

PEOPIL

The Pan-European Organisation of Personal Injury Lawyers
www.peopil.com

Response to the Green Paper on the Review of the Consumer Acquis - Comm (2006)-744

**Submitted by:
The Pan-European Organisation of Personal Injury Lawyers**

1. PEOPIL

The *Pan European Organisation of Personal Injury Lawyers* (PEOPIL) was founded in 1996 and formally established as a charitable entity in 1998 to improve and promote co-operation and communication between European jurisdictions in the field of personal injury law. The development and expansion of PEOPIL is recognition that the issues involved in personal injury litigation frequently extend beyond national boundaries and require an international perspective and knowledge.

Currently PEOPIL has 520 members from jurisdictions within the European Union, Non-European Union jurisdictions within Europe and 5 jurisdictions outside Europe.

The aims of PEOPIL are:

- To develop co-operation and networking of personal injury lawyers within Europe;
- To promote access to the legal system for consumers suffering personal injury;
- To promote higher standards of care and safety for consumers;

- To promote proper and fair compensation for all personal injury victims;
- To support and encourage the exchange of information and knowledge.

PEOPIL is interested in the harmonisation process which is being carried out by The European Commission and European Parliament. In this respect PEOPIL has formulated many written submissions in response to the European Commission's Green Papers

PEOPIL has received grants from the European Commission to fund its continuing work including research in Comparative Law under the Grotius Project and under the Framework Programme for Judicial Co-operation in Civil Matters.

2. INTRODUCTION TO PEOPIL'S RESPONSE

PEOPIL has carefully studied the Green Paper where the Commission calls on all interested parties to express their views on the issues identified in the context of the Review of Consumer Acquis.

PEOPIL understands that 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. Ideally, it should 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'.

ISSUES FOR CONSULTATION

1. General legislative approach

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)

PEOPIL chooses Option 2, for several reasons:

Firstly, with sectoral directives potential particular problems can be addressed in a specific and appropriate way. Secondly, a horizontal instrument would assure the consumers legal position regardless of which area of law his or her rights are infringed (e.g. package travel or the sale of consumer goods and associated guarantees). Thirdly a horizontal framework would support the Commissions aim to harmonise laws throughout the EU.

2. Scope of a horizontal instrument

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.)

PEOPIL chooses Option 1, as this alternative guarantees the most effective consumer protection. The other options would offer less effective measures to protect consumers and without doubt it would be a source of uncertainty and misunderstanding amongst the European Consumers. In many cases consumers might not be able to establish if they engage in a cross-border transaction or not.

3. Degree of harmonisation

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.

At the moment PEOPIL would recommend option 2. The European Commission outlined the difficulties of harmonising compensation systems in relation to the concept of immaterial damages. Seeking to introduce of what such compensation cover could be highly problematic in view of the differences between Member States” (see Green Paper «Compensation to crime victims», September 2001).

However if the Commission decides nevertheless to recommend full harmonisation which in this context would mean that the Member States would not have any power to introduce advanced protective legislation in their domestic jurisdiction it should be guaranteed that consumers enjoy maximum protection in the harmonised legislation as it is currently in force in the Scandinavian jurisdictions.

4. Horizontal issues

4.1. Definition of ‘consumer’ and ‘professional’

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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.

In order to prevent fraudulent use respectively bypassing provisions in B2C dealings option 2 had to be chosen.

4.2. Consumers acting through an intermediary

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

For the reasons named under question B1 option 2 has to be chosen as otherwise misuse might be widespread in order to bypass respective provisions valid in B2C dealings.

4.3. The concepts of good faith and fair dealing in the consumer acquis

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.)

(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.

The notion of good faith has worked very well in jurisdictions such as France and Germany and would enable courts to effectively protect the European consumers from malevolent business partners.

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

4.4.1. Extension of the scope to individually negotiated terms

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 preformulated terms.)

