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REPORT FROM THE COMMISSION

Second Progress Report on The Common Frame of Reference

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1. INTRODUCTION

This report summarises the progress of the work on the Common Frame of Reference (CFR) since the publication of the First Progress Report in 2005 and fulfils the commitment to provide regular updates on this work.

2. REPRIORITISATION OF CONSUMER CONTRACT LAW ISSUES

The Commission announced in its previous report that it would prioritise the CFR work on issues related to consumer contracts, in order to ensure timely input into the review of the consumer *acquis*.

The Competitiveness Council¹ followed the same line and stated that topics “*directly relevant to the review should be rescheduled and treated at an earlier stage than previously envisaged*”. In organising the 2006 workshops priority was given to topics related to consumer contract law²: consumer sales, pre-contractual information, unfair terms, right of withdrawal and right to damages. The researchers’ findings on these issues and the discussions at the workshops, together with the results of other preparatory work, served as input for the Green Paper on the review of the consumer *acquis* that the Commission adopted on 7 February 2007.

During the period covered by this report, the research network, financed through the 6th Framework Programme, continued to deliver drafts for the preparation of the CFR, in accordance with the grant agreement.

In order to ensure that materials related to the consumer *acquis* are treated as a priority, the researchers agreed to divide them into three categories:

“Acquis revision”: material regarding topics of contract law dealt with in the EU consumer *acquis* and material that might clarify, widen or alter the current EU consumer *acquis*. E.g. with regard to pre-contractual information, this concerned material on “pre-contractual information duties”.

“Directly relevant”: material regarding topics of general contract law which are directly relevant for the EU consumer *acquis*, i.e. concepts of national contract law which are presupposed in the EU *acquis* as it currently stands. E.g., with regard to

¹ Competitiveness Council of the European Union 28/29 November 2005 14155/05 (Press 287)

² During the period covered by this report 11 workshops were held, five of which did not relate specifically to consumer issues: Content and effects of a contract, Problems related to e-commerce, Authority of agents, Structure of the CFR, Insurance

the right of withdrawal, this concerned material on “the time of conclusion of the contract”.

“Essential background”: material regarding topics of general contract law which provide essential background against which the EU *acquis* provisions need to be set. E.g., with regard to pre-contractual information, this concerned material on “the principle of good faith and fair dealing”.

At the workshops, the “*acquis* revision” materials were discussed as a priority, and a discussion on the “directly relevant” took place if there was time. The purpose of the “essential background” was mainly informative.

The network of stakeholder experts (CFR-net), consisting at present of 176 business and consumer representatives and legal practitioners from European countries, continued to operate by participating in the workshops and providing comments on the drafts developed by the researchers.

The network of Member States experts, consisting of contract law experts representing Member States, met twice.

3. SUBSTANTIVE ISSUES ARISING FROM THE CFR WORKSHOPS

3.1. Workshops on EU consumer contract law

The main issues discussed in the consumer workshops are reported below. The Commission will take these issues into consideration during the process of elaborating the CFR as well as for its work on the review of the consumer *acquis*.

Notion of Consumer and Professional

The main issues discussed included the following:

- **Legal persons:** there was a general agreement that only natural persons should fall within the definition of consumer
- **Transactions with mixed purpose:** the possibility of considering mixed-purpose transactions which are *partly* outside the professional sphere as consumer transactions was discussed
- **Interrelation between the proposed definitions of consumer and professional:** some stakeholder experts considered that the definitions of consumer and professional should correspond to one another and be mutually exclusive.

Unfair Terms

The issues discussed included the following:

- **Scope of application of the unfairness test:** the inclusion of individually negotiated terms was discussed. There was disagreement between stakeholder experts on this issue

- Regarding the exclusion from the unfairness test **of the main subject matter and the adequacy of the price**, stakeholder experts considered that there should be no control on the adequacy of the price contained in a contract term.

