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GREEN PAPER

on the Review of the Consumer Acquis

(presented by the European Commission)

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1. INTRODUCTION

With this Green Paper the European Commission calls on all interested persons to express their views on the issues identified in the context of the Review of Consumer Acquis by sending in their replies (marked “Response to the Green Paper on the Review of Consumer Acquis”) by no later than 15 May 2007 to the following address.

European Commission
Directorate-General Health and Consumer Protection
Rue de la Loi 200
1049 Brussels
Belgium

Or by e-mail to SANCO-B2@ec.europa.eu

Replies and observations will be published on the web site of the Health and Consumer Protection Directorate-General of the European Commission unless respondents clearly indicate their objections. The Commission will examine the contributions and publish a summary thereof in the first half of 2007. On the basis of the outcome of the consultation, the Commission will decide whether there is a need for a legislative initiative. Any legislative proposal will be accompanied by an impact assessment.

2. BACKGROUND

2.1. Objective and status of the Review

The Commission launched the Review of the Consumer Acquis in 2004¹ with the objective to better achieve its Better Regulation goals by simplifying and completing the existing regulatory framework. The review process is outlined in the 2004 Communication on European Contract Law and the revision of the acquis: the way forward.²

This Review covers eight directives aiming at protecting consumers³. The overarching aim of the Review is to achieve a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring the strict respect of the principle of subsidiarity. At the end of the exercise it should, ideally, be possible to say to EU consumers "wherever you are in the EU or wherever you buy from it makes no difference: your essential rights are the same". This is in line with the approach taken by the Commission in its Communication “A citizens’ agenda - Delivering results for

¹ COM(2004) 651 final, OJ C 14, 20.1.2005, p.6.

² COM(2004) 651 final, OJ C 14, 20.1.2005, p.6.

³ Listed in annex II. It is important to note that what is commonly referred to as the 'Consumer Acquis' does not cover all consumer protection legislation in the EU. The recently adopted Directive on Unfair Commercial Practices falls outside the Consumer Acquis for instance. In addition, many provisions aiming at protecting consumers can be found in sector-specific EU legislation, such as legislation in the field of e-commerce, financial services.

Europe”.⁴ In other words, consumers’ confidence in the internal market must be stimulated by ensuring a high level of protection across the EU. Consumers should be able to rely on the equivalent rights and have resort to equivalent remedies if something goes wrong.

We must also make sure that businesses, not least SMEs, may benefit from a more predictable regulatory environment and simpler EU rules in order to decrease their compliance costs and more generally to allow them to trade more easily across the EU, irrespective of where they are established.

The Review of the Consumer Acquis can provide a unique opportunity to modernise the existing consumer directives, in order to simplify and improve the regulatory environment for both professionals and consumers and improve or extend if necessary the protection offered to consumers. This is fully in line with the modernisation of the Internal Market. To this end, the directives are being reviewed as a whole and individually to identify regulatory gaps and shortcomings affecting all of them as well as problems specific to individual directives. As envisaged in the First Annual Progress Report⁵, this Green Paper concludes the diagnostic phase of the review, sums up the Commission’s initial findings and calls on views on some options to review the consumer acquis. The Commission findings are the result of the following activities:

- A comparative analysis on how the Directives are applied in the Member States, including case-law and administrative practice⁶.
- In December 2005, the Commission established a standing working group of experts from the Member States. Three meetings dedicated to the review of specific Directives were held in 2006.
- A number of stakeholder workshops organized in the context of the work on the Common Framework of Reference on contract law⁷ were held throughout the first semester of 2006. These workshops concentrated on contract law issues directly relevant for the Review of the Consumer Acquis⁸.
- Analysis of consumer and business attitudes towards existing legislation in the area of consumer protection and its effects on cross-border trade⁹.

⁴ COM(2006) 211 final.

⁵ Commission’s First Annual Report on European Contract Law and the Acquis Review, COM (2005) 456 final.

⁶ The Comparative Analysis of the EC Consumer Law is available on http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/index_en.htm

⁷ See the Commission’s Communication on European Contract Law and the revision of the acquis: the way forward, COM (2004) 651 final, and the Commission’s First Annual Report on European Contract Law and the Acquis Review, COM (2005) 456 final.

⁸ Discussed topics included: consumer sales of goods (incl. direct producers’ liability), unfair contract terms, pre-contractual information duties in consumer contracts, consumer rights of withdrawal and consumer’s rights to damages. See the Second Annual Progress Report on Common Framework of Reference [...], to be published in 2007 at the website of DG Health and Consumer Protection.

⁹ Eurobarometer Consumer Protection in the Internal Market, survey conducted February to March 2006, published in September 2006. (http://ec.europa.eu/consumers/topics/eurobarometer_09-2006_en.pdf)

In addition, the Commission evaluated how the various Directives under review have been transposed in the Member States. Implementation reports were published on the Unit Pricing¹⁰ and Distance Selling Directives¹¹; the implementation reports on the Directive on Sale of Goods and Guarantees (“Consumer Sales Directive”) as well as on the Injunctions Directive are to be published shortly.

In addition to the work conducted, all interested parties will be consulted on the specific problems which were identified by the Commission in the course of the review of the Package Travel and Doorstep Selling Directives. These will be addressed in working documents to be published on the website of the Health and Consumer Protection Directorate-General. The Commission identified a number of problems related to long-term tourism products which require a quick solution. To this end, the Commission has begun work on a proposal for a revision of the timeshare directive.¹²

2.2. Relationship between the Review and other Community legislation

Given the breadth of the ground covered by the consumer acquis and the overlaps with other internal market directives the impact of any proposed follow-up to the Green Paper on areas such as e-commerce or intellectual property rights will need to be assessed. In particular, the follow up to the Green Paper should not prejudice the operation of the internal market clause of the e-commerce Directive.

The review will not affect Community rules on the conflict of laws. In this field, the Commission has presented two proposals for Regulations: A proposal for a Regulation on the law applicable to non-contractual obligations (Rome II) and a proposal for a Regulation on the law applicable to contractual obligations (Rome I). This latter proposal includes a provision proposing a conflict rule on consumer contracts consisting of applying only the law of the place of the consumer’s habitual residence under certain conditions.

In accordance with what has been announced in the White Paper on financial services policy (2005-2010), the Commission is undertaking various initiatives in the financial services sector, in particular in the field of retail financial services. In the light of the results of the consultation the Commission will examine to what extent any follow-up legislative action will apply to financial services. It may thus be necessary to exclude the application of all or part of any legislative follow-up to the financial sector.

This Green Paper seeks to collect views from all interested parties on the possible policy options for the Review of the Consumer Acquis as well as on a number of specific issues.

¹⁰ available on http://ec.europa.eu/consumers/cons_int/safe_shop/price_ind/index_en.htm

¹¹ available on http://ec.europa.eu/consumers/cons_int/safe_shop/dist_sell/index_en.htm

¹² See the Commission’s Consultation Document on the Timeshare Directive at http://ec.europa.eu/consumers/cons_int/safe_shop/timeshare/consultation_paper010606_en.doc

3. THE MAIN ISSUES

3.1. New Market Developments

Most directives that are part of the Consumer Acquis are prescriptive rather than principle-based. Most of them no longer meet fully the requirements of today's rapidly evolving markets. This is particularly important in the face of the growing importance of digital technology and digital services (e.g. music downloads), which raise controversial issues relating to user rights, as compared to the sale of physical goods.

