BUSINESSEUROPE

POSITION PAPER

24 May 2007

RESPONSE TO THE COMMISSION'S GREEN PAPER ON THE REVIEW OF THE CONSUMER *ACQUIS* (COM (2006) 744 FINAL)

SUMMARY

BUSINESSEUROPE supports the debate on the review of the regulatory framework in the field of consumer policy, particularly its objectives of implementing the better regulation agenda and improving the functioning of the Internal Market.

A sound consumer protection policy that strikes a balance between the competitiveness of enterprises and an appropriate high level of consumer protection is important for businesses and the correct functioning of the market.

When there is solid evidence of the existence of barriers to the well functioning of the Internal Market that justify Community action, BUSINESSEUROPE supports full harmonisation to ensure legal certainty, a more common level of consumer protection and regulatory simplification. It will also allow for easier and more even enforcement of legislation.

The choice of the approach to achieve the review objectives should be decided once the following action has been completed:

1. The analytical work should be reinforced. There is a need for a better understanding of how the identified dysfunctions of the current directives play out in practice: clearer identification of problems for cross-border trade in the fields covered by the acquis, their source and their real impact.
2. The scope of full harmonisation should be pragmatically defined so that it focuses on targeted and proportionate solutions to the problems identified. Any new measures should apply to both domestic and cross-border transactions.
3. The Commission has to bear in mind that the review should not go beyond the scope of the eight directives constituting the acquis. The Commission should also clarify the link between the ongoing research on European contract law and the review. BUSINESSEUROPE is strongly opposed to creation of a European civil code for consumers.
4. The Commission should explain the effects of both the vertical approach and the mixed approach (horizontal instrument) on the acquis directives and other Community legislation and ensure that there is coherence and compatibility with existing legislation.
5. National transposition, administrative implementation and enforcement of the harmonisation instrument must be closely monitored by the Commission.

The debate is complex and its outcome can be far-reaching. Before any new proposal is tabled, the Commission should continue consultation with interested parties, via a white paper, about legislative approaches. An impact assessment should also be produced.

THE CONFEDERATION OF EUROPEAN BUSINESS a.i.s.b.l.

AV. DE CORTENBERGH 168
BE-1000 BRUSSELS
BELGIUM
VAT BE 863 418 279

TEL +32(0)2 237 65 11
FAX +32(0)2 231 14 45
E-MAIL: MAIN@BUSINESSEUROPE.EU
WWW.BUSINESSEUROPE.EU

CONSUMER POLICY AND THE INTERNAL MARKET

A sound and balanced consumer policy is important for a well-functioning Internal Market and realisation of the Lisbon goals.

As provided for in the EU Treaty, consumer policy is to be understood in the context of the Internal Market which is one of the main cornerstones of EU's welfare and prosperity. This is why the right balance between the competitiveness of enterprises and an appropriate high level of consumer protection should be sought when any consumer protection proposals are envisaged. The two interests are compatible and must be taken into account in internal market policy-making.

In this regard, BUSINESSEUROPE agrees with the objective of the new Consumer Strategy 2007-2013 which seeks to highlight the role of EU consumer policy in reinforcing and improving the functioning of the internal market and implementing the better regulation agenda. It is important to bear in mind this broad setting laid out in the new Strategy to fully understand the implications and the remits of the debate on the review of existing EU legislation on consumer protection (hereinafter "the consumer acquis").

We are of the opinion that together with better regulation and regulatory simplification in consumer policy, the Commission's action should focus on effective and even enforcement, promotion of alternatives to legislation such as self-regulation and co-regulation, promotion of informal dialogue between business and consumers, improve consumer information and education and better collection of consumer data, statistics and knowledge.

GREEN PAPER ON THE REVIEW OF THE CONSUMER ACQUIS

BUSINESSEUROPE welcomes the public debate launched by the European Commission's Green Paper on the review and the future of the regulatory framework in the field of consumer policy. In particular, we support its overall objectives of implementing the better regulation agenda and improving the Internal Market in this field.

