CCBE approves for reasons of consistency and legal certainty of EU legal instruments.

1 Not supported by the CCBE UK delegation.

2 The CCBE Austrian, French, Slovak and UK delegation do not support such full harmonisation. The Belgian delegation noted that some parts of the proposal are not ripe for full harmonisation as the proposed rules cannot work without remedies which are left to national law, thus merely hiding the differences instead of obtaining full harmonisation. See further explanation of UK delegation at <http://international.lawsociety.org.uk/files/Further%20explanation%20of%20UK%20delegation%20on%20CCBE%20position%20November%202009%20final.pdf>

3 The position of the Irish and Belgian delegations is as follows: we support the principle of full harmonization in the area of consumer rights on condition that such harmonization (a) is effective and produces equivalent results in each Member State in practice, and (b) does not materially reduce existing rights of consumers. We are not satisfied that the proposed Directive meets these conditions.

4 The Common frame of reference (CFR) is envisaged by the Council as a set of definitions of key concepts in contract law, of fundamental principles of contract law and of model rules. The future purpose of the CFR is not yet clear, its content and legal effect may range from a non-binding legislative tool to the foundation for an optional instrument in European contract law.

II. CCBE comments on the draft consumer rights directive

1. The majority of the CCBE favours the position taken in Art. 4 of the Proposal (*Full harmonisation*)ⁱ. Yet, the CCBE stresses an important caveat that such full harmonisation should not reduce the protection available to the consumer beyond an acceptable level; there should not be a race to the bottom.

2. It is suggested to change the English term “trader” to “professional” (Art. 2 Section 2 - *Definitions*)ⁱⁱ in order to mitigate any discrepancies between the English and the French version of the Proposal. Furthermore, the term “trader” is not appropriate for lawyers, who are included in the application of the Directive. According to the laws of the Member States and the Codes of the National Bars, the business of a “trader” is incompatible with the profession of a lawyer.⁵

3. The CCBE supports the position taken in Art. 5 of the Proposal (*General information requirements*)ⁱⁱⁱ regarding pre-contractual information obligations, as the proper and timely fulfilment of these obligations is designed to enable the consumer to make a better and informed choice of goods and services offered in the market⁶. This obligation forms part of the existing deontological rules in many EU Member States.

3.1 However, it is arguable whether respective remedies (See Art. 6 Sec. 2 – *Failure to provide information*)^{iv} available to the consumer should be harmonised where the professional has breached any of its pre-contractual information obligations. The CCBE favours the current wording of Art.6 Sec.2, i.e. that effective remedies should be provided at national level⁷. This equally applies to Art. 42 (*Penalties*)^v, namely leaving the respective remedies available to the consumer to the national legislators. At present the CCBE supports the position taken by the drafters of the Proposal, as any further harmonisation would be too burdensome and would most probably delay the desired enactment of the Proposal.

3.2 However, in respect of the damages remedy provided for in Art. 27 Sec. 2 of the Proposal (*Costs and damages*)^{vi}, it is suggested that the need of full harmonisation should also imply an explicit harmonisation of the legal preconditions of this remedy (no-fault, negligence) and its respective scope (causation, remote cause, foresee ability). Lacking such harmonisation, the CCBE is of the opinion that the drafters have incorporated a no-fault concept in this Article. A no-fault concept known in the national law of many EU member states is supported by the CCBE.⁸

The Draft Directive applies to sales contracts and service contracts concluded between the trader and the consumer (article 3 § 1). Services provided by lawyers fall within the scope of such definitions and are therefore covered by the Draft Directive. However, excluding them from Chapter III remains necessary due to the specificity of the lawyer-client contract (See point 4 below).⁹

4. Services provided by lawyers should be excluded from Chapter III on the same basis as contracts listed in Article 20 § 1, to the extent that explanations put forward do not correspond to the real situation in the case of contracts concluded between a lawyer and a citizen/consumer, and that

5 Not supported by the CCBE French delegation with regard to “mixed”/“dual use” contracts and not supported by the UK delegation: See further explanation of UK delegation at link in footnote 2.

6 The UK delegation cautions against over burdensome requirements. See further explanation of UK delegation at link mentioned in footnote 2; for the Belgian delegation, please see foot-note 2

7 The French delegation requests to insert the obligations concerning “after sales services”.

8 Not supported by the CCBE Austrian, German, Slovak and the UK delegation. The Belgian delegation noted that the terminology of the draft directive is inconsistent in parts, as regards for example “damage” (comp.art.23 and 27); furthermore, various clarifications are necessary, for example concerning the term “contract”, “sales contract”, “conclusion of the contract”, “signature/sign” in relation with directives on e-signature and e-commerce etc. See further explanation of the German delegation at <http://www.anwaltverein.de/downloads/Stellungnahmen-09/StN-24-09.pdf>

9 Not supported by the CCBE European Contract Law working group, the German and the Luxembourgish delegation which are in favour of the inclusion of lawyers. The German delegation is of the opinion that the main reason against the exclusion of lawyers is that the pertinent argument of the majority seems to refer to the (rare) risk that the remuneration for the legal services rendered will be lost due to the withdrawal of the consumer. In this regard, however, there is no need to protect lawyers, as the right of withdrawal is part of public policy. The UK delegation calls for an exclusion subject to certain conditions, see further explanation of UK delegation at link mentioned in foot-note 2

10 See foot-note 9
See foot-note 9

the considered legislation is inappropriate for provision of services by lawyers.¹⁰ The withdrawal deadline provided within Chapter III is obsolete considering the nature of services offered by lawyers, in particular as far as the principles of proper administration of justice and access to law are concerned.

5. The presumption of unfairness of certain contract terms (Art. 35)^{vii} is accepted, as it also will lead to a higher degree of harmonisation.

Annex on specific Articles of proposal

i Article 4 Full harmonization

Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

ii Article 2 Definitions

For the purpose of this Directive, the following definitions shall apply:

- (1) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;
- (2) 'trader' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

iii Article 5 General information requirements

1. Prior to the conclusion of any sales or service contract, the trader shall provide the consumer with the following information, if not already apparent from the context:
 - (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
 - (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
 - (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
 - (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
 - (e) the existence of a right of withdrawal, where applicable;
 - (f) the existence and the conditions of after-sales services and commercial guarantees, where applicable;
 - (g) the duration of the contract where applicable or if the contract is open-ended, the conditions for terminating the contract;
 - (h) the minimum duration of the consumer's obligations under the contract, where applicable;
 - (i) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader.
2. In the case of a public auction, the information in paragraph 1(b) may be replaced by the geographical address and the identity of the auctioneer.

¹⁰ See foot-note 9

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3. The information referred to in paragraph 1 shall form an integral part of the sales or service contract.

iv Article 6 Failure to provide information

1. If the trader has not complied with the information requirements on additional charges as referred to in Article 5(1)(c), the consumer shall not pay these additional charges.
2. Without prejudice to Articles 7(2), 13 and 42, the consequences of any breach of Article 5, shall be determined in accordance with the applicable national law. Member States shall provide in their national laws for effective contract law remedies for any breach of Article 5.

v Article 42 Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
2. Member States shall notify those provisions to the Commission by the date specified in Article 46 at the latest and shall amend them.

vi Article 27 Costs and damages

1. The consumer shall be entitled to have the lack of conformity remedied free of any cost.
2. Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.

vii Article 35 Terms presumed to be unfair

Member States shall ensure that contract terms, as set out in the list in point 1 of Annex III, are considered unfair, unless the trader has proved that such contract terms are fair in accordance with Article 32. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40.