Technological developments are creating new channels for transactions between businesses and consumers, which are not covered by consumer legislation. On-line auctions are a good example of this phenomenon. The Distance Selling Directive, for instance, which was prepared before the recent expansion of e-commerce, allows the Member States to exempt auctions. As confirmed by the evaluation of the national laws, the different usage of this regulatory option by the Member States creates fragmentation and has led to a rise in consumer complaints in respect of these online auctions¹³. The exclusion of software and data from the scope of the Consumer Sales Directive may prompt professionals to try to avoid responsibility for possible damages/non conformity of such products through conditions in End User Licences Agreements (EULA), preventing consumers from making use of remedies for non-conformity and invoking damages¹⁴.

3.2. Fragmentation of Rules

The existing EU consumer protection rules are fragmented basically in two ways. Firstly, the current directives allow Member States to adopt more stringent rules in their national laws (minimum harmonisation) and many Member States have made use of this possibility in order to ensure a higher level of consumer protection. Secondly, many issues are regulated inconsistently between directives or have been left open. During the preliminary phase of the Review, business and consumer stakeholders have pointed out a number of examples of regulatory fragmentation which create problems. These are illustrated in Annex I. The differences usually trigger extra compliance costs for businesses, including costs of acquiring relevant legal advice, changing information and marketing material or contracts, or in the event of non-compliance, possibly litigation costs. This is often cited by enterprises as one reason among others for not conducting business cross-border. While 19 % of EU retailers¹⁵ market and advertise to at least another EU country, 48 % of the companies are prepared to make cross-border sales. As many as 55 % of retailers that express interest in cross-border sales consider extra costs of compliance with different national laws regulating consumer transaction to be very important or fairly important. 43 % of all EU retailers think harmonisation of consumer protection laws

¹³ See the Communication from the Commission on the implementation of Directive 1997/7EC on Distance Selling.

¹⁴ For more information on the problems encountered by consumers in respect of the EULA see the report by the Federation of German Consumer Organisations (vzbv) available on http://www.vzbv.de/mediapics/anlage_pm_digitale_medien_06_2006_copy.pdf.

¹⁵ Flash Eurobarometer 186 on Business attitudes towards cross-border trade and consumer protection, conducted in October 2006. The survey will be published in its totality on the DG Health and Consumer Protection web page.

should have a positive effect on their cross-border sales and their cross-border marketing budget.

There are even cases where professionals refuse to sell to customers in other Member States: a recent Eurobarometer¹⁶ shows that 33 % of consumers report that businesses refused to sell or deliver goods or services because the consumer was not resident in their country.

3.3. Lack of Confidence

According to the above-mentioned Eurobarometer survey, 26 % of EU consumers purchased goods and services from businesses established in other EU Member States¹⁷. While distance selling is a growing phenomenon only 6 % made purchases by Internet from a supplier in another Member State¹⁸. One reason to this is that as many as 45 % of the consumers feel less confident in making purchases on the Internet from businesses located abroad (in one Member State this figure amounted to 73 %). This is further demonstrated by the fact that 44% of those who had internet access at home made a domestic e-commerce purchase whereas only 12% made a cross-border e-commerce purchase. In general terms, 56 % of consumers were of the opinion that, when purchasing goods and services from businesses in other Member States, businesses are less likely to respect consumer protection laws. 71 % believed it is harder to resolve problems such as complaints, returns, price reductions, guarantees etc. when purchasing from businesses in other Member States. 65 % considered it to be more problematic returning a product bought by distance selling within the cooling-off period when purchasing from a supplier in a different Member State.

Different rules resulting from minimum harmonisation may have a negative impact on the internal market. One reason for consumers being reluctant to make cross-border purchases is that consumers cannot be sure that the level of protection that they enjoy at home will apply when they buy cross-border. For example, the length of the cooling-off period for cross-border distance selling varies between the Member States, creating uncertainties for consumers. The same applies to the modalities of exercising the right of withdrawal and the cost of returning goods.

4. POSSIBLE OPTIONS FOR THE FUTURE

In the First Annual Progress Report on European Contract Law and the Review of the Acquis of 2005¹⁹, the Commission identified two main strategies for the revision of the consumer acquis: a *vertical approach* consisting of the individual revision of the existing directives, or a more *horizontal approach* consisting of the adoption of one or more framework instruments to regulate common features of the acquis, underpinned whenever necessary by sectoral rules.

¹⁶ The survey was conducted from February to March 2006. The survey is published in its totality at the DG Health and Consumer Protection web page.

¹⁷ This figure refers to cross-border purchases during the period February/ March 2005 to February/ March 2006.

¹⁸ The number of consumers purchasing from other Member States by Internet varies from only 1 % in Greece, Hungary and Slovakia, up to 28 % in Luxemburg followed by Denmark with 19 %.

¹⁹ COM (2005) 456 final.

When translating the review into concrete policy proposals, the Commission will examine carefully the impact of such proposals, including the impact on business.

4.1. **Option I: the vertical approach**

Under the vertical approach, the existing directives could be amended separately in order to adapt them to market and technological developments. The gaps specific to the individual directives could be filled in and particularities to these directives could be addressed. The inconsistencies between the different directives could be eliminated. It could, however, take much longer and not be able to achieve the simplifying effect of the horizontal approach. The EU would have to address the same issues in the course of the different legislative procedures. The Commission would also have to make sure that the same issue is transposed consistently by the Member States for each of the directives. The volume of legislative acts would not diminish and the same common concepts would continue to be contained and regulated in the various directives. However, it would allow for respect of the specificity of each area by improving the existing legislation and reviewing it when necessary.

4.2. **Option II: the mixed approach** (Horizontal instrument combined, where necessary, with vertical action)

Consumer protection legislation until the adoption of the Unfair Commercial Practices Directive (“UCP”)²⁰ in 2005 has mostly been based on the vertical approach, intended to provide specific solutions to particular problems. This approach, however, has given rise to a fragmented regulatory environment. The relation between the different instruments is sometimes unclear as the legal terminology, as well as the relevant provisions, is not sufficiently coordinated. For instance, if timeshare is sold by a door-to-door salesman, it is unclear which of the different information and withdrawal provisions of the Doorstep Selling and Timeshare Directives apply²¹.

A more integrated, “horizontal” approach has begun with UCP.

There are a number of issues which are common to all directives forming part of the Consumer acquis. Definitions of basic notions such as *consumer* and *professional*, the length of cooling-off periods and the modalities for the exercise of the right of withdrawal are examples of issues that are of relevance in the context of several directives. These common issues could be extracted from the existing directives and regulated in a systematic fashion in a horizontal instrument. Together with the provisions of the Unfair Terms Directive, given its horizontal character, they could form the general part of the instrument since they would apply to all consumer contracts. A second part of the horizontal instrument could regulate the contract of sale, which is the most common and broad consumer contract. For this reason, the Consumer Sales Directive would be included in the horizontal instrument. This approach would simplify and rationalise the consumer acquis in line with the Better

²⁰ Directive 2005/29/EC.