The objective of improving the quality and consistency of the consumer acquis so that consumers are more evenly protected and businesses operate in a level-paying field is laudable insofar it contributes to a fully functioning Internal Market.

The outcome of this debate will have important consequences for the future of consumer policy. Although the Green Paper focuses on eight specific directives, any decisions taken regarding the consumer acquis review are likely to have consequences for other legislation dealing with consumer protection aspects and that do not fall within the remits of the acquis. It is therefore necessary to take into account the interaction between future and existing legislation, particularly with the directive on unfair commercial practices.

Given the complexity and importance of the review, it is therefore important that stakeholders and interested parties are adequately consulted and that the input from representative stakeholders are given due consideration. This includes acknowledging the representativeness of the various interested parties providing comments on the

Green Paper. Enough time should be allowed for a proper debate on the various options for action and new proposals should be thoroughly assessed and justified.

CASE FOR THE REVIEW: MORE WORK IS NEEDED

According to the green paper, the main reasons that called for a debate on the review of the consumer acquis are the following:

1. Market developments, rules are not adapted to e-commerce and digital progress (e.g. on-line auctions or downloading).

2. National fragmentation of rules due principally to the minimum harmonisation approach used in the consumer acquis.

3. Lack of confidence: for the green paper, the above scenario affects the confidence in cross-border trade of both consumers who are not sure about the protection given in other Member States and of companies who have to bear extra compliance costs in their cross-border activities.

BUSINESSEUROPE supports debate on further harmonisation of the consumer protection acquis and a more level playing field, however, we consider that the case for the proposed overhaul of the consumer acquis needs to be completed. In particular, it is crucial to delimit carefully and pragmatically the scope of the harmonisation on the basis of the problems hampering the well-functioning of the market.

Divergences between national rules do not amount automatically to a regulatory obstacle and therefore EU harmonisation of all minimum harmonisation-based rules or the existing national rules is not necessarily the solution. Also, the degree of confidence in cross-border trade and the digital developments do not suffice by themselves to justify legislative action insofar as the level of confidence in cross border buying/selling depends to a large extent on non legislative factors such as distance or proximity, language, personal choices, etc.

The green paper fails short to provide adequate evidence about existing gaps in consumer protection and particularly the impact in the functioning of the Internal Market of national regulatory divergences due to the minimum harmonisation directives or due to the absence of Community harmonisation. This information is essential in order to deliver the right regulatory environment and look for the best solutions, be they legislative or non-legislative. Clarity and predictability of the legal framework is necessary for businesses and consumers. Thus, change must be fully justified and supported by evidence.

We consider that the need for harmonisation must be assessed each time on its own merits. Directives should be assessed individually with the aim of identifying regulatory gaps and shortcomings and looking for the best instruments to address the problems. The assessment of the acquis directives must also take account of the broader context and its relation with other relevant directives (e.g. e-commerce, distance selling of financial services, etc. In this respect, the green paper often cites a few examples of regulatory divergences which may have a negative impact on the internal market: the length of the cooling-off period for cross-border distance selling, modalities of the exercising the right of withdrawal and the cost of returning goods. The impact of the

provisions of the acquis directives which are regulated differently in Member States in the market both in consumer and companies should be more clearly spelled out.

Also as stated above, new legislation is not the only and sometimes most suited instrument to create confidence. Action should also focus on better enforcement, better information, better consumer data and statistics, promotion of non-legislative tools or proper access to justice. At national level, it is important that the EU consumer agenda and strategy is fully integrated in the relevant national policies and that national consumers are properly informed about their rights and responsibilities in the internal market.

BUSINESSEUROPE underlines that the issue of proper and even enforcement of existing rules must be regarded as a priority before a definitive stance is taken in this debate. This issue is essential for companies and consumers which bear the negative consequences caused by distortions of competition caused by those who do not respect the rules. Thus, it is essential not to decouple the legal environment from practical reality. The European institutions must therefore focus on more effective enforcement of existing regulations, including better transposition in order to deliver consumer protection. In this regard, market supervision deserves special attention.

