

# **A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback**

## **I. CONTEXT**

Under the Europe 2020 strategy, the Commission is currently tackling bottlenecks in the internal market to drive economic recovery. This includes its work on European contract law<sup>1</sup>. Contracts are essential for running businesses and making sales to consumers. They formalise an agreement between parties and can cover a broad range of matters, including the sale of goods and associated services such as repairs and maintenance.

Businesses and consumers wishing to carry out cross-border transactions must reckon with the existence of different national contract laws when operating in the internal market. This can lead to additional transaction costs, increased legal uncertainty for businesses and lack of consumer confidence and thus cause obstacles to cross-border trade. The Commission wants businesses and consumers to reap the full benefits of the internal market which is why it has taken the initiative to examine several options on how to ease cross-border transactions by making contract law more coherent across the EU.

The EU has been working on European contract law for a decade. With its 2001 Communication on European contract law<sup>2</sup>, the Commission launched a process of extensive public consultation on the problems arising from differences between Member States' contract laws and on potential actions in this field. In the light of the responses, the Commission issued an Action Plan in 2003<sup>3</sup>, proposing to improve the quality and coherence of European contract law by establishing a Common Frame of Reference (CFR) containing common principles, terminology and model rules. Between 2005 and 2009 a network of European contract law experts developed a Draft Common Frame of Reference which was the result of extensive comparative law research<sup>4</sup>. In parallel to this, analytical work was also carried out by the Association Henri Capitant des Amis de la Culture Juridique Française and the Société de Legislation Comparée drafting the *Principes Contractuels Communs*<sup>5</sup>.

The European Parliament has also been actively involved with European contract law ever since its first Resolution on the matter in 1989<sup>6</sup>. Just recently the European Parliament's Legal

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<sup>1</sup> COM(2010) 2020 final, page 21, 3.3.2010. The Single Market Act (COM(2011) 206 final, page 19, 13.4.2011), the Annual Growth Survey, Annex 1, progress report on Europe 2020 (COM(2011) 11 - A1/2, page 5), the Digital Agenda for Europe (COM(2010) 245 final 12, pages 13 and 37, 26.8.2010) and the Action Plan Implementing the Stockholm Programme (COM(2010) 171 final, pages 5 and 24, 20.4.2010), also mention the Commission's work on European contract law.

<sup>2</sup> COM(2001) 398, 11.7.2001.

<sup>3</sup> COM(2003) 68, 12.2.2003.

<sup>4</sup> Von Bar, C., Clive, E. and Schulte Nölke, H. (eds.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Munich, Sellier, 2009.

<sup>5</sup> Bénédicte Fauvarque-Cosson and Denis Mazeaud (eds.), European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules.

<sup>6</sup> Resolution of 26 May 1989 on action to bring into line the private law of the Member States, OJ C 158, 26.6.1989, p. 400, by rapporteur Nicolaos Gazis. See also the Resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States, OJ C 205, 25.7.1994, p. 518, by rapporteur Carlos Maria

Affairs Committee voted in support of a European contract law instrument to facilitate cross-border transactions<sup>7</sup>.

#### *Establishment of an Expert Group on a European contract law*

In April 2010, an Expert Group<sup>8</sup> was established to assist the Commission by means of a feasibility study and in making further progress on the development of a possible future European contract law instrument. The Expert Group was composed of legal practitioners, former judges and academics from across the European Union, appointed in a personal capacity with outstanding competence in the area of civil law, and in particular contract law. It represented a balance in terms of geographical origin and experiences, and reflected the different traditions of contract law across Europe<sup>9</sup>.

The Expert Group held monthly meetings. Observers from the European Parliament and the Council of Ministers participated in the meetings of the Expert Group.

#### *Consultation and involvement of stakeholders and legal practitioners*

- On 1 July 2010 the Commission published a 'Green Paper on policy options for progress towards a European contract law for consumers and businesses'<sup>10</sup> (Green Paper). The purpose of this Green Paper was to set out different options on how to strengthen the internal market by making progress in the area of European contract law, and to launch a public consultation on them.

The Green Paper consultation closed on 31 January 2011 and resulted in 320 responses<sup>11</sup>. The large number of responses, which are available on the Commission website, show a widespread interest in the subject of European contract law. While many respondents were interested in participating in this work, some did not want to provide in-depth comments on the nature, form and scope of the potential European contract law instrument without more detail on the policy options. A large number of respondents also stressed the importance of a comprehensive and sound impact assessment.