²¹ This situation is addressed in the ECJ case Travel Vac, Case C-423/97.

Regulation principles²². It would repeal, through a recasting exercise, the existing consumer directives fully or in part, and so reduce the volume of the acquis.

The horizontal instrument will have to be complemented by a certain number of vertical actions (e.g. revision of timeshare directive to address its specific problems, such as the definition of timeshare) whenever needed (“mixed approach”).

4.3. Option III: “no legislative action”

Both the horizontal and the vertical approaches require legislative action. No legislative action would mean that existing regulatory fragmentation would remain or could increase through Member States’ use of minimum harmonisation clauses. Inconsistencies between different directives would continue to exist.

4.4. Possible scope of a Horizontal Instrument

If Option II is followed, an important issue to consider will be the scope of the horizontal instrument. Under the mixed approach, a possible solution would be to adopt a framework instrument with a broad coverage, applicable to both domestic and cross-border transactions. Creating one instrument for all consumer contracts would simplify the regulatory environment significantly, both for consumers and businesses. However, where sector specific rules exist (such as, for instance, in financial services and insurance) they will continue to prevail, unless provided otherwise. Examples of these rules are the provisions regulating the cancellation period and the definition of consumer in the financial services area²³.

An alternative could be to introduce a horizontal instrument applying exclusively to cross-border contracts. The notion of cross-border contract would then have to be defined (e.g. all distance contracts concluded by a consumer and a professional from two different Member States). As a result, consumers dealing with a foreign professional would benefit from a uniform protection across the EU. This alternative could, on the one hand, increase consumer confidence in cross-border trade but on the other hand it could increase legal fragmentation, subjecting consumers and professionals to different sets of rules depending on whether the transaction is cross-border or domestic. It would also reduce the better regulation value of the horizontal instrument.

Another alternative could be a horizontal instrument limited to distance shopping whether cross-border or domestic, which would replace the Distance Selling Directive. This could create a set of uniform rules for distance contracts. Again, the main disadvantage would be that different conditions would apply to distance and face-to-face transactions, thereby increasing the legal fragmentation, and decreasing its better regulation value.

²² The review of the consumer acquis is listed in the Rolling Simplification Programme attached to the Commission’s Communication on simplification of 25 October 2005. COM (2005) 535 – implementing the Community Lisbon programme – A strategy for the simplification of the regulatory environment.

²³ E.g. Article 35 and Annex III of the Recast Life Assurance Directive 2002/83/EC; Article 31 of the Third Non-life Insurance Directive 92/49/EEC.

4.5. Degree of Harmonisation

Independently of the option chosen to revise the *acquis*, the degree of harmonisation would also need to be decided.

The current consumer protection directives, which are under review, are based on minimum harmonisation, i.e. they contain clauses under which Member States are allowed to have higher protection levels than those provided for by the directives. Many Member States have made use of this possibility, e.g. by providing for longer cooling-off periods than the minimum periods laid down in the Directives on Distance Selling, Doorstep Selling and Timeshare.

Consequently consumers cannot be sure that the level of protection they are used to in their home country will apply when they shop cross-border, whereas businesses may be deterred from marketing their products or services across the EU by the fact that they have to comply with different rules in each Member State.

To remedy this problem, one option would be to revise the Consumer *Acquis* with a view to achieving full harmonisation. This would mean that no Member State could apply stricter rules than the ones laid down at Community level. Full harmonisation would not only entail the repeal of the minimum harmonisation clauses; it would also imply the elimination of the regulatory options available to Member States on specific aspects by some provisions in the directives, which could result in modifying the level of consumer protection in some Member States.

For instance, when regulating the time limits of the legal guarantee imposed on the seller, Article 5 of the Directive on Sale of Consumer Goods allows Member States to provide that, in order to benefit from their rights, consumers must inform the seller of the lack of conformity within a period of two months from the date of detection. Such options for Member States would disappear. The transposition checks have confirmed that a significant number of Member States have made use of such regulatory options. On the basis of the full harmonisation approach, a choice will have to be made between different solutions, for instance by eliminating or generalising the duty to notify the seller of the lack of conformity within a specified time period.

Nevertheless, given that it may be difficult to achieve full harmonisation on all aspects, and in order to avoid the re-creation of barriers to the internal market, a harmonisation approach might on a case-by-case basis be complemented by a clause providing for mutual recognition for certain aspects covered by the proposed legislation but not fully harmonised.

Another option could therefore be the combination of minimum harmonisation with a mutual recognition clause. In this case, Member States would retain the possibility to introduce stricter consumer protection rules in their national laws, but they would not be entitled to impose their own stricter requirements on businesses established in other Member States in a way which would create unjustified restrictions to the free movement of goods or to the freedom to provide services.

Finally, another option would be minimum harmonisation eventually combined with the country of origin approach. This combination would mean that a Member State would retain the possibility to introduce stricter consumer protection rules in its

national law, but businesses established in other Member States would only have to comply with the rules applicable in their home country.

However, these options would not simplify and rationalise the regulatory environment. Regulatory fragmentation would continue to exist and its negative effects on consumers' confidence in the internal market would not be removed. In the absence of a rule designating the law of the trader as the applicable law, the judge having jurisdiction over a crossborder lawsuit (i.e. normally the judge of the country of destination) would have to compare systematically the law of the country of the consumer with that of the country of origin. He would then have to assess to what extent the country of destination law goes beyond the level of protection provided in the law of the country of the trader and, if the divergence constitutes an unjustified restriction, disapply the stricter requirements. This cumbersome procedure would not enhance legal certainty.

These two options would also not provide for a solution ensuring the high common level of consumer protection required by the Treaty.

4.6. The consultation contained in Annex I

Annex I contains the list of issues and questions put to consultation. The majority of questions relate to the cross-cutting or horizontal issues which could be dealt with in the context of the mixed approach. The vertical approach, which concerns the specific directives, does not require an extended list of issues or questions; these have been dealt with in the context of the different consultations organised by the Commission, as described in point 2.1. of the Green Paper.

A number of cross-cutting issues have emerged from the review. These issues reflect regulatory shortcomings and consumer protection lacunae in the *acquis*. In most of the cases, which have been brought to the Commission's attention by various consumer and business stakeholders, the issues arise from the use of the minimum clauses and regulatory options by the Member States.

The issues are grouped in two categories; those which are common to the whole of the *acquis* (e.g. definition of consumer) or to more than one directive (e.g. right of withdrawal), and those which are specific to the contract of sale, which is by far the predominant consumer contract.

As to the first group, the Commission feels that a consistent definition of the notions of consumer and professional is important since it permits to delimit the scope of the *acquis* more accurately.

A more far reaching option is the possible introduction of a general principle of good faith and fair dealing in contractual transactions. The inclusion of such a principle, which would act as a safety net, would fill in any future regulatory gap and ensure that the *acquis* remains future proof.