OBJECTIVES OF THE REVIEW

According to the Commission's text "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".

The Commission pursues:

1. to create an equally high level of protection across the EU which will generate an equally high level of consumer confidence and

2. to create a more predictable regulatory environment and simpler rules in order to reduce compliance costs for businesses, particularly SMEs.

This is presented as the contribution from the consumer policy to the modernisation of the Internal Market and the achievement of the Better regulation goals.

BUSINESSEUROPE supports the above-mentioned objectives and stresses the importance that the debate on the consumer review and subsequent action respond to the objective of establishment and the functioning of the Internal Market enshrined in the EU Treaty and the commitments of Better regulation agreed by the EU institutions.

BUSINESSEUROPE considers it essential that there is an agreement by the EU institutions participating in the legislative process that the review:

- result in true regulatory simplification and clarification,
- create an appropriate and proportionate level playing-field that is easy to enforce,

- strike a balance between the competitiveness of companies and an appropriate common level of consumer protection avoiding the increase of the level of consumer protection unnecessarily,
- not become burdensome and impose excessive costs on business, and
- is proportionate, practical and targeted and its follow-up is based on real evidence of need for better functioning of the internal market and be backed up by impact assessments based on a competitiveness test.

Two important proposals were already adopted implementing the new approach seeking full harmonisation and improved enforcement, the Unfair Commercial Practices Directive and the Regulation on Consumer Protection Cooperation. The experience from this is still insufficient since transposition of the directive is not yet completed in some MS and the implementation of the regulation is still in process. It is therefore difficult to assess whether the harmonisation and simplification objectives pursued, notably in the directive, are adequately met.

THE REVIEW AND BETTER REGULATION: A KEY TEST CASE

According to the green paper, the review process has been created "with the objective to better achieve its Better Regulation goals by simplifying and completing the existing regulatory framework".

Better regulation is a central element of the policy for strengthening competitiveness and supporting sustainable growth and employment. Member States and the Commission recently stressed the importance of achieving concrete results and also the European Parliament is committed to lend particular attention to simplification proposals to ensure that they do not add new burdens and are dealt with quickly.

Regulations should create workable and affordable solutions for clearly identified problems which do not harm the competitiveness of Europe. Simplification should render legislation cost-effective by effectively reducing burdens. This is the reason why the Commission has identified simplification as one of the key political priorities through the Better Regulation agenda.

Better regulation is thus of fundamental importance and it is vital that simplification proposals really reduce costs for businesses and do not increase burdens that can stifle cross-border trade.

BUSINESSEUROPE strongly supports the Commission's plans to apply the above-mentioned better regulation objectives in the field of consumer policy. The outcome of the review will be an important test case for application of these objectives in practice.

For BUSINESSEUROPE, the Commission, after the consultation phase, should present a comprehensive plan, in the form of a white paper, addressing the key factors for achieving the consolidation, streamlining and simplification of the consumer acquis:

- Use of a clear methodology.

- Use of systematic impact assessments of new proposals and major amendments to Commission proposals proposed by any of the EU Institutions; impact assessments should be subject to scrutiny by an independent party.

- Clear and detailed information on the effects of the review in terms of simplification (legislation to be modified, repealed, etc) of the action envisaged both at EU and national level.

- Concrete measures to ensure correct transposition, implementation and enforcement of legislation.

- Role and use of self-regulation and co-regulation.

- Improved communication on content of the proposals, objectives, benefits, etc.

Equally, Member States should also provide for:

- Development and enforcement of consultation mechanisms.

- More systematic impact assessment through adequate guidelines and resources, and more transparency on the results.

- Development of national simplification programmes.

- Improved method of transposition, implementation and enforcement of Community law.

COHERENCE WITH OTHER COMMUNITY LEGISLATION

The impact that consumer policy proposals may have on other Community legislation is of special concern and must be thoroughly assessed before any decision on the review is taken. Legal certainty and coherence between existing and future legislation is of paramount importance.

