



BUNDESRECHTSANWALTSKAMMER

**Position
of the Bundesrechtsanwaltskammer
(The German Federal Bar)
on the Green Paper of the Commission
of the European Communities
“Review of the Consumer Acquis”, COM(2006)744**

**drafted by the Bundesrechtsanwaltskammer’s
Working group on European contract law
and the
European Affairs Committee**

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April 2007

BRAK Position no. 14/2007

The German Federal Bar is the self-regulatory body of the German legal profession. As the umbrella organisation it represents the 27 regional Bars and the Bar at the Federal Court of Justice which represent a total of currently approximately 142,800 lawyers in the Federal Republic of Germany.

The German Federal Bar submitted a position paper as early as October 2001 on the Communication from the Commission to the Council and the European Parliament on European contract law (COM[2001]398) and also presented its views in a position paper in May 2006 on the report of the European Parliament's Legal Affairs Committee on European contract law and the review of the *acquis communautaire* as well as the European Union's further action in this field¹.

Taking into account the progress that has been made in the Commission's work on the development of a Common Frame of Reference (CFR) for contract law, The German Federal Bar takes this opportunity to submit the following comments on the questions raised by the "Green Paper on the Review of the Consumer Acquis" (COM [2006]744 final), presented in February 2007 by the European Commission, under the responsibility of DG Health and Consumer Protection.

I.

The German Federal Bar still supports the European Parliament's and the Commission's intention to harmonise European contract law. The CFR, which is currently being established, is to serve as the basis for the future common European contract law. However, The German Federal Bar is decidedly **against the creation of contract law that would only apply to consumer contracts**. In the long term, a uniform European contract law applicable in all Member States should be given preference. This would promote and facilitate the free movement of goods, services and also legal advice in the Union as well as legal transactions with third countries.

It should be underlined that European integration does not justify different efforts to harmonise general contract law on the one hand and special consumer contract law on the other. If there is a need for harmonisation, this need exists with regard to general contract law, commercial law and specific rules for consumer contracts alike. European contract law applying to consumer contracts must under no circumstances be harmonised in isolation. This would not sufficiently serve the aim to achieve a more coherent legislation. A genuine single market, characterized by the sound balance between consumer protection on the one

¹ BRAK Position no.13/2006

hand and unhindered trade on the other, can only be completed on the condition that general rules be developed that apply not only to B2C, but also to B2B relations. Aspects that do not pertain to purely consumer-law related issues should be reserved to the CFR. Only where the protection of the consumer requires special rules should these be covered by a horizontal instrument for consumer legislation. Therefore, it seems indispensable that work proceeds in synchronization with the work undertaken in connection with the CFR.

However, the genesis of the Green Paper and the questions raised by the Commission with the Green Paper give rise to concerns that indeed an isolated harmonisation of the general and the special contract law applying to consumers is actually intended. The Green Paper on the Consumer Acquis contains no reference at all to the work regarding the CFR.

II.

The German Federal Bar therefore advocates that the work on a European contract law, including the consumer acquis, be continued by the **European Parliament** as well as the Commission; but within the Commission the matter should be moved to **DG Justice and Home Affairs**. Evidently, the principles of contractual freedom and a uniform legal order in contract law must be respected with regard to all holders of rights - i.e. consumers and non-consumers alike.

The German Federal Bar is willing to participate actively in this process and to support the medium-term establishment of an optional horizontal set of rules for contract law in its entirety and that can be applied in the EU.

It is for this reason that The German Federal Bar also welcomes any steps towards the **simplification of the consumer acquis**. This could render null and void the provisions that are at present still contained in Article 5 of the intended regulation regarding Rome I. The scope of the regulation regarding Rome I could then be restricted to conflict-of-law rules, in accordance with its actual regulatory character.²

III.

Against this background The German Federal Bar submits the following response to the questions raised in Annex I of the Green Paper:

² In May 2006 The German Federal Bar submitted a position paper on the Proposal for a Regulation on the law applicable to contractual obligations (Rome I), (BRAK Position no. 17/2006).

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

We favour **Option 2**, a mixed approach combining the adoption of a framework instrument addressing horizontal issues that are relevant to all consumer contracts with revisions of existing sectorial directives whenever necessary.

However, we insist that in order to harmonise the EU Member States' contract law it is necessary **to integrate** the specific rules on consumer contracts into the **general law applying to contracts**. Since the Green Paper on the Consumer Acquis contains no explicit reference at all to the work undertaken in connection with the CFR, we fear that the harmonisation of the consumer acquis might result in general and specific legislation applying exclusively to consumer contracts. We are against contract legislation that applies to consumer contracts only. General contract law fundamentally applies to contracts with consumers as well as to contracts between non-consumers. This has to be taken into account when it comes to proposing a horizontal instrument and further developing the CFR.

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

A horizontal instrument providing specific rules for consumer contracts should apply to all consumer contracts, regardless whether they regard domestic or cross-border transactions (**Option 1**). This is the only way to ensure uniform legislation applicable to consumer contracts in EU Member States.