A number of issues refer to the Unfair Contract Terms Directive, which is the only directive applying to all types of consumer contracts, covering both goods and services. The practical importance of these issues is demonstrated by the noticeable

proportion of complaints received by the European Consumer Centres concerning contract terms²⁴. In this context, the Commission wishes, amongst others, to raise the question whether the protection afforded by the directive should be extended to cover individually negotiated terms.

Issues such as the right of withdrawal, which is a typical remedy afforded to the consumer by several directives, and the conditions for its exercise are also addressed.

The introduction of general contractual remedies, including a generalised right to damages is also touched on. The absence of general remedies in the *acquis* may create a consumer protection deficit, which could be addressed in this context.

As regards the sale of goods, some important questions refer to the clarification and possible extension of the scope in order to include intangible goods, such as software and data. Some other questions cover key concepts such as delivery, the passing of risk and the hierarchy of remedies. Finally, the possible introduction of the producer's direct liability, and the content of commercial guarantees are also raised.

Annex I describes each of the following issues:

1	General legislative approach
2	Scope of a Horizontal Instrument
3	Degree of harmonisation
4.1	Definition of “consumer” and “professional”
4.2	Consumers acting through an intermediary
4.3	Introduction of a general clause of good faith and fair dealing
4.4.1	Extension of the scope of the unfairness test to negotiated terms
4.5	The legal effects of the list of unfair terms
4.6	Scope of the unfairness test: price and subject matter of the contract
4.7	Providing for contractual effects of the failure to provide information
4.8.1	Harmonisation of the length of the cooling off periods
4.8.2	Harmonisation of the modalities of exercising the right of withdrawal
4.8.3	Harmonisation of cost imposed on consumers in the event of withdrawal.
4.9	Introduction of the general contractual remedies
4.10	Introduction of the right to damages
5.1	Extension of the scope of application to other types of contracts
5.2	Second-hand goods sold at public auctions
5.3	Definition of delivery
5.4	Passing of risk
5.5.2	Time limits for lack of conformity
5.5.3	Specific rule on recurring defects
5.5.4	Specific rule on second-hand goods

²⁴ European Consumer Centres report that 10 % of complaints made in 2005 concerned unfair terms.

5.6	Burden of proof
5.7	Modification of the order in which remedies may be invoked
5.8	Notification of the lack of conformity
5.9	Direct producers' liability for non-conformity
5.10.1	Introduction of default rules on the content of the commercial guarantee
5.10.2	The transferability of the commercial guarantee
5.10.3	Commercial guarantees for specific parts
6	Other issues

ANNEX I

ISSUES FOR CONSULTATION

When answering the questions below, contributors are encouraged to motivate their answers. It should be noted that all options indicated are non-exhaustive; other solutions may also be put forward.

1. General Legislative Approach

As indicated in section 4 above, there are different alternatives available to reviewing the consumer legislation.

Question A1: In your opinion, which is the best approach to the review of the consumer legislation?

Option 1: A vertical approach consisting of the revision of the individual directives.

Option 2: 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 3: Status quo: no revision.

2. Scope of a Horizontal Instrument

Section 4.4 above highlights different options as to the scope of a possible horizontal instrument. One option would be to adopt a framework instrument with broad coverage, applicable to both domestic and cross-border transactions. Alternatively, the horizontal instrument could cover cross-border contracts only. A third alternative would be to limit the scope of application of the instrument to distance contracts concluded cross-border and domestically.

Question A2: What should be the scope of a possible horizontal instrument?

Option 1: It would apply to all consumer contracts whether they concern domestic or cross-border transactions.

Option 2: It would apply to cross-border contracts only.

Option 3: It would apply to distance contracts only whether they are concluded cross-border or domestically.

3. Degree of Harmonisation

Section 4.5 above discusses the degree of harmonisation that future consumer protection legislation should be based on. Current legislation allows Member States to adopt more stringent national rules through the use of minimum clauses. The resulting fragmentation of rules may create internal market barriers and deter consumers from shopping cross-border. Full harmonisation could represent an option for addressing this problem. A second option would be to keep the minimum harmonisation approach. Minimum harmonisation, as indicated above, could be

combined with a mutual recognition clause or with the country of origin principle. However, this option would not simplify and rationalise the regulatory environment. Regulatory fragmentation would continue to exist and its negative effects on consumers' confidence in the internal market would not be removed.

Question A3: What should be the level of harmonisation of the revised directives/the new instrument?

Option 1: The revised legislation would be based on full harmonisation complemented on issues not fully harmonised with a mutual recognition clause.

Option 2: The revised legislation would be based on minimum harmonisation combined with a mutual recognition clause or with the country of origin principle.

4. Horizontal Issues

4.1 Definition of "consumer" and "professional"

Currently the directives do not have coherent definitions of the concepts of “consumer” and “professional”, although these are fundamental concepts for the application of the consumer acquis. There is no serious justification in terms of the specific purposes of the relevant directives. The uncertainty this causes is aggravated by the fact that the Member States use the minimum clause to extend the vague definitions in different ways. Several stakeholders advocate strongly in favour of consistent definitions of consumer and professional to avoid confusion. In this respect it is also important to ensure coherence with definitions used in other areas of Community legislation.

For instance, the Directive on Doorstep Selling defines consumer as a natural person who is acting for purposes “which can be regarded as outside his trade or profession”. The Directive on Price Indications refers to any natural person “who buys a product for purposes that do not fall within the sphere of his commercial or professional activity” and the Unfair Contract Terms Directive refers to “purposes which are outside his trade, business or profession”.

Differences between Member States can be noted for example when it comes to individuals buying a product to be used both privately and professionally, e.g. when a doctor buys a car and occasionally uses it to visit his patients. Several Member States have granted natural persons acting for purposes which fall primarily outside their trade, business or profession the same protection as consumers. In addition some businesses, such as individual entrepreneurs or small businesses may sometimes be in a similar situation as consumers when they buy certain goods or services which raises the questions whether they should benefit to a certain extent from the same protection provided for to consumers. During the review the widening of the definitions to cover transactions for mixed purposes should be considered.

Similarly the professional is referred to variously as “trader”, “seller”, “supplier” etc, depending on the directive. The definitions vary as well: The Distance Selling Directive, for instance, defines the “supplier” as “any natural or legal person who ... is acting in his commercial or professional capacity”, whereas the Unfair Contract Terms Directive refers to a “seller or supplier” as a natural or legal person who “is acting for purposes relating to his trade, business or profession, whether publicly or

privately owned”. To overcome the current inconsistencies the notion of “professional” could replace the variety of terms in the existing Directives and apply to all persons who are not deemed to be consumers.

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

Option 1: An alignment would be made of the existing definitions in the acquis, without changing their scope. Consumers would be defined as natural persons acting for purposes which are outside their trade, business or professions. Professionals would be defined as persons (legal or natural) acting for purposes relating to their trade, business and profession.

Option 2: The notions of consumer and professional would be widened to include natural persons acting for purposes falling *primarily* outside (consumer) or *primarily* within (professional) their trade, business and profession.

4.2 Consumers acting through an intermediary

A consumer is not protected by the acquis when his/her contractual counterpart is another private person. The same goes for the case when an individual is represented by a commercial agent, broker or any other intermediary. A practical example of this is when a car dealer sells a second-hand car on behalf of one consumer to another consumer. It has been argued that in these cases consumers need similar protection as in an ordinary business-to-consumer contract since the other party will benefit from the professional expertise of the intermediary and some Member States have chosen to extend consumer protection to these situations.