Pre-contractual information

The following issues were discussed:

- **Duty to inform about goods and services:** stakeholder experts found the proposed general rule requiring full disclosure of all relevant information which the opposite party may need in order to make a fully informed decision (in particular information relevant in assessing the quality and performance that can be expected) too broad and considered that it might lead to legal uncertainty. They stressed the possibility to focus on specific sectors (e.g. insurance contract law, financial services)
- **Duty to provide information when concluding a contract with a consumer who is at particular disadvantage:** stakeholder experts appreciated this provision seeking to state, in general form, the circumstances when the *acquis* imposes information duties on a business dealing with a consumer. According to them this provision should be used as a common basis or guideline to define the catalogue of core pre-contractual consumer information
- **Remedies for breach of information duties:** stakeholder experts pointed out that the consequences of an infringement of pre-contractual information obligations is of utmost importance to consumers. The researchers' draft proposes the prolongation of the cooling-off period as the remedy for the breach of the information duties in the context of contracts from which the consumer has the right to withdraw. The issue of concluding a contract on the basis of false and misleading information was not specifically tackled in this context.

First workshop on Consumer sales

The following issues were discussed:

- The possible extension of **notion of goods** to other types of assets as envisaged by Article 1:105 of the researchers' draft³: several stakeholder experts stated that "*software*" and more generally intellectual property rights should be covered. The Commission invited the researchers to reflect to which goods the definition could be extended and which adaptation should be done
- **Delivery – Time of delivery – Link with the transfer of risk:** the possibility of introducing rules on the transfer of risks was discussed. Positions were diverging. It was recalled that this question was intensively discussed at the Council during the adoption of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees

³ i.e. to electricity, information and data (including software) and other forms of incorporeal property.

- **Relevant point in time for establishing conformity:** the passing of risks was generally considered as a proper moment to evaluate the conformity. The researchers agreed to clarify that in some situations, e.g. damages caused by faulty packaging, the seller should be liable of defects which appear after the transfer of risks, in line with the Vienna Convention on the International Sale of Goods.

Second workshop on Consumer sales (remedies)

The workshop was devoted to the remedies for breach of contract. The issues discussed included:

- **The hierarchy of remedies for non-conformity:** some stakeholder experts did not agree with foreseeing any hierarchy amongst remedies, as the consumer should have the possibility to choose between remedies and should not have to wait for all other options to be exercised before terminating the contract. Other stakeholder experts defended the seller's interests and opted for maintaining the hierarchy of remedies as provided for by Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees
- **The situations when termination of the contract can take place:** questions discussed were: how late the performance must be before termination could take place, whether it would be wise to set a fixed deadline for performance, and what situations would be considered as fundamental non-performance as the definition of this concept seemed to pose difficulties
- **Notification to the seller of defects which were discovered/ought to have been discovered by the buyer:** apart from the general questions why this should be a duty at all and why the exercise of a remedy should be contingent on notification, in more concrete terms the question of the period of notification was debated. Two years were viewed as being acceptable by a few experts but not by others.

Right of withdrawal

The horizontal rules on *exercise* and *effects* of the right of withdrawal drafted on the basis of the provisions of the Doorstep Selling⁴, Distance Selling⁵ and Timeshare Directives⁶ were discussed. The main issues concerned:

- **Scope of application:** the proposed rules would apply whenever a party has a statutory right to withdraw from a contract. Stakeholder experts indicated that it should be clarified that the rules apply only to business to consumer (B2C) transactions

⁴ Council Directive 85/577/EEC of 20 December 1985, OJ L 372, 31.12.1985, p. 31

⁵ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997, OJ L 144, 4.6.1997, p. 19

⁶ Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994, OJ L 280, 29.10.1994, p. 83

- **Exercise of the right of withdrawal:** according to the proposed rule the party entitled to withdraw should not give any reasons to exercise its right effectively or be subject to specific form requirements. Some stakeholder experts pointed out that a declaration lacking form should not be possible for reasons of clarity and legal certainty and that a minimal form requirement should apply
- **Withdrawal period:** some stakeholder experts contested the rationale for introducing a single uniform length applicable to all existing cooling-off periods and found the proposed 14 day period too long. Some argued for maintaining the existing divergences in this area
- **Time limits for withdrawal:** the majority of stakeholder experts supported the need to provide for a maximum time limit for executing the right of withdrawal in order to protect the legal certainty on the side of professionals.