The Commission, as the main guardian of the Treaties including the Internal Market principles and legislation, should ensure that there are no contradictions between proposals and that the well-functioning of the Internal Market is not at risk. The Commission must ensure that Internal Market principles are respected systematically and that there is coherence and compatibility between new proposals and existing legislation. This is important as regards the regulatory framework governing e-commerce, intellectual property, financial services or the Community rules on the conflicts of laws.

The recently adopted Consumer Strategy 2007-2013 states that any proposals relevant to the acquis review "*would also represent the first outcomes of the Commission's work on a common frame of reference for European contract law*".

BUSINESSEUROPE recalls that the legal nature of the planned Common Frame of Reference for contract law (CFR) still has to be clarified without delay. European businesses are firmly opposed to development of a harmonised European civil code. Thus, the consumer review must not lead to a European contract law code for

consumers as a first step towards a harmonised European civil code. It must not be the case that the findings and discussions held in the context of the CFR will mainly be used to strengthen consumer protection artificially or to the highest level through the proposals that may be decided within the acquis review. It must be also borne in mind the implications that decisions on contractual issues relevant to consumers may have on business to business matters and the freedom of contract. Thus, before any proposals are made regarding the acquis review, the objective of the CFR has to be explained.

Finally, any measures resulting from the review should take into account the directive on unfair commercial practices which Member States must transpose by December 2007.

MINIMUM/FULL HARMONISATION

When there is solid evidence of the existence of barriers to the well functioning of the Internal Market that justify Community action, BUSINESSEUROPE believes that full harmonisation is a suitable instrument to attain increased legal certainty, a level playing field and regulatory simplification. This legislative technique also allows for easier and more even enforcement of legislation.

However, full harmonisation should be decided in a targeted fashion. It should be justified and assessed on the basis of proportionality and necessity, reflecting the conditions and specificities of the area covered and with the objective of contributing to a simpler and clear legal framework and ensuring an adequate level of consumer protection.

The crucial question then will be striking the right balance between the competitiveness of companies and an appropriate common level of consumer protection and at the level of consumer protection to be chosen as the common denominator in future legislation. Nor the most protective models or the most fragile should be chosen.

Consumer protection policy should not use the benchmark of the most vulnerable consumers, i.e. children or the elderly as the average consumer in which to base new proposals. The concept of average consumer developed by the European Court of justice should remain the centre of this policy, a concept that considers a consumer with rights and obligations. This does not preclude that proposals when appropriate and justified could provide special protection of vulnerable groups.

LEVEL OF CONSUMER PROTECTION

Although the EU Treaty itself says "to ensure a high level of consumer protection" in article 153, this concept has to be interpreted case by case. Most importantly, "high" should not be construed to mean "the more restrictions on companies, the better". Overregulation is counterproductive, and not in the interest of either consumers or business. For practical purposes, the concept should rather be consumer protection at an adequate level, i.e. a protection level that effectively satisfies justifiable consumer demands but without negative side effects on competitiveness of companies.

The level of protection can only be decided by a political process, which should be based on facts and sound and objective research providing empirical hard data and on substantive stakeholder consultation. It should be also borne in mind that the notion of consumer needs to embrace both the rights and obligations that a consumer has as part of the market and the society as a whole.

VERTICAL/MIXED APPROACH

BUSINESSEUROPE considers that the choice of legislative approach to accomplish harmonisation and achieve the review objectives of better regulation and improvement of the Internal Market should be decided once the following questions are given due consideration:

1. The analytical phase should be completed: identification of real problems and shortcomings for cross-border trade in the fields covered by the acquis directives and their source, e.g. national transposition, enforcement, national regulatory divergences, protection gaps, lack of information, etc.

2. The scope of full harmonisation must be clearly and pragmatically defined and should provide targeted and proportionate solutions to the problems previously identified. The review exercise should not go beyond the scope of the eight directives constituting the acquis and the problems directly linked with them. In particular, BUSINESSEUROPE opposes the review dealing with matters relating to collective redress, right to damages, producer's liability, contractual rights which are not harmonised. These aspects are of a particular importance which goes beyond the scope of the acquis.