However, it may be very difficult to establish clear criteria as to when the role of the intermediary is so strong as to warrant consumer protection. There may be a risk of unforeseen and negative knock-on effects on markets on which private persons trade with private persons.

Against applying consumer protection rules to private sellers it could also be argued that a private person might not realise that contracting a professional as her or his intermediary will put her or him in a position equivalent to a professional. On the other hand, a consumer who concludes a contract with a professional acting as intermediary for a private person may be more in need of protection than his contractual counterpart.

It should be noted that the notion of intermediary would not include trading platforms for sellers and consumers, e.g. on the Internet, where the platform provider is not involved in the conclusion of the contract. The role of intermediaries in electronic commerce, including search engines and auction platforms, is currently being examined in a different context and therefore not covered by this review²⁵.

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

²⁵ Conclusions will be announced in the Second Report on the application of the Directive 2000/31, to be adopted in 2008.

intermediary?

Option 1: Status quo: consumer protection would not apply to consumer-to-consumer contracts where one party makes use of a professional intermediary for the conclusion of the contract.

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

4.3 The concepts of good faith and fair dealing in the Consumer Acquis

The consumer acquis on contract law does not include a general duty to deal fairly or to act in good faith. A general clause referring to the concept of (un-)fairness exists in Article 5 of Directive on Unfair Commercial Practices, which concerns marketing practices, but which does not apply to contracts²⁶. Article 3 (1) of Directive 93/13/EEC on Unfair Terms in Consumer Contracts constitutes a general clause referring to “(un-) fairness” and contains a definition of that term for the purposes of the Directive.

The main advantage of an overarching general clause for consumer contracts in the horizontal instrument would be the creation of a tool which would provide guidance for the interpretation of more specific provisions and would allow the courts to fill gaps in the legislation by developing complementary rights and obligations. It could therefore provide a safety net for consumers and create certainty for producers by filling gaps in legislation. In addition, a general provision may also be a useful tool when interpreting clauses contained in offers or contracts and it may as well respond to the criticism that certain directives or provisions are not time-proof. A general provision could be built round the phrase “good faith and fair dealing”. This includes the idea that they show due regard to the interests of the other party, considering the specific situation of certain consumers.

The disadvantage of such a general clause is that it does not encompass precisely the rights and obligations imposed on each party. Its interpretation may vary from Member State to Member State.

If included, such a general principle should apply from the negotiation phase to the execution of the contract, including remedies. It would also prevent the emergence of the kind of problems encountered with the current consumer protection directives, due to legislation being overtaken by technological and market developments.

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 horizontal instrument would provide that under EU consumer contract law professionals are expected to act in good faith.

²⁶

Article 5 of the Directive on Unfair Commercial Practices outlaws marketing practices which - contrary to the requirement of professional diligence – can adversely affect the economic behaviour of consumers.

Option 2: The status quo would be maintained: There would be no general clause.

Option 3: A general clause would be added which would apply both to professionals and consumers.

4.4 The scope of application of the EU rules on unfair terms

4.4.1 Extension of the scope to individually negotiated terms

The Directive on unfair contract terms currently applies to non-negotiated terms only, i.e. contractual clauses which the consumer has had no possibility to influence during the negotiation process. In practice, the Directive is in most cases applicable to pre-formulated contract terms used in mass transactions. In reality consumers often have only a very limited possibility to influence the content of a clause even if it theoretically is open to negotiations. A number of Member States have specific rules on the (un-)fairness of individually negotiated terms.

If it is decided to include individually negotiated terms, the test of unfairness could be reformulated so that it ensures that the competent authorities will take into account the actual ability of individual consumers to influence the terms of the contract. Alternatively, this test could be restricted to the list of terms annexed to the directive.

In the absence of specific rules, the unfairness of negotiated terms would be assessed under the principle of good faith (see 4.3).

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

Option 1: The scope of application of the Directive on Unfair Terms would be expanded to individually negotiated terms.

Option 2: Only the list of terms annexed to the Directive would be made applicable to individually negotiated terms.

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

4.5 List of unfair terms

The rationale behind the list attached to the current Directive on unfair contract terms is to provide guidance to the Member States as to what contractual terms can be challenged under the unfairness test. As the list has a purely indicative character, it may lead to divergent application in Member States.

It should be considered whether a term included in a list of unfair terms of a horizontal instrument should be considered unfair in all circumstances (black list) or unfair unless the examination of the specific circumstances of the contract (including any individual negotiation) shows the contrary (i.e. a rebuttable presumption of unfairness – grey list). These two options could also be combined, i.e. some terms would be considered unfair in all circumstances while other terms are presumed to be unfair. That option has been considered by the CFR researchers.

A comitology mechanism could be included in the horizontal instrument in order to update the list of terms.

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

Option 1: Status quo: To maintain the current indicative list.

Option 2: A rebuttable presumption of unfairness (grey list) would be established for some contractual terms. This option would combine guidance with flexibility as to the assessment of fairness.

Option 3: A list of terms – presumably much shorter than the existing list – which are considered to be unfair in all circumstances (black list) would be established.

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

4.6 Scope of the unfairness test

Under the Directive on Unfair Terms a non-negotiated contractual term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, i.e. the unfairness test. According to this test, the assessment of the unfair nature of the terms relates neither to the definition of the main subject matter of the contract nor to the adequacy of the price (as far these terms are expressed in plain intelligible language).

National laws typically allow the aggrieved party to avoid the contract only where he or she has had little choice as to whether to conclude the contract and the situation has been exploited by the contractual counterpart through charging an exorbitant price. An example of this would be where a consumer whose car breaks down in the middle of a rural area at night may agree to pay a disproportionate price for the repair.

Especially if the scope of the directive were to be extended to negotiated terms, the question arises as to whether the unfairness test should be widened to assess all core terms of a contract, including the main subject matter of the contract and the adequacy of the price.

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

Option 1: The unfairness test would be extended to cover the definition of the main subject matter of the contract and the adequacy of the price

Option 2: Status quo - the test of unfairness would be kept in its present form.

4.7 Information requirements

Several Directives impose obligations on professionals to provide consumers with information before, at or after the conclusion of the contract. Failure to comply with these obligations is however regulated in an incomplete and inconsistent way. In

several cases no remedies are available when information duties are ignored by professionals. Even an extension of the cooling-off periods for failure to provide information, as it is provided for in the Distance Selling and Timeshare Directives, may not be sufficient since the consumer loses his right to withdraw from the contract within three months. Consumer organisations quote the lack of information as one of the main problems in relation to distance selling, whereas business stakeholders deplore the complexity of the current situation.

The Commission is of the opinion that although the horizontal instrument should not cover the existence and the content of the information requirements, considering the varying purposes of consumer information in the different vertical directives, it could encompass provisions on the failure to fulfil information requirements. One possibility is that the horizontal instrument would provide for an extension of the cooling-off period for failure to comply with information requirements. Another solution would be to combine such an extension of the cooling-off period with general remedies for the most serious breaches of information duties (e.g. no information on price and address of the professional).