Consumers' right to damages and producers' liability

The most important issues discussed were:

- **The notion of strict liability versus the notion of fault:** the proposed regime of strict liability with a number of grounds for exoneration (fault of the victim, fault of a third party or *force majeure*) was contested by some stakeholder experts, who believed that there should be a fault element as a condition for the liability for damages
- **The inclusion of lack of future profits and non-pecuniary loss:** the majority of stakeholder experts agreed that the notion of damages should cover actual loss as well as lack of future profits; on the issue whether the notion of damages should also cover non-pecuniary loss no consensus was reached
- **Producers' liability:** the issue was considered important as nowadays most transactions are cross-border and consumers rarely reside in the same country as the manufacturer (or the seller) of the purchased goods. However, it raises many legal and practical difficulties. According to stakeholder experts the consumer should be able to exercise his rights only against the producer and not against every intermediary in the business chain. The fact that intermediaries and agents of the producer residing in the consumer's Member State could also be held liable was contested by stakeholder experts. Other issues raised included the burden of proof, the time limit for exercising the consumer's right and the liability in the case of sale of second hand goods.

3.2. Workshops on other EU contract law acquis

A number of workshops concerning non-consumer focussed contract law acquis were held before the decision was taken to give priority to the consumer acquis. The main issues discussed in the workshops are mentioned below

Insurance law

The following points are examples of the specific issues discussed:

- **Duty to disclose (applicant):** there was a discussion about where responsibility lied in a duty to disclose. Some stakeholder experts felt the duty should be on the insurer to ask all relevant questions, others felt that an applicant should have a duty to disclose relevant information that was not requested. The arguments represented the balance between an enormous all encompassing questionnaire, and the risk to the applicant of no cover if he/she had forgotten to mention something deemed relevant, both of which could be barriers to people taking out insurance they needed
- **Duty to disclose (insurer):** the researchers draft required the insurer to point out gaps in the cover sought by the applicant and the cover offered. Many stakeholder experts felt this imposed a duty to give advice, which would be costly, and not desirable. It also introduced a high element of subjectivity. They preferred a duty to explain the policy, leaving it up to the applicant to decide if it was suitable
- **Time limits for voidance:** stakeholder experts generally agreed that the proposed one month time-limit to rescind the contract in case of breach of duty to disclose was too short, and felt that in the case of a fraudulent breach no time limit should apply.

E-commerce

The following points are examples of the specific points discussed:

- **Unsolicited contracts:** researchers and stakeholder experts debated whether the prohibition of the supply of unsolicited goods or services to a consumer, where such a supply involves a demand for payment, should apply also to B2B contracts
- **Right of withdrawal:** stakeholder experts observed that the definitions contained in the provision had not been sufficiently elaborated and that the provision should be reworked. There was support for a 14 days right of withdrawal. The proposal to make the exercise of this right conditional on the consumer's willingness to bear his expense was contested; it was debated whether this right should apply to B2B contracts as well
- **The definition of "reached, sent and dispatched" in electronic communications:** researchers and stakeholder experts discussed the question of at what exact point in time a message should be considered sent or received. It was concluded that more clarifications were needed and that international instruments in the area of e-commerce should be taken into consideration.

3.3. Workshops on general contract law

The main issues discussed in the workshops concerning general contract law are mentioned below. The Commission will take these issues into consideration during the process of elaborating the CFR.

Content and effect of the contract

The following points are examples of the specific issues discussed:

- **Statements giving rise to contractual obligations:** stakeholder experts expressed the need to define clearly when a statement “*gives rise to a contractual obligation*”. It was discussed whether the proposed provision, insofar as it concerned binding pre-contractual statements relating to the quality or use of goods or services, should cover only B2C or also B2B relationships
- **Terms of a contract:** the nature and the effect of implied terms were discussed. Stakeholder experts felt that imprecise provisions should be avoided. The researchers pointed out that in this provision the vagueness would not be detrimental as the provision was supposed to be a default rule on contracts where there are no implied terms for specific contracts in specific legislation
- **Stipulation in favour of a third party:** the issue of the effects of the contract in favour of a third party was debated and it was concluded that further reflection on the circumstances under which the third party can rely on the stipulation was needed.

