Response of the European Financial Services Round Table (EFR) to the Green Paper of the European Commission on the Review of the Consumer Acquis

COM (2006) 744 final

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European Financial Services Round Table
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The Members of the European Financial Services Round Table (EFR), Chairmen or Chief Executives of leading European banks and insurers, warmly welcome the initiative of the European Commission to present its preliminary views on the envisaged review of the consumer acquis and the opportunity to comment on the Green Paper (COM (2006) 744 final).

0) Introduction
The EFR believes that the single market for retail financial services is far from completed. More has to be done. We could not agree more to the basic idea that “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’.”\(^1\) The Commission is therefore right in proposing an approach which provides more consistency in the application of consumer protection rules and simplifies the regulatory environment for both professionals and consumers. New measures adopted after the review should – as far as possible – also be consistent with the revised consumer acquis.

We have outlined in earlier publications\(^2\) that the approaches of “minimum” and “maximum” harmonisation used for a number of directives have failed to integrate retail financial markets substantially. The national rules related to consumer protection are still (too) different and, due to national goldplating, in some areas even tend to increase rather than diminish. Therefore they constitute an important roadblock for the development of a truly European single market for financial retail products in a more competitive environment. Today, EFR Members’ companies already conduct their activities on an EU scale, and therefore, in principle, are very well positioned to play an active role in the integration process. However, national differences cannot be overcome and consequently consumers suffer from less competition across the EU and possibly do not get the “best deal” for their needs.

From our perspective, we consider it important to clarify the concept of cross-border, with specific regards to financial services. In our view cross-border transactions do not mean that consumers have to shop around across different Member States to compare offers or to buy services but implies that national providers would enter Member State markets to offer products directly to customers.

The removal of existing obstacles would genuinely enable financial providers to distribute their whole range of products in all Member States. It is worth remembering that the integration of an internal market for goods happened through a process where supply induced demand, and not the other way around.

Further, we believe that a high level of consumer protection, as developed in our earlier publications, would be crucial to boost consumer confidence in the Internal Market.

This review should not be pre-empted by current initiatives like, for instance, the proposed regulation on the applicable law to contractual obligations (Rome I). As indicated in our recent statement on this proposed regulation we are concerned that the fragmentation is even likely to increase and that by introducing a quasi-mandatory principle of law of destination, in particular SMEs could possibly suffer from the non-existence of a single market. We therefore urge the Commission to conduct an impact study and to possibly review the proposed measure. In addition, we believe that the proposed regulation should be part of this review and therefore it should be avoided to create legislation, which might not be in line with a future strategy for consumer policy in the EU.

We welcome also that the Commission is intending to conduct an impact assessment of any legislative initiative. However, we believe that ideally an impact assessment should be undertaken before a legislative initiative is issued (and therefore should not only “accompany” any legislative proposal).

1) EFR’s approach to overcome fragmentation of different national consumer protection regimes

The Members of the EFR do not believe that the approaches of “minimum” and “maximum” harmonisation legislation will lead to a single market for retail financial services, and therefore advocate a more flexible approach and methodology.

The core ideas of a more flexible approach are:
- to determine the principles for a distinction between key and non-key requirements and define key requirements for each product type,
- to fully harmonise the key requirements by means of EU legislation,
- to mutually accept the existing national rules regarding non-key requirements.

Given the complexity of the issues it would be advisable to form one or several expert group(s) for the various product types, composed of various stakeholder groups which would 1) help to determine the principles, 2) identify key and non-key requirements, and 3) check the compatibility of remaining differences of national laws regarding the non-key requirements under the relevant rules of conflict-of-laws.

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3 For more information on EFR’s position see statement of the EFR Rome I proposals will deter further integration of financial services, 5 March 2007, [www.efr.be](http://www.efr.be).

4 The application of the present Rome Convention in fact constitutes the mutual acceptance of other countries’ rules. At the same time the mandatory rules related to the protection of the consumer of the country of the consumer’s habitual residence are preserved.
2) Remarks on the questionnaire

1. A1
General Legislative Approach

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

**EFR’s position: 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.*

2. A2
Scope of a Horizontal Instrument

What should be the scope of a possible horizontal instrument?