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, would be extended, e.g. up to three months.

Option 2: There would be different remedies for breaching different groups of information obligations: some breaches at the pre-contractual and contractual level would give rise to remedies (e.g. incorrect information on the price of a product could entitle the consumer to avoid the contract), whilst other failures to inform would be treated differently (e.g. through an extension of the cooling-off period or with no contractual sanction at all).

Option 3: Status quo: The contractual effects of failure to provide information would continue to be regulated differently for different types of contract.

4.8 Right of withdrawal

4.8.1 The cooling-off periods

The Directives on Timeshare, Doorstep Selling and Distance Selling give consumers the right to withdraw from the contract within a certain period. There are significant divergences in relation to the length of these periods, and as to the beginning and calculation of the periods (in calendar or working days). Such differences may be confusing for consumers and can create legal uncertainty in case of overlaps between Directives²⁷.

The horizontal instrument could provide for common rules on the time frames for all types of contracts for which a right of withdrawal exists, so as to increase legal certainty.

²⁷ See e.g. the case C-423/97 Travel Vac, where the ECJ found that the Doorstep Selling Directive was applicable to a timeshare contract.

An alternative could be to group the directives into two categories, attaching to each of them a specific withdrawal period. The reason for this would be that different directives grant consumers a right to withdrawal for different reasons, e.g. to allow consumers to compare the price and quality of the products ordered in a door step situation with alternative offers or to allow consumers to see the product ordered at a distance.

Whichever of the two alternatives is chosen, the Commission is of the view that all periods should be uniformly counted in calendar days rather than working days to increase legal certainty. The concept of working days is differently interpreted by the Member States and varying national holidays may cause uncertainties for consumers and businesses.

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

Option 1: There would be one cooling-off period for all cases when the consumer directives grant consumers a right to withdraw from the contract, e.g. 14 calendar days.

Option 2: Two categories of directives would be identified and to each of them a specific cooling-off period would be attached (e.g. 10 calendar days for door-to-door and distance contracts as opposed to 14 calendar days for timeshare).

Option 3: Status quo: cooling-off periods would not be harmonised in the consumer acquis; they would be regulated in the sectoral legislation.

4.8.2 *The modalities of exercising the right of withdrawal*

The modalities of exercising the right of withdrawal are currently regulated differently across the consumer acquis. There are also significant differences in the Member States' transposition of the directives. In some countries consumers may choose how to notify the seller (e.g. by sending an email or simply by returning the good to the seller), whereas in others the consumer is obliged to use a certain procedure such as registered mail. Clarifying the rules on how to return products could increase consumer confidence in cross-border transactions. A recent Eurobarometer survey shows that, in relation to distance selling, 65 % of consumers consider that there are more problems with returning a good during the cooling off period when it was bought cross-border.

To clarify and simplify matters, the provisions on the modalities of exercising the right of withdrawal could be harmonised in the horizontal instrument.

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

Option 1: Status quo: Member States would be free to determine the form of the notice of withdrawal.

Option 2: One uniform procedure for the notice of withdrawal across the consumer acquis would be established.

Option 3: All formal requirements for the notification of withdrawal would be

excluded. A consumer would then be able to withdraw from the contract by any means (including by returning the goods).

4.8.3 *The contractual effects of withdrawal*

The effect on the contract when the consumer exercises his or her right of withdrawal is regulated differently for different types of contract in the acquis. The Doorstep Selling Directive provides only that withdrawal releases consumers from any obligations under the cancelled contract. Other legal effects are to be determined by national law. The Directive on Distance Selling provides instead that when the right of cancellation is exercised, the seller is obliged to reimburse the sums paid by the consumer free of charge as soon as possible and in any case within 30 days. The only charge that may be made to the consumer is the direct cost of returning the goods.

The horizontal instrument could harmonise the provisions on the effects of withdrawal. The rule that consumers should not bear any costs when exercising their right of cancellation could be spelled out more clearly and made general whereby the option for Member States to impose charges on consumers in the event of cancellation could be removed. In addition, the horizontal instrument could provide for a general time limit by which the professional would have to reimburse consumers who exercise their right to withdraw, as it is currently the case in respect of contracts concluded at a distance.

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

Option 1: The current regulatory options would be removed - consumers would then not face any costs whatsoever when exercising their right of cancellation.

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.

Option 3: Status quo: The current regulatory options would be maintained.

4.9 *General contractual remedies*

The acquis does not provide for a general set of remedies available to consumers for all consumer contracts. Existing remedies are limited to particular types of contracts. The Directive on Sale of Consumer Goods for example, grants consumers some remedies, but not all of those remedies apply to all consumer contracts. The absence of general remedies at EU level creates a deficit in consumer protection.

According to a recent Eurobarometer survey, 71 % of consumers consider it harder to resolve problems such as complaints, returns, price reductions and guarantees when shopping cross-border. Common EU-wide remedies in the horizontal instrument could contribute to addressing this problem. However, this would not tackle the problems faced by consumers concerning the enforcement of rights against a person established in another country. Reduction of the price and termination of a contract could be construed as remedies of general application. Also the introduction of a general right to withhold performance in case of breach of a consumer contract could be considered. Under this option, if the consumer has not yet performed his or

her obligations (typically the payment of the price) – the professional who is in breach of the contract cannot enforce his rights against the consumer until he performs correctly.

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

Option 1: Status quo: the existing law provides for remedies limited to the particular types of contracts (i.e. sales). The general contractual remedies would be regulated by national law.

Option 2: A set of general contractual remedies available to consumers in the case of a breach of 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.

4.10 *General right to damages*

In addition to the right to withhold performance and the right to reduction of price and termination of contract, the horizontal instrument could foresee a general right to damages for breach of a consumer contract. At the moment, the issue of damages is not regulated in the Community acquis, the only exception being the Package Travel Directive. The relationship between domestic rules on damages and the remedies provided for by the specific directives is unclear. Different solutions are possible. The horizontal instrument could merely introduce a general right to damages for consumers or it could specify that these damages should cover only purely economic damages or both economic and moral losses as in the Package Travel Directive.

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

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).

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.

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).

Option 4: A general right to damages for consumers would be introduced and it would be provided that these damages should cover both the purely economic (material) damage and moral losses.

5. **Specific rules applicable to Consumer Sales**

5.1 *Types of contracts to be covered*

The Directive on Consumer Sales applies to sales contracts. It does not apply to any other type of contract involving the supply of goods, except for goods to be manufactured in the future. Therefore a consumer who hires a car is not protected by its provisions. Likewise, as the supply of digital content is not covered by the Directive, a consumer who downloads music from the Internet is not protected either. This is a potential consumer protection lacuna. If the horizontal instrument were to cover these types of contracts, consumers would enjoy the same protection against lack of conformity regardless of the legal nature of the contract.