In many European jurisdictions the principle of freedom of contract is paramount and choosing option 1 virtually abolishes this principle. However, in the interest of the consumer who in many instances might be the weaker party PEOPIL choose option 1. However, option 3 would be also a possible solution provided that the weaker party is still protected by for example the notion of good faith which in this case has to be applicable to the negotiated terms.

4.5. List of unfair 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

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.)

The choice of this option is in line with maximum consumer protection. However, of course, this area of law is very well regulated in most of the European Union Member States and it will be a huge task to harmonise those laws.

4.7. Information requirements

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.)

In order to maximise consumer protection there has to be a variety of sanctions depending on the severity of the breach of the duty to provide proper and accurate information, a mere extension of the cooling-off-period does not seem to be sufficient.

4.8. Right of withdrawal

4.8.1. The cooling-off periods

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.)

In order to avoid confusion amongst consumers option 1 has to be given preference. The different time periods currently in force within the consumer acquis is a source of uncertainty.

4.8.2. The modalities of exercising the right of withdrawal

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).

Clearly option two has to be given the preference as this option certainly will increase consumer confidence in cross-border transactions and it would remove one source for confusion amongst consumers, see also above 4.8.1.

4.8.3. The contractual effects of withdrawal

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.)

In our opinion the consumer should not be obliged to carry any costs. The consumer in cross-border transaction should not be worse off as if he or she bought for example a good in a local high street shop.

4.9. General contractual remedies

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.

The remedies available to consumers should be harmonised.

4.10. General right to damages

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.)

There should be a general right to damages for consumers but PEOPIL considers that – for the time being – it should be left to the Member States to regulate non-economic damages. The reason for this is simply that the laws on this issue differ so widely across the EU Member States that it can not realistically be expected to be harmonised within the foreseeable future.

5. Specific rules applicable to consumer sales

5.1. Types of contracts to be covered

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.

Option 4 is the choice if the consumer is to be protected overarching. However, it might be difficult to find a suitable form of law as different types of contracts are to be regulated and in general different types of contract need different specific rules. In any case the new rules should cover music downloads and similar as there is a definite need to protect consumers in this area of business.

5.2. Second-hand goods sold at public auctions

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.)

In the interest of overarching consumer protection option 1 has to be chosen

5.3. General obligations of a seller — delivery and conformity of goods

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)

Option for has to be preferred as this solution gives the parties to the contract room for manoeuvre and also supports the principle of freedom of contract.

5.4. The passing of risk in consumer sales

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

5.5.2. Extension of time limits

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

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.

As stated earlier, in the interest of an overarching consumer protection option 2 has to be preferred.

5.5.4. Second-hand goods

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

The horizontal instrument should contain specific rules for second hand goods since otherwise it would not be a complete instrument.

5.6. Burden of proof

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.

Option 2 is to be preferred 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.

5.7. Remedies

5.7.1. Introduction

5.7.2. The order in which remedies may be invoked

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.

Option 2 has to be the choice as in many cases of complaints it is an additional hassle for the consumer to have to wait for repairs etc and he/she should be in a position where it is up to him/her what kind of remedy he/she prefers.

5.8. Notification of the lack of conformity

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.

Option three is the most suitable to give maximum consumer protection.

5.9. Direct producers' liability for non-conformity

Question L: Should the horizontal instrument introduce direct liability of producers for nonconformity?

(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.

Although the introduction of direct liability of producers for any non-conformity is contradictory to many EU jurisdiction option 2 has to be preferred. It has to be made as simple as possible for the consumer to bring a claim and it can not be expected from him/her that he/she has to rely on contractual claims along the supply chain only.

5.10. Consumer goods guarantees (commercial guarantees)

5.10.1. Content of the commercial guarantee

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.

The minimum content of commercial guarantees has to be regulated in the interest of legal certainty.

5.10.2. The transferability of the commercial guarantee

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.)

There is no reason why a second buyer should not benefit from the commercial guarantee and therefore option 2 has to be the choice.

5.10.3. Commercial guarantees for specific parts

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

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?

No.