3. The legal nature of the proposed Common Frame of Reference for contract law must be clarified. The Commission should also clarify the link between the ongoing research on European contract law and the review. BUSINESSEUROPE is strongly opposed to creation of a European civil code for consumers.

4. The Commission should clearly explain the effects of both vertical and mixed approaches on the existing acquis directives and other relevant Community legislation. Special attention should be given as to how simplification and reduction of the volume of the acquis would be achieved.

5. A balance between the interests of businesses and consumers must be ensured, as well as legal certainty and simplification of the regulatory framework.

6. The Commission must make it clear during legislative discussions that it will consider withdrawing any full harmonisation proposal which is deprived of the means to achieve the harmonisation objective.

7. National transposition, administrative implementation and enforcement of the harmonisation instrument must be closely monitored and facilitated by the Commission.

FOLLOW-UP OF THE GREEN PAPER

We consider that the debate launched by the green paper is of the utmost importance not only for the future of the regulatory framework in the field of consumer policy but also for the functioning of the Internal Market.

The issues under discussion are complex and therefore decisions on the way forward should not be rushed. We believe that before any new legislative proposal is tabled, the Commission should continue consultation with interested parties about the possible content of the Community instrument. Also, an impact assessment should accompany any new proposals including information on their interaction with existing relevant legislation. This public consultation could be conducted via a white paper in which the Commission presents its proposed action and provides reason for its choices.

RESPONSES TO SPECIFIC QUESTIONS IN ANNEX I OF THE GREEN PAPER

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 sectorial directives whenever necessary.

Option 3: Status quo: no revision.

BUSINESSEUROPE's response:

See the above comments on vertical/mixed approach.

The choice of the legislative approach to accomplish harmonisation and achieve the review objectives of better regulation and improvement of the internal market can only be decided once the questions raised above are given due consideration and the necessary safeguards are envisaged. The approach chosen should be the one that provides the best guarantees to attain the objectives pursued.

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.

BUSINESSEUROPE's response:

As a general principle, we would prefer that any Community instrument proposed should apply to both domestic and cross-border transactions.

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.

BUSINESSEUROPE's response:

Full harmonisation is the way forward for reviewing or elaborating new consumer protection legislation and to ensure uniform implementation across the EU and guarantee legal security. However, full harmonisation should be decided in a targeted way taking into account the specific context. It should be justified and assessed on the basis of proportionality and necessity, reflecting the conditions and specificities of the area covered and with the objective of contributing to a simpler and clear legal framework and ensuring an adequate level of consumer protection.

As foreseen in the Treaty, full harmonisation legislation should be accompanied by application of the mutual recognition principle for the matters that are not fully harmonised. However, practical implementation of this principle at national level has proved to be difficult and uneven. We believe that the application of the mutual recognition in this field should be described in a separate guidance paper. Information about the application of this principle by Member States should be transparent and publicly available.

The crucial question then will lie at striking the right balance between the competitiveness of companies and an appropriate common level of consumer protection and at the level of consumer protection to be chosen as the common denominator in future legislation. Nor the most protective models or the most fragile should be chosen.

4. Horizontal Issues

4.1 Definition of "consumer" and "professional"

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.

BUSINESSEUROPE's response:

We support Option 1. The concepts of "consumer" and "professionals" as described above should be the same throughout the various directives. Consistency in definitions of terms will help the functioning and enforcement of the internal market, both for consumers and business and lead to a stronger degree of legal certainty. It will avoid confusion and the creation of doubt about the intended meaning.

Consistency with the UCP Directive, in as much as it is the most recently adopted directive and the widest ranging should be ensured. Its benefits would be weakened if its definitions were subject to variations through other directives.

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.

BUSINESSEUROPE's response:

We support Option 1. The status quo should be retained. If professional intermediaries were to be included, the law would become too complicated. It is not justified that intermediaries should have the same rights and obligations as the contracting parties themselves.

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.