The lack of coverage of contracts for the supply of software and data (so called “contracts providing digital content”) is a particularly important problem. With the increase in digital content consumption, questions of liability (e.g. when software damages hardware) and guarantee from defects will grow in importance. Several consumer complaints point, for instance, to problems with music downloaded from the internet or used in MP3 players, software and digital content to be used in mobile phones (e.g. ring tones). An extension of the coverage of consumer protection rules to such situations would allow consumers to make use of remedies for non-conformity and obtain damages. Such an extension of the scope of the Directive may, however, require specific rules since digital content is usually licensed rather than sold to the consumers.

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 1: Status quo: i.e. the scope of application would be limited to sales of consumer goods, with the only exception of goods which are still to be produced.

Option 2: The scope would be extended to additional types of contracts under which goods are supplied to consumers (e.g. car rental).

Option 3: The scope would be extended to additional types of contracts under which digital content services are provided to consumers (e.g. on-line music)

Option 4: Combination of Option 2 and 3

5.2 *Second-hand goods sold at public auctions*

Under Article 1 (3) of the Directive, Member States may provide that the definition of consumer goods does not cover “second-hand goods sold at public auctions where the consumer has the opportunity to attend the sale in person”. This exemption is a source of uncertainty both for businesses and consumers. A horizontal instrument could define the notion of “public auctions” in order to remove this uncertainty; having said this it may be necessary to follow a specific and different approach for on-line auction.

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

Option 1: Yes.

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

5.3 *General obligations of a seller – delivery and conformity of goods*

According to a recent Eurobarometer survey, 66 % of consumers perceive that delivery in the context of cross-border sales may cause more problems than for domestic sales. Adding rules on delivery should increase legal certainty and thereby consumer confidence.

The Directive on Sale of Consumer Goods provides that the seller must deliver goods which are in conformity with the sales contract. However, it does not define the notion of delivery. This is unfortunate, since the moment of delivery is the starting point for time limits for the exercise of fundamental consumer rights, e.g. remedies for non-conformity. The concept of delivery is also important for the passing of the risk²⁸.

The Directive does not provide for remedies against lack of delivery, late or partial delivery. Regulating such questions in the horizontal instrument would require a definition of delivery.

The horizontal instrument could clarify whether delivery means that the consumer has materially received the goods (i.e. the consumer has acquired physical possession of the good, for example by collecting the ordered car from the dealer) or whether it is sufficient that the goods are put at the consumer's disposal (e.g. the dealer informs the consumer that the ordered car has arrived at his garage and is ready to be picked up). The horizontal instrument could also provide that, as a default rule, delivery takes place when the consumer acquires physical possession of the good. The parties would remain free to agree otherwise.

Question I1: How should delivery be defined?

Option 1: Delivery would mean that the consumer materially receives the goods (i.e. the goods are handed over to the consumer).

Option 2: Delivery would mean that goods are placed at the consumer's disposal at the time and place specified in the contract.

Option 3: Delivery would mean, by default, that the consumer takes physical possession of the goods, but the parties can agree otherwise.

Option 4: Status quo: the term delivery would not be defined.

5.4 *The passing of risk in consumer sales*

An issue connected to the definition of delivery is whether the horizontal instrument should regulate the passing of risk in consumer sales, i.e. the question of the point at which the professional bears the risk and the cost of any deterioration or destruction

²⁸ See point 5.5 in this annex.

of the good and when this risk passes to the consumer, e.g. in a situation where a good is damaged or destroyed while in transit from the seller to the consumer. At the moment, the issue is regulated differently in the Member States. In some Member States the risk passes to the buyer at the time of the conclusion of the contract while in others property does not pass with the conclusion of the sales contract but with the delivery.

The passing of the risk could be linked to the moment of delivery. Depending on the definition of delivery, this could be at the time when the consumer acquires physical possession of the good or at an earlier stage.

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

Option 1: The passing of the risk would be regulated at Community level and be linked to the moment of delivery.

Option 2: Status quo: the passing of risk would be regulated by the Member States, with the consequence of divergent solutions.

5.5 *Conformity of goods*

5.5.1 *Introduction*

The duty of the seller to deliver goods in conformity with the contract is the cornerstone of the Directive on Consumer Sales. The Directive establishes a presumption that goods are in conformity with the contract if they fulfil a series of conditions which are considered to be implied by the contract (e.g. that the goods are fit for the purposes for which goods of the same type are normally used).

5.5.2 *Extension of time limits*

Under the directive, the seller is liable for any lack of conformity which existed at the time of delivery and becomes apparent within two years from that moment (legal guarantee). The Directive does not regulate the suspension or interruption of the two-year period in the event of repair, replacement or negotiations between seller and consumer. Some Member States have introduced specific rules on the extension of the period during which the seller is liable while the seller is trying to cure the defect, whereas others have not introduced such rules. This has led to significant divergences among national laws impeding cross border trade. A horizontal instrument could provide that the duration of the legal guarantee is extended for a period corresponding to the time during which the consumer was not able to use the goods because some remedy was being performed.

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

Option 1: Status quo: no changes would be made.

Option 2: Yes. The horizontal instrument would 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.

5.5.3 Recurring defects

It may happen that defects which became apparent within two years from delivery re-appear after the expiry of the legal guarantee, even though they have been repaired. In these cases, consumers are left with goods which were already defective at the moment of delivery, but for which any further repair is at the expense of the consumers. Some Member States have introduced specific rules to deal with recurring defects.

A horizontal instrument could provide that when the seller repairs the goods during the period of the legal guarantee, the guarantee is automatically extended to cover any future re-emergence of the same defect for a period to be specified since repair. The issue of recurring defects could also be relevant in the context of remedies, possibly justifying a consumer's claim for replacement instead of another repair.

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

Option 1: Status quo: The guarantee would not be extended.

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.

5.5.4 Second-hand goods

Member States may currently provide that, in case of second-hand goods, the seller and the consumer may agree on a shorter time period for the liability of the seller, provided this period is not less than one year. Varying conditions in different Member States cause legal uncertainty.

This could be corrected by eliminating the possibility for the seller and the consumer to agree on a shorter time period of liability. This should not create any disproportionate burden on professionals since they would only remain responsible for those defects which already existed at the moment of delivery²⁹.

Another option could be to allow professionals and consumers throughout Europe to agree on a shorter period for the seller's liability for lack of conformity.

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

Option 1: A horizontal instrument would not include any derogation for second hand goods: the seller and consumer would not be able to agree on a shorter period of liability for defects in 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 of liability for

²⁹

In addition, as it is mentioned below, the presumption that the defects which become apparent within six months from delivery were already existent at that moment only applies if it is not incompatible with the nature of the goods and the nature of the defects. These rules ensure an adequately differentiated treatment of second hand goods vis-à-vis new products.

defects in second hand goods (but not less than one year).

5.6 *Burden of proof*

The Directive establishes a rebuttable presumption that any lack of conformity which becomes apparent within six months from delivery shall be presumed to have existed at the time of delivery. However, such presumption does not apply when it is incompatible with the nature of the goods or the nature of the lack of conformity.

The Commission has been informed that it is difficult to apply a system with a rebuttable presumption that can only be used when it is compatible with the nature of the goods and the defects. Once the six-month period has passed, consumers have to prove a fact (the existence of the defect at the time of delivery) which is extremely difficult to establish without access to relevant technical data and/or specialised assistance. Even during the first six months it is in each case necessary to examine whether the consumer can actually invoke the presumption and obtain the reversal of the burden of proof. This way the reversal of the burden of proof serves de facto as a limitation of the legal guarantee³⁰.