Authority of Agents

The researchers pointed out that the draft on authority of agents should be reworked in order to reflect recent developments in the Member States and possibly include specific rules on consumer protection. A number of other issues were discussed at the workshop, in particular:

- **The use of the terminology “agent” and “representative”:** stakeholder experts pointed out the need for coherent terminology and that terms should only be used as defined in the CFR. The researchers explained that an annex to the CFR will contain a list of definitions of terms used
- **The distinction between direct and indirect representation:** the researchers explained that only a direct representative can bind the principal, as he acts “*in the name of*” the principal, whereas an indirect representative acts “*on behalf of*” the principal. The idea behind indirect representation would be the protection of the principal, for example in situations where the representative becomes insolvent after concluding a deal. Some stakeholders questioned the usefulness of the rule. It was concluded that there should be further reflection on the interests that are worth protecting in the cases of non-performance or insolvency of the representative.

4. THE STRUCTURE OF THE CFR – RESULTS OF WORKSHOPS WITH STAKEHOLDERS AND MEMBER STATES

Preliminary discussions on the structure of the CFR took place at two workshops, one with stakeholder experts and one with Member State experts. At the stakeholder experts workshop on 29 November 2005 there was an emerging consensus that the CFR should contain the topics directly related to the existing EU contract law *acquis*

in combination with general contract law issues which are relevant for the *acquis*. The stakeholder experts also requested more definitions and pointed out the need for providing alternative formulations for certain definitions/model rules. Finally the stakeholder experts considered that the distinction between B2B and B2C should be more clearly expressed in the draft CFR.

Member State experts reached similar conclusions at a workshop on 9 December 2005, but with nuances. Most Member States wished to cover consumer contract law in combination with the parts of general contract law that are relevant for the consumer *acquis*. Some wished to include also other issues of general contract law and others wanted to focus exclusively on the consumer *acquis*.

5. THE INPUT IN THE PREPARATORY WORK

5.1. Input from the European Discussion Forum

The First European Discussion Forum, hosted by the United Kingdom Council Presidency and the Commission, which brought together for the first time the researchers, the CFR-net, the network of Member States experts, senior representatives from business and consumer side as well as Ministers, senior officials and Members of the European Parliament, took place in London on 26 September 2005. This conference confirmed the necessity to prioritise the work on the CFR so that it feeds efficiently and effectively first into the review of the EU consumer *acquis*.

This conference was followed-up by the Second European Discussion Forum in Vienna on 26 May 2006, hosted by the Austrian Council Presidency, where the support for a focus on EU consumer issues was reiterated. A consensus that the CFR should also cover topics of general contract law also emerged. At the Third European Discussion Forum hosted by the German Council Presidency in Stuttgart on 1 March 2007, the Presidency concluded that there was general support for a CFR providing European legislators with a toolbox including the *acquis* and that decisions on the CFR content are an important matter for political consideration.

5.2. Input from other institutions

5.2.1. The Council

The Competitiveness Council endorsed the approach taken in the First Progress Report and in particular the prioritisation of issues related to the review of the EU consumer *acquis* in its conclusions of 29 November 2005. It emphasised the need for the work “*to focus on practical issues in order to deliver real benefits to consumers and business*” and the need to “*acknowledge the distinction between business-to-consumer and business-to-business contracts*”. It also welcomed the Commission's reassurance that it does not intend to propose a European Civil Code.

5.2.2. The European Parliament

The European Parliament (EP) adopted a resolution on 23 March 2006 in which it welcomed the First Progress Report and expressed its support for the CFR project.

