



04/05/2007

Legal Affairs Committee
Draft EMF Position Paper

Re: Green Paper on the Review of the Consumer Acquis

It is with pleasure that the European Mortgage Federation (EMF) takes up the opportunity to provide its comments on the Green Paper on the Review of the Consumer Acquis published by the Commission on 8 February 2007.

1. General Comments

The Federation would like to welcome the initiative of the Commission to iron out certain inconsistencies or contradictions in the existing rules and to render the consumer acquis both more simple and transparent.

However, the EMF does not currently see the need to extend the scope of the consumer acquis and to introduce new rules. It should be borne in mind in this context that harmonisation bears the risk of product standardisation, which in turn could result in a limitation of the products on offer limiting the choice of consumers.

On the contrary, certain sets of rules (such as the existing pre-contractual information requirements) should rather be reduced. Consumers do not benefit from too many layers of too detailed information. There is a risk of information overload.

As regards the scope of the review, the Federation believes that for the sake of consistency financial services should not be excluded from the current review of the consumer acquis. The Commission states that it intends to investigate at a later stage whether or not and to which degree regulative measures put forward based on the current consultation might be applicable to financial services. However, it should not be forgotten that the Doorstep Selling Directive, which the Commission has included in the review, is applicable to financial services.

If financial services are excluded from the review questions would arise as to what the relationship between the horizontal instrument and those services is. To ensure legal clarity and legal certainty financial services should thus be included in the review of the consumer acquis.

2. Preliminary Response to the Commission's Questionnaire (Annex I of the Green Paper)

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

The EMF would support Option 2 (i.e. a mixed approach combining the adoption of a framework instrument addressing horizontal issues that are of relevance for all consumer

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contracts with revisions of existing sectoral directives whenever necessary). This approach would ensure that certain notions central to all consumer contracts would be identical throughout the EU.

However, the main focus of this exercise should be to adapt and make more coherent those provisions already in existence and not to extend and widen the scope of the consumer acquis. For the time being, there is no clear evidence that there is a need to introduce further regulation in this respect. It should be borne in mind that harmonisation bears the risk of product standardization, which can ultimately lead in a limitation of the products on offer for the consumer.

[The UK delegation favours Option 1 (i.e. a vertical approach consisting of the revision of the individual directives)]

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

The EMF would favour Option 1 (i.e. the horizontal instrument would apply to all consumer contracts whether they concern domestic or cross-border transactions), since it would ensure legal certainty.

In the Federation's view the other options would leave some scope for confusion. Option 1 on the other hand would facilitate cross-border activities for professionals and thus the development of the internal market. What is more, the application of the horizontal instrument to all consumer contracts would not exclude the possibility for there to be specific provisions only applicable to certain types of contracts or under certain circumstances.

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

[The DK, NL and SE delegations are in favour of Option 1 (i.e. the revised legislation would be based on full harmonisation complemented on issues not fully harmonised with a mutual recognition clause.

The DE delegation would like to distinguish between the horizontal instrument on the one hand, addressing more technical issues, namely the definitions, pre-contractual information requirements and the right of withdrawal, and sector related provisions on the other hand where minimum harmonisation could be combined with mutual recognition, in their view.

The CZ and UK delegations would tend to favour Option 2 (i.e. the revised legislation would be based on minimum harmonisation combined with a mutual recognition clause or with the country of origin principle]

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

The EMF takes the view that it is vital to have harmonised and precise definitions of central notions such as the ones of “consumer” and “professional”. To widen the scope of the definition and to include the word “primarily” in it would lead to different interpretations of the terms leading to inconsistencies. Also, it should be borne in mind that the courts would be confronted with some difficulties to actually assess whether or not a certain natural person is acting as a consumer or as a professional in a given set of circumstances.

For these reasons, the Federation would support Option 1 (i.e. 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 favoured by UK delegation]

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

The EMF would support Option 1 (i.e. 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).

- **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?**

[The SE delegation would support Option 1 (i.e. the horizontal instrument would provide that under EU consumer contract law professionals are expected to act in good faith).

The DE and UK delegations are in favour of Option 2 (i.e. the status quo would be maintained: There would be no general clause.

The DK and NL delegations would support Option 3 (i.e. a general clause would be added which would apply both to professionals and consumers]

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

It is the EMF’s view that the focus of the review of the consumer acquis should be to simplify and consolidate the existing provisions, not an extension of its scope. As such, the Federation is not in favour Options 1 and 2. It would, however, support Option 3 (i.e. Community rules would continue to apply exclusively to non-negotiated or pre-formulated terms).

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

[The DE, DK and UK delegations are in favour of Option 1 (i.e. the status quo: To maintain the current indicative list.

The CZ delegation would tend to support Option 2 (i.e. 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.

The UK delegation feels that, ideally, Option 3 should be supported, because it would give legal certainty (i.e. 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).

The NL delegation favours Option 4 (i.e. a combination of options 2 and 3: Some terms would be banned completely, while a rebuttable presumption of unfairness would apply to the others]

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

Since – in the EMF’s view – the focus of the review of the consumer acquis should not be on its extension, the Federation would support Option 2 (i.e. the test of unfairness would be kept in its present form). In addition, it can be argued that the main subject matter of the contract and the adequacy of the price are central aspects of any contract and that they should as such and according to the principle of freedom of contract be freely negotiable.

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

The Federation would favour Option 3 (i.e. the contractual effects of failure to provide information would continue to be regulated differently for different types of contract).

[The DE delegation does not favour any of the options given. They take a differentiated view, favouring – for instance – a lengthening of the withdrawal period instead of an unlimited period in case of non compliance by the professional with its obligation to inform the consumer of the right of withdrawal]

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

[The DE and NL delegations are in favour of Option 1 (i.e. 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).

The DK, SE and UK delegations are supportive of Option 3 (i.e. cooling-off periods would not be harmonized in the consumer acquis; they would be regulated in the sectoral legislation). The SE delegation argues that cooling-off periods need to be adapted to how rapidly the value of the goods or services in question diminish]

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

The EMF would support Option 2 (i.e. one uniform procedure for the notice of withdrawal across the consumer acquis would be established). Both consumers and professionals would benefit from a uniform procedure.

For evidence reasons the consumer should be obliged to exercise his right of withdrawal in writing.

[The UK delegation favours Option 1]

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

The cancellation of a contract has a cost for the professional. As such, the Federation is of the opinion that the current regulatory options should be maintained (see Option 3) and that the professional must be granted the right to recover the loss incurred in case of withdrawal. Options 1 and 2 are aiming at limiting the professional's right to compensation and are thus not supported by the EMF.

[The NL delegation favours Option 2]

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

The EMF would support Option 1 (i.e. 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).

[The NL delegation favours Option 2]

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

The Federation favours Option 1 (i.e. the issue of contractual damages would be governed by national laws, except when provided for in the Community acquis (e.g. package travel)).

[The NL delegation favours Option 2]



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

If a horizontal instrument is being considered, requirements should be put in place describing in a clear and comprehensive manner how the consumer has to be informed of his right of withdrawal. To this end, a standardised European form specifying the information to be given to the consumer on the right of withdrawal could be introduced.

Furthermore, the Federation would support a harmonised definition for the Annual Percentage Rate of Charge (APRC).