The Commission wonders if the present regime should not be changed. A horizontal instrument could provide that the professional would have to prove that the defects did not exist at the time of delivery since the seller is better placed than the consumer to access relevant data (e.g. by contacting the producer) and provided that the consumer acts in good faith. In any case the reversal of the burden of proof applies only if compatible with the nature of the goods and of the defects. The seller would, therefore, still be able to escape this reversal of the burden of proof in case of normal wear and tear.

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 would be up to the professional to prove that the defect did not exist at the time of delivery.

Option 2: It would be up to the professional to prove that the defect did not exist at the time of delivery for the entire duration of the legal guarantee, as long as this would be compatible with the nature of the goods and the defects.

5.7 *Remedies*

5.7.1 *Introduction*

In the context of consumer sales, remedies should lead to the fulfilment of consumers' reasonable expectations in relation to the contract. However, the Directive provides for remedies only in the case of non-conformity and not other kinds of breaches of contract, e.g. when the goods are not delivered at all. Consumers perceive the existing rules as unsatisfactory. Approximately 70 % of consumers state

³⁰ For instance in some Member States, after the six months period, consumers are forced by the sellers to prove the existence of the defect at the moment of delivery by producing expensive technical reports.

that when buying goods cross-border it is harder to resolve problems such as returns or price reduction in comparison with the domestic situations.

As mentioned in point 4.9 in this annex, the horizontal instrument might provide for some general remedies, which would apply to any breaches of consumer contracts. The remaining, sale-specific remedies (repair and replacement) could continue to be available only in case of non-conformity of the goods.

5.7.2 *The order in which remedies may be invoked*

Currently the Directive provides for a particular order in which remedies may be invoked. Reduction of price or termination of contract can only be invoked if repair and replacement are impossible or disproportionate. The Commission has been informed that it is difficult for consumers to assess whether a professional's claim that a particular remedy would be disproportionate is right or not.

A horizontal instrument could allow consumers to choose freely amongst the available remedies in case of wrong performance. However, to limit the economic burden on the professional, termination of contract would remain available only in case of non-performance and breaches that are so serious as to give consumers reasonable grounds to refuse correct performance.

Alternatively, the horizontal instrument could maintain the current sequence of remedies, with some amendments. For instance, it could provide that the reduction of the price is available immediately as an alternative to repair and replacement, while at the same time altering the conditions under which the consumer can “move” from these first-line remedies to the termination of contract (e.g. in the case of recurring defects).

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.

Option 2: Consumers would be able to choose any of the available remedies from the start. However, termination of the contract would only be possible under specific conditions.

Option 3: Consumers would be obliged to request repair, replacement or reduction of price first, and would be able to ask for termination of contract only if these remedies are unavailable.

5.8 *Notification of the lack of conformity*

The Directive allows Member States to provide that the consumer must inform the seller of the lack of conformity within a period of no less than two months from the moment of discovery in order to benefit from his rights. Most Member States have made use of this option, some of them waiving this obligation only in certain circumstances. The horizontal instrument should eliminate the existing divergences, which cause confusion for consumers and businesses.

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 would be introduced.

Option 2: A duty to notify in certain circumstances would be introduced (e.g. when the seller acted contrary to the requirement of good faith or was grossly negligent).

Option 3: The duty to notify within a certain period would be eliminated.

5.9 Direct producers' liability for non-conformity

A number of Member States have introduced various forms of direct liability of producers. These differ considerably as to the conditions and modalities. The horizontal instrument may address these divergences by introducing rules on the direct liability of producers (e.g. the introduction on an EU wide producer's liability) so that consumers would be able to request certain remedies directly from the manufacturer (and possibly from the importer) throughout the EU. This would eliminate possible internal market barriers and would favour especially consumers buying cross-border. A more detailed analysis can be found in the Report on the implementation of the Consumer Sales Directive.

The issue of producers' liability in the context of the review of the acquis is limited to situations where a good is not in conformity with the consumer contract, e.g. the product does not have the quality or characteristics that the consumer is entitled to expect. Liability for damage caused by the defectiveness of a product, i.e. death, personal injuries or destruction of any item of property other than the defective product itself, is regulated by the Product Liability Directive and falls outside the scope of the review³¹.

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

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

Option 2: A direct liability for producers would be introduced under the conditions described above.

5.10 Consumer Goods Guarantees (Commercial guarantees)

On top of the rights conferred upon consumers by legislation, sellers or producers may offer consumers additional rights on a voluntary basis (a so-called commercial guarantee). They can, for example, grant consumers certain rights in case the goods do not meet the specifications set out in the guarantee statement and in associated advertising.

5.10.1 Content of the commercial guarantee

³¹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

The directive does not address the question of what happens if the guarantee statement omits to inform the consumer on the content of the guarantee. It has been stated that the current situation may mislead consumers who rely on such vague statements without checking whether they are actually granted any additional rights.

A horizontal instrument could remedy this situation by providing a default content of a guarantee setting out basic rights which the guarantee holder should have if these are not spelled out in the guarantee document. These may include a right to replacement or repair if goods are not in conformity with the contract. If the duration of the commercial guarantee is not indicated it could apply to the estimated life-span of the goods. It would have to be EU-wide. Finally, the costs of invoking and performing the guarantee would be borne by the guarantor.

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

Option 1: Status quo: the horizontal instrument would contain no default rules.

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

5.10.2 The transferability of the commercial guarantee

The directive does not regulate the issue of the transferability of the commercial guarantee to subsequent buyers. This is important for consumers who intend to resell a product as well as for subsequent buyers who would like the products still to be covered by the commercial guarantee especially in the context of a cross-border transaction.

The horizontal instrument may address this problem by providing that a guarantee would benefit also subsequent buyers of a product. Such a rule could have a mandatory or default character (i.e. the seller would be able to limit the transferability of the guarantee in certain circumstances).

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

Option 1: Status quo: the possibility to transfer a commercial guarantee would not be regulated by Community rules.

Option 2: A mandatory rule that the guarantee is automatically transferred to the subsequent buyers would be introduced.

Option 3: The horizontal instrument would 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.

5.10.3 Commercial guarantees for specific parts

In the case of complex goods (e.g. cars) producers offer commercial guarantees limited to specific parts. The horizontal instrument could make sure that consumers are clearly informed on which parts are covered by a particular guarantee. If such information is not provided the limitation would be without any effect.

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.

Option 2: The horizontal instrument would only provide for the information obligation.

Option 3: The horizontal instrument would include an information obligation and would provide that, by default, a guarantee covers the entire contract goods.

6. *Other issues*

In this document stakeholders are consulted on a number of issues that have been identified as important in the context of the review of the consumer acquis. The Commission welcomes information and suggestions on any other matter deemed to be pertinent and relevant to overall objectives of the review.

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?

ANNEX II

CONSUMER DIRECTIVES UNDER REVIEW

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985, p. 31.

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, p. 59.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29.

Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, p. 83.

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19.

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18.3.1998, p. 27.

Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51.

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p. 12.