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

We prefer full harmonisation complemented on issues not fully harmonised with a mutual recognition clause (**Option 1**) to minimal harmonisation (Option 2). Option 1 would guarantee a more comprehensive harmonisation of specific contract legislation applying to consumer contracts and ensure best possible legal certainty.

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

As a rule, legal persons should not be treated as consumers. **Option 1** comes closest to this premise. The fact that a legal person is established for a particular purpose suffices to prohibit that person's treatment as a consumer. It is therefore impossible to fathom why there should be a distinction between small and medium-sized enterprises (SME) and other entities when it comes to non-consumers. It would be more opportune to treat as a consumer every natural person that concludes a legal transaction for purposes that cannot be regarded

as falling within his commercial or professional activity³. This ensures that employed persons who participate in legal transactions in order to exercise their profession (a teacher of Latin purchases Latin literature) are treated as consumers.

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

In principle, we would like to see a differentiated rule that takes the provider of a typical service as a starting point:

Where a consumer acting as the seller is represented by a non-consumer or establishes the sales contract through an intermediary, the rules applying to the seller should not warrant consumer protection.

Where the buyer, as a consumer, is represented by a non-consumer (e.g. the buyer uses an authorized agent when purchasing from a non-consumer), consumer protection should be relevant with respect to the rules applying to the buyer.

With this in mind, we are in favour of **Option 2**, i.e. that the notion of consumer contracts includes contracts in which one party is represented by a professional intermediary. But it should be added that this is only the case where the represented party does not provide the typical service.

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 horizontal instrument should contain a general clause applying to professionals as well as consumers (**Option 3**). Additionally, this would, in particular, match the Draft-CFR Section II-1:105 rules on „good faith and fair dealing“.

At this point we would like to emphasize again that it is necessary to correlate the provisions of consumer legislation with those of the CFR. A separate contract law for consumer contracts, detached from the CFR, has to be avoided in order not to encourage the development of a “contract code for consumer contracts” that would supplant general and special contract law applicable to all holders of rights.

³ This corresponds to the definition under § 13 BGB (Civil Code).

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

The status quo should be maintained (**Option 3**). According to the status quo, consumer protection provisions only apply if the contractual parties do not negotiate the contractual clauses individually.

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

We are in favour of **Option 4**. According to Option 4 certain clauses should be banned (black list) as a rule, whereas for other clauses there is a rebuttable presumption of unfairness (grey list). A grey list and a black list would make it possible to define clearly which provisions are admissible in each particular case. This creates legal certainty, but also allows for provisions falling under the “grey list” to be negotiated effectively in special circumstances.

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

The scope of the unfairness test should remain unchanged. The status quo should not be altered (**Option 2**).

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

As a uniform remedy for failure to comply with information requirements, the cooling-off periods should be extended to up to three months, i.e. **Option 1**.

However, we would like to point out that the options offered as answers to Question E do not correlate with the question. The question regards the *contractual effects* of failure to comply with information requirements. Failure to comply with information requirements could also lead to claims arising from *culpa in contrahendo*. All these questions cannot be settled in the consumer acquis, but only in a general and special contract law that applies to all contracts. By contrast, the length of the cooling-off period for e.g. withdrawal should of course be clarified in the special contract law applying to consumer contracts.

It becomes obvious at this point that the multiple-choice options provided to answer the questions listed in Annex I to the Green Paper are inadequate. It is therefore a matter of urgency to coordinate the work undertaken in connection with the consumer acquis and the work undertaken in connection with the CFR.

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

The cooling-off-period should be fixed uniformly at around 14 calendar days for all cases where the consumer has a right of withdrawal under the consumer directives. This corresponds with **Option 1**.

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

Option 2 should be given preference: It introduces a uniform procedure for notification of withdrawal which shall apply to the entire consumer acquis.

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

We are in favour of **Option 2**. The existing options should be elaborated in such a way as to make them applicable to all cases where the special contract law for consumers has to be resorted to.

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

The status quo should be maintained. Under the existing rules special remedies that are exclusively at the consumer's disposal, are applicable to certain types of contracts (e.g. sales contracts) only (**Option 1**). Any other general remedies should continue to be regulated by national law or the CFR.

Again, we would like to point out that the consumer acquis should by no means become a contract law for consumer contracts. Rather should a horizontal instrument define the provisions of special contract law that apply to consumer contracts and - if harmonised European contract law is not yet available – all other issues fall under national law. Simultaneously – and considering the importance of this aspect we want to stress this point again – the work undertaken in connection with the consumer acquis has to correlate with the development of the CFR.

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

For the same reasons as mentioned in our reply to Question G1 (maintenance of the status quo), we are in favour of **Option 1**. The question as to which party has a right to damages is

still regulated by national law, insofar as the consumer acquis does not provide otherwise (as in the Package Travel Directive, for example). It is of course necessary and desirable that the law on contractual damages be governed by the CFR. However, we disapprove of the idea that a general law on contractual damages is regulated by the consumer acquis. Since the law of damages in contract law is not exclusively a matter pertaining to consumer legislation, these issues are reserved for the preparatory work on the CFR on the one hand and to national regulations on the other, as long as contract law has not been harmonised at Union level.