The EP emphasised the need for the CFR work to “*follow clear guidelines laid down by the EC legislature*” and considered that the CFR could only finally be adopted following political approval by the EP and the Council. The EP called on the Commission to act in the closest possible cooperation with the Parliament in every step taken towards developing a CFR and to consult the Parliament particularly on the draft CFR structure and before taking any further planning measure. Like the Council, the EP called on the Commission to distinguish between legal provisions applicable to the B2B and the B2C sectors and to separate the two systematically.

Finally the resolution announced the establishment of a parliamentary working group consisting of members of the EP’s Legal Affairs Committee and the Internal Market and Consumer Protection Committee. This working group provides a forum for discussion of topics dealt with by researchers and stakeholder experts for which the EP considers it important to provide political guidance. The meetings of the working group are prepared by a project team consisting of EP officials. The Commission participates in these meetings. Several meetings were held so far. The topics discussed include issues such as the notion of consumer and professional and unfair contract terms.

In reply to the EP request in its resolution to produce a flow chart which clearly identifies all the different parties involved in the CFR process, the Commission has drafted the flow chart in the Annex.

On 7 September 2006 the EP adopted another resolution on European Contract Law, in which it expressed support for the preparation of a wide CFR project covering general contract law issues and not only consumer contract law, which the Commission should continue in parallel with the *acquis* review.

6. CONCLUSIONS

In so far as EU consumer contract law is concerned the relevant CFR findings will be incorporated where appropriate into the EU consumer contract law *acquis* review, on which the Commission adopted a Green Paper on 7 February 2007. The Green Paper describes the options for a possible revision of the EU consumer contract law *acquis*.

According to its original conception the CFR is intended to be a “toolbox” or a handbook for the Commission and the EU legislator to be used when revising existing and preparing new legislation in the area of contract law. The current timeframe of preparation foresees that researchers will present their draft CFR by the end of 2007. The Commission will need to select very carefully the parts of this draft that correspond to the common legislative objectives. This selection process will need to be done in consultation with the other institutions and stakeholders. The Commission will ensure that the parts of the research draft selected for the CFR (and possibly modified) are coherent with each other and with the follow-up of the Green Paper. After analysing the results of the consultation process, elaborating its draft CFR, and conducting an impact assessment, the Commission could submit its approach in the form of a White Paper.

However a separate topic concerns the scope of the CFR which needs to be decided now in order to steer the future CFR work, bearing in mind, especially, in how far

future CFR work should also cover topics concerning other areas of the EU contract law *acquis* and directly relevant issues of general contract law in addition to consumer contract law.

During the CFR work and the ongoing consultative process, several voices (CFR-net experts, a number of Member States) advocated including certain general contract law issues that are relevant for the existing EU contract law *acquis*.

The EP, in its resolutions of 2006, already pointed out the importance of this project and called on the Commission as a whole to participate in this work. It further called for the Commission to exploit the ongoing research work with a view to eventually using the results beyond those strictly related to the EU consumer *acquis* towards developing a system of Community civil law. In its September resolution it further reiterated its support for the preparation of a wide CFR project on general contract law issues going beyond the consumer protection field, which the Commission should continue in parallel with the *acquis* review.

The Commission's considers the CFR a better regulation instrument. It is a longer-term exercise with the purpose of ensuring consistency and good quality of EC legislation in the area of contract law. It would be used to provide clear definitions of legal terms, fundamental principles and coherent modern rules of contract law when revising existing and preparing new sectoral legislation where such a need is identified. Its scope is not a large scale harmonisation of private law or a European civil code.

Given the interest of Council and Parliament and their wish to be closely involved, it would be opportune for the Commission to know the position of both institutions. The EP has already issued its position on the subject through its resolutions. By submitting this progress report to the Council, the Commission is now seeking its position on the remainder of the work on the CFR, which could cover a number of workshops relating to other EU contract law *acquis* such as information, marketing and distribution requirements in financial services legislation or delays in payment of money (including the issue of retention of title clauses), and to general contract law issues such as formal requirements, validity and interpretation of the contract in case of fraud, mistake and misrepresentation.