**EFR’s position: Option 1:**

*It would apply to all consumer contracts either they concern domestic or cross-border transactions to increase legal clarity and legal convergence.*

3. A3
Degree of Harmonisation

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

**EFR’s position: revised Option 1:**

*The revised legislation would be based on full harmonisation of key issues. Non-key issues would not be fully harmonised but should be mutually accepted by Member States.*

**Additional comment:** the EFR believes that the harmonisation of essential issues is crucial. Applying the principle of mutual recognition already enshrined in the existing Rome Convention could solve the question of the non-essential issues to achieve integration. However, we believe that this issue is very complex and needs further defining and exploration. Which of the national mandatory rules of consumer protection create problems in transactions with European dimension? What should be the consequences thereof for further harmonisation?

4.1 B1
Definition of "consumer" and "professional"

How should the notions of consumer and professional be defined?

**EFR’s position: Option 1**

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5 Mutual recognition is already enshrined in the present Rome Convention, see footnote 4.
It is essential to have clear rules to increase legal certainty and convergence. An alignment would be made of the existing definition 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 or profession.

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<th>4.2 B2</th>
<th>Consumers acting through an intermediary</th>
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<td>Should contracts between private persons be considered as consumer contracts when one of the parties acts through a professional intermediary?</td>
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**EFR’s position: None**

Under the scope of this questionnaire there are probably no or only very few practical cases imaginable where contracts about financial services between private persons would involve professional intermediaries.

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<th>4.3 C</th>
<th>The concepts of good faith and fair dealing in the Consumer Acquis</th>
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<td>Should a horizontal instrument include an overarching duty for professionals to act in accordance with the principles of good faith and fair dealing?</td>
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**EFR position: Option 2**

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

**Additional comment:** EFR does not believe that additional EU legislation is required to implement the principle of good faith and fair dealing and accordingly supports Option 2.

The principle of good faith is already enshrined in EU legislation, i.e. the Directive on Unfair Commercial Practices and the Directive on Unfair Terms in Consumer Contracts with examples of what constitutes unreasonable practices. In addition, domestic legislation in the Member States also enshrines this principle. Meanwhile, EFR naturally supports the principle that professionals should act in accordance with the principles of good faith and fair dealing.

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<th>4.4.1 D1</th>
<th>Extension of the scope to individually negotiated terms</th>
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<td>To what extent should the discipline of unfair contract terms also cover individually negotiated terms?</td>
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**EFR’s position: Option 3**

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

**Additional comment:** Since the implementation process of the Unfair Commercial Practices Directive is ongoing, it may be more appropriate to raise this question after due implementation and monitoring of possible shortcomings of the measure.
4.5
D2
List of unfair terms

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

**EFR’s position: Option 4**

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

4.6
D3
Scope of the unfairness test

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

**EFR’s position: Option 2**

Status quo – the test of unfairness would be kept in its present form and therefore not include considerations about the adequacy between price and performance.

4.7
E
Information requirements

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

**EFR’s position: Option 2**

There would be different remedies for breaching different groups of information obligations, also depending on the quality and relevance of the information in question:

- some breaches at the pre-contractual and contractual level on core information elements would give rise to remedies (e.g. incorrect information on the price of a product could entitle the consumer to nullify the contract);
- failures to provide ancillary information would be treated differently (e.g. possibly through an extension of the cooling-off period or with no contractual sanctions at all).

**Additional comment:** article 6 – 1 of the Directive on Distance Selling (financial services expressly excluded from Directive) foresees that when supplier has failed to fulfil his obligation to provide written confirmation of information, period for the exercise of the right of withdrawal shall be three months, starting from the day of conclusion of contract (for services) or day of reception of goods (for goods). If the information is supplied within this three months period, the fourteen-day period of withdrawal shall start from that moment.