BUSINESSEUROPE's response:

We support Option 2. The status quo should be retained. The differing assessment, interpretation and understanding of a general clause in 27 Member States will not contribute to regulatory simplification and legal certainty.

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 pre-formulated terms.

BUSINESSEUROPE's response:

We support Option 3: status quo. There is no reason justifying such extension and that Community rules should continue to apply exclusively to non-negotiated or pre-formulated terms. A mandatory list with prohibited clauses is impractical in the area of individually negotiated contracts.

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.

BUSINESSEUROPE's response:

We support Option 3. A brief list with clear and unambiguous prohibitions would be the right choice. If agreement on this cannot be achieved, the status quo must be preserved (Option 1). In addition, BUSINESSEUROPE recalls that any changes to a list of terms should be made through the ordinary legislative procedure and not through comitology.

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.

BUSINESSEUROPE's response:

We support Option 2: Status quo. The extension of the unfairness test to include the price as expressed in Option 1 is not acceptable on any account since setting the price is a matter for the parties and not to be determined by law.

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.

BUSINESSEUROPE's response:

We support Option 3: status quo. The contractual effects of the violation against information requirements do not only depend on the character of the information, but also on the specificities and circumstances of the contract. In most cases there are good reasons why the directives regulate the contractual effects in a different way.

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.

BUSINESSEUROPE's response:

We support option 3: status quo. While in theory it may seem beneficial to have a general principle on cancellation rights and remedies, the rationale for, and scope of, the eight individual directives is very diverse. Besides, for the sake of clarity, it must be noted that not all of the eight directives concerned have cooling-off periods.

We do not support a one-size-fits-all approach if related to the right of withdrawal. Consideration should be given to reducing the period in some circumstances.

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).

BUSINESSEUROPE's response:

We support option 2. Businesses have an interest in the establishment of a one uniform procedure for the notice of withdrawal. We believe that the conditions to exercise the right of withdrawal should be specified in order to increase the level of legal certainty for companies without hampering the consumer's right to withdrawal.

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.

BUSINESSEUROPE's response:

We support Option 3: the status quo.

While in theory it may seem beneficial to have a general principle on cancellation rights and remedies, the rationale for, and scope of, some of the eight individual directives is very different and the range of goods, services and circumstances they cover so diverse that it is difficult to envisage the development of a general rule.

The current obligation under the distance selling directive is to take reasonable care of the goods but it does not extend to keeping them and returning them in good condition so that they can be resold as new. Consideration should be given as to whether certain goods should be exempted from the cancellation right on the grounds that they cannot subsequently be resold as new in cases where the supplier has performed the contract exactly has agreed so as not to put legitimate sellers at undue competitive disadvantage vis-à-vis traditional sellers. Current requirements place a disproportionate burden o business and risk penalising those business which carry out business on-line and which supply correct goods in the appropriate condition as ordered by the consumer, but which they cannot resell. There needs to be a redressing of balance within the directive.

We do not think there should not be any extension of cancellation rights to areas currently covered by the acquis. We see no reason why there should be a general principle of cancellation inserted into the Sale of Goods Directive, for example; cooling off/cancellation rights are best reserved for the specific directives covering special trading circumstances where consumers need the additional protection. But attention does need to be given to distortions of competition for legitimate on-line and off-line sellers.

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 then 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.

BUSINESSEUROPE's response:

We support Option 1: status quo. An extension to other contracts apart from distance sales and doorstep sales is not justified. The different national law systems have already established contractual remedies, which give the contracting parties the protection they need. There is no justification to introduce general contractual remedies in a Community instrument and would go beyond the scope of the review

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.

BUSINESSEUROPE's response:

We support Option 1: status quo. It not justified or sensible to create comprehensive European special provisions on the right to damages. The general issues of damage compensation should continue to be governed by national laws and goes beyond the scope of the review.

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

BUSINESSEUROPE's response:

We support Option 1: status quo. The rules of the consumer sales directive should not be extended. The proposed extension merits a broader and in-depth study.

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.