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?

We support an extension of the scope of the rules applying to consumer sales to additional types of contracts providing digital content (**Option 3**).

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

Community law on consumer sales for second-hand goods sold at public auctions should not contain any special rules (**Option 2**). What “public auction” exactly means is not clearly defined in the acquis. Furthermore, the law that applies to contracts concluded at a public auction is general contract law. The question raised in the Green Paper has been answered by national law. This issue should be clarified within the framework of the CFR because the matter is by its nature a matter of general contract law.

Question I1: How should delivery be defined?

The term should be defined so as to mean that goods are placed at the consumer’s disposal at a certain time and at a certain place, as agreed in the contract (**Option 2**).

This will leave enough room to include a general definition in the CFR. The definition of “delivery” is by no means a fundamentally consumer-law related question. Therefore, at least as far as the consumer acquis is concerned, the definition of “delivery” has to be reserved to the parties or the applicable national law. This is another area where a potential incoherence of the system becomes discernible, resulting from a separate definition made from a consumer-law perspective that is completely detached from the CFR.

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

We believe that this matter, too, should be dealt with in connection with the CFR. It cannot be solved within the context of the consumer acquis. **Option 1** is the option that comes closest to our position.

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

This question interferes considerably with the system of suspension or interruption of limitation periods. Since this is another question that cannot be answered in an isolated way for the consumer acquis alone, it has to be referred to the CFR and until then continue to be governed by national law. It must be noted that there is also a need for harmonisation with respect to the laws governing limitations. Great care must be taken though that functioning chains of limitation periods are created, so as to allow B2C and B2B contracts to interlock. Therefore, limitations cannot be regulated differently in the consumer acquis on the one hand and in general contract law on the other. The limitations laid down by consumer contract law have to be taken into account in the general limitation periods and they must correlate. Thus, we would at most opt for **Option 1**, i.e. the consumer acquis status quo should not be changed before the CFR is established.

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

In Germany, as far as the scope of application of the Civil Code is concerned, the status quo (**Option 1**) has already been rendered obsolete through court rulings. Therefore we are in favour of **Option 2**: The guarantee should be extended for a short period to be specified after the repair if another attempt to repair the defect is undertaken. The extended guarantee should only cover the defect that was also the object of the first repair.

One could imagine a period of six months, starting from the last repair, provided that the original period of the legal guarantee as such is not longer.

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

A horizontal instrument should contain special rules for sales contracts for second-hand goods. Seller and buyer should be allowed to agree on shorter periods of liability (**Option 2**).

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

The status quo should be maintained (**Option 1**): During the first six months following delivery the seller has to bear the burden to prove that the defect did not exist at the time of delivery.

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

Again, we are in favour of upholding the status quo (**Option 1**). Price reduction and termination of contract should only be possible after the clearly requested repair of the defect has failed within an appropriate period of time.

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

This question has obviously been formulated against the background of the different ways in which this area is dealt with by the individual national laws of obligations. It is not an area which is primarily characterized by consumer law. It pertains to general contract law. According to general contract law, the creditor should notify the debtor of the delivered good's lack of conformity with the contract. Since this principle should be taken into account by the consumer acquis, we support **Option 1**, i.e. the introduction of a duty to notify the seller of any lack of conformity that is not obvious to both parties.

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

The status quo should be upheld, i.e. no rules on direct liability of producers at EU level should be introduced (**Option 1**). Product liability is closely linked with consumer law. However, it is not purely contract law, but also statutory law of obligations and/or law of torts. At most, product liability can be a subject covered by the CFR or a separate Directive on product liability.

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

The status quo should be maintained (**Option 1**). A horizontal instrument should not contain any default rules for commercial guarantees. This should be left to the parties. It is not for EU law to elaborate the content of a contract where this is not done by the contracting parties.

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

If the transferability of commercial guarantees has to be regulated, it must be ensured that the contracting parties enjoy a maximum of freedom. The horizontal instrument could provide that, as a rule, the commercial guarantee is transferable, but the guarantor should have the possibility to exclude or limit transferability (**Option 3**).

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

In this respect we also prefer **Option 1**, maintaining the status quo. Commercial guarantees for specific parts should at most be dealt with in the CFR.

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?

The law governing the sale of consumer goods is closely linked to the law on loans and leasing contracts. Consequently, the legislation on consumer credit should be harmonised, too.

IV.

We would like to stress again that an isolated harmonisation of contract law for consumer contracts is not desirable. Consumer legislation should rather be defined in correlation with general and special contract law.

In the long term, a horizontal instrument is required to regulate B2C as well as B2B contracts. The German Federal Bar therefore advocates the medium-term establishment of an optional legal instrument as a first step towards the harmonisation of contract law in the Union and is happy to contribute to the creation of this optional instrument.