4.8.1
F1
The cooling-off periods

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

**EFR’s position: None of the proposed options – instead new option**
It is rightly pointed out that current rules may be confusing for both consumers and providers, and the introduction of common rules would increase legal certainty, hence increase consumer confidence when cross-border shopping.

The cooling-off period should depend on the type of product (linked to the complexity of the product in question).

For the calculation of these periods, calendar days should be chosen, but it should be ensured that, if the end of the period does not fall on a working day in either the professional’s or the consumer’s country, the period only expires on the subsequent working day.

In order to avoid misuses as they have occurred, for instance, in Germany, an expiry date should be set after which it is not possible any more to exercise the right of withdrawal even though the explanation of the customer’s right of withdrawal was not fully correct or was not given at all. This period could be fixed at one year, for example; it would make a valuable contribution to legal certainty regarding this instrument.

4.8.2
F2
The modalities of exercising the right of withdrawal

How should the right of withdrawal be exercised?

EFR’s position: Option 2

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

Additional comment: In particular, clear forms should be presented in the Community texts the use of which would guarantee that providers have fulfilled their duty to correctly inform the customer about contents and modalities of exercising his right of withdrawal.

4.8.3
F3
The contractual effects of withdrawal

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

EFR’s position: We could partly agree with the proposed Option 2. However, the answer should be more differentiated and needs further clarification.

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. Products do differ in complexity and price. Therefore there should not be one standard cost for the contractual effects of exercising the right of withdrawal for all products. We would prefer a general principle stating that consumers should be advised of the costs of withdrawal and that these reasonably reflect recompense to the provider for costs incurred.

4.9
G1
General contractual remedies

Should the horizontal instrument provide for general contractual remedies available to consumers?
EFR’s position: We could partly agree with the proposed Option 1. However, the answer should be more differentiated and needs further clarification.

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. The review of the Common Framework of Reference is also addressing this issue. The outcome of this exercise should possibly be taken into account with a view to ultimately elaborate a coherent and well-thought legal framework.

4.10
G2
General right to damages

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

EFR’s position: We could partly agree with the proposed Option 1. However, the answer should be more differentiated and needs further clarification.

The review of the Common Framework of Reference is also addressing this issue, and the outcome of this exercise should possibly be taken into account to provide a clear and coherent legal framework.

6.
N
Other issues

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?

Rome I

The transformation of the Rome I Convention into Community law should be coherent with the “New” Consumer Acquis. There still seems to be a fundamental mismatch between the current proposal of the envisaged Rome I regulation requiring all consumer contracts to be drafted in accordance with the law of the consumer’s habitual residence, and the options on harmonisation being put forward in this Green Paper. These include mutual recognition for non-key provisions. However, if Rome I were enacted in the proposed form (especially article 5), there would be no room for mutual recognition in this context⁶.

It would be grossly counter-productive if the Rome I regulation were adopted. And subsequently the review came to different results regarding the future approach on consumer protection rules.

⁶ See EFR statement of 5 March 2007 for more details.
3) Conclusions

We believe that the introduction of horizontal instruments could help to achieve more consistency in the existing laws. The benefits for consumers and business would be noticeable if the regulatory environment was simplified without weakening consumers’ rights.

Although not in the scope of this review it would be recommendable to have a more profound discussion and good solutions for mediation schemes for consumers in cross-border cases. It is likely that more than a fourth of EU consumers\(^7\) will purchase goods and services from businesses established in other EU Member States in the future. More legal certainty would help to increase confidence of consumers and businesses to profit of the opportunities a truly single market could offer.

For further information or questions please contact Mr Sebastian A. Fairhurst at the EFR, secretariat@efr.be, or telephone +32 2 256 75 23.

The Members of the European Financial Services Round Table (EFR) are Chairmen or Chief Executives of leading European banks and insurance companies. The objective and purpose of EFR is to provide a strong industry voice concerning the further integration of the EU single market in financial services.

Chairman of the EFR is Francisco González, Chairman and Chief Executive Officer of BBVA.

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\(^7\) Figure taken from Green Paper on the review of the Consumer Acquis, page 7.