BUSINESSEUROPE's response:

We support Option 2: Second-hand goods should not fall within the scope of Community law.

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.

BUSINESSEUROPE's response:

We support Option 4: status quo. The definition and regulation of "delivery" should remain a part of national civil law. If a common Community solution was decided, we would prefer Option 2. The freedom of contract has to be respected.

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.

BUSINESSEUROPE's response:

We support Option 2: status quo. Regulations governing the passing of risk should be decided at national level.

5.5 Conformity of goods

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.

BUSINESSEUROPE's response:

We support Option 1: status quo. The existing period limits professionals' responsibility and is a central consideration for business operations. The current regulation already contains a fair balance between the interests of enterprises and consumers and therefore should be respected.

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.

BUSINESSEUROPE's response:

We support Option 1: status quo. We do not support an extension of the period of guarantee in the case of recurring repairs since this involves too many imponderables and would encourage abuses by consumers.

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).

BUSINESSEUROPE's response:

We support Option 2: this option can be considered in so far as the parties concerned in the purchase of second-hand goods can agree shorter periods of limitation. That provision is already contained in the directive on the sale of consumer goods. An amendment would only make sense if the period can be freely determined.

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.

BUSINESSEUROPE's response:

We support Option 1: an extension of the reversal of the burden of proof is not justified on objective grounds. The existing regulation is the result of an intense discussion between European businesses and consumers. The six-month solution in its present form is already a heavy burden for enterprises.

5.7 Remedies

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.

BUSINESSEUROPE's response:

We support Option 1: status quo. We consider that the current system strikes a fair balance between the interests of consumers and companies.

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.

BUSINESSEUROPE's response:

We support Option 1. A consumer's duty to notify the seller of the lack of conformity together with an exclusion of the possibility of pursuing further claims after expiry of the period would be a major contribution to legal certainty. Clear time limits provide certainty and predictability, which is in everybody's interest. It also works as an incentive for the consumer to act, which is also beneficial. Further, overly long or undefined timeframes tend to worsen the defect as consumers easily put off making the complaint.

5.9 Direct producers' liability for non-conformity

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

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.

BUSINESSEUROPE's response:

We support Option 1: status quo. "Direct producer liability" is not justified or appropriate. It would be a contravention of the system, drives up costs and creates a one-sided disadvantage for the supplier.

We strongly oppose introduction of direct liability of producers. Everybody is free to choose his/her contractual partner and to agree on the content individually (freedom of contract). The non-conformity always has to be assessed by the content of the concrete contract. Therefore it is logical that in case of any lack of conformity, the contractual partner by himself is responsible for the consequences.

The introduction of a direct liability would be a heavy financial burden for business and result in higher prices for consumers.

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.

BUSINESSEUROPE's response:

We support Option 1: status quo. Guarantees voluntarily offered by suppliers must not be made subject to statutory regulation since otherwise the incentives to offer them would be nullified. A matter of principle, we believe that guarantees are an important means of competition upon which detailed legal control would have a chilling effect, to the detriment of companies and consumers alike. We are firmly opposed to statutory regulation of commercial guarantees.

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.

BUSINESSEUROPE's response:

We support Option 1: status quo. There is no need for Community rules on the transferability of guarantees. The supplier should decide whether he is in a position to offer such guarantees and freedom to contract should be respected. It should be up to the producer to decide whether the guarantee is transferable or not. It must be noted that the guarantee is a voluntary and additional service of the producer.

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.

BUSINESSEUROPE's response:

We support Option 1: status quo. There is no need for Community rules on the transferability of guarantees. The supplier should decide whether he is in a position to offer such guarantees and freedom to contract should be respected.

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?

The role of non-legislative instruments such as self- and co-regulation and their potential to contribute to better regulation in the field of consumer protection should be further explored by the Commission. We believe that some of the issues being discussed within the review are also dealt with by self-regulation, for instance the specification of the information to be provided before conclusion of a contract. . We ask the Commission to take this into account when deciding on the way forward and the level of protection to be included in future proposals.