With regard to the main observations concerning the policy options set out in the Green Paper, many respondents saw value in option 1 (the publication of the work of the Expert Group) as well as option 2 (the introduction of a toolbox). There was little support for option 3 (a Commission Recommendation on European contract law).

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Bru Puron, the Resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member States: OJ C 140 E, 13.6.2002, p. 538, by rapporteur Klaus-Heiner Lehne, the Resolution of 2 September 2003 on the Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan, OJ C 76 E, 25.3.2004, p. 95, by rapporteur Klaus-Heiner Lehne, the Resolution of 23 March 2006 on European contract law and the revision of the acquis: the way forward, OJ C 292 E, 1.12.2006, p. 109-112, by rapporteur Klaus-Heiner Lehne and draftswoman Diana Wallis, the Resolution of 7 September 2006 on European contract law, OJ C 305 E, 14.12.2006, p. 247-248, by rapporteur Giuseppe Gargani, Resolution of 12 December 2007 on European contract law, OJ C323E, 18.12.2008, p. 364-365, by rapporteur Giuseppe Gargani, and the Resolution of 3 September 2008 on the common frame of reference for European contract law, OJ C 295E, 4.12.2009, p. 31-32, by rapporteur Klaus-Heiner Lehne.

<sup>7</sup> See the report of rapporteur Diane Wallis, which was adopted on 12 April 2011 (INI/2011/2013).

<sup>8</sup> Commission Decision 2010/233/EU of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, OJ L 105, 27.4.2010, pages 109-111.

<sup>9</sup> See a list of members in annex I.

<sup>10</sup> COM (2010) 348.

<sup>11</sup> Annex II provides statistics on the responses to the Green Paper consultation.

The opinions on option 4 (the introduction of an optional instrument) were more varied. Several Member States and a large number of other respondents said they could support an optional instrument, provided that it fulfilled certain conditions (for example: had a high level of consumer protection, a clear and user-friendly nature, was clear about its link with the proposed Consumer Rights Directive and other EU-legislation). Some respondents expressed a preference for option 6 (a Regulation establishing a European contract law that would replace Member States' national contract laws). A large number of respondents did not want to take a position at that time, because they did not know the detail of the work of the Expert Group. Others expressed concerns about the level of consumer protection or warned of legal uncertainty (i.e. because of the initial absence of case law).

Of those respondents who commented on the scope of a potential European contract law instrument, most only expressed opinions on a toolbox (option 2) and an optional instrument (option 4). Out of those respondents who made explicit comments concerning the scope of the toolbox (option 2), the majority believed it should be as comprehensive as possible, i.e. should not be restricted to certain types of contract and should have a rather broad scope. Out of those respondents who made explicit comments concerning the scope of the optional instrument (option 4), the majority seemed in favour of an instrument which focused on cross-border business to consumer (B2C) sales contracts.

- In July 2010, the Commission established a Group of Key Stakeholder Experts ('Sounding Board') which represented different categories of persons affected by a possible European contract law instrument (businesses, consumers and legal practitioners)<sup>12</sup>. The stakeholder group met monthly, reviewed drafts of parts of the feasibility study prepared by the Expert Group and provided practical input on a regular basis, particularly on the level of consumer protection, legal certainty and clarity. This group submitted many useful suggestions which further increased the quality, clarity and usability of the work.
- In addition, individual contributions on the ongoing work of the Expert Group were sent by other interested stakeholders<sup>13</sup>.

## **II. THE PRACTICAL RELEVANCE OF DIFFERENCES IN NATIONAL CONTRACT LAWS**

The following examples illustrate how differences in national contract laws could lead in practice to additional transaction costs and increased legal uncertainty for businesses as well as a lack of confidence for consumers when they trade or shop across a border.

- *A small business limits its cross-border trade because of high transaction costs*

A British company of 6 people producing hand-made designer jewellery becomes famous after a celebrity wears one of its pieces at a gala dinner. Now that its products are popular, the

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<sup>12</sup> See annex III.

<sup>13</sup> For example, a group of members of the Judiciary of England and Wales submitted comments on three draft Chapters on formation of contract, content and effects of contracts and interpretation of contracts, which were already available on the Commission website, on 1 April 2011. The Law Society of England and Wales provided comments made by practitioners on those draft Chapters on 29 March and 20 April 2011.

company receives enquiries from all over Europe. In order to be able to distribute its products across Europe, it decides to set up an online shop which would be accessible by the whole of the EU. It believes the easiest way to do this would be to adapt its internet platform by translating its content into other languages. To make sure that this would be sufficient, the company contacts a lawyer and a software developer.

The lawyer advises to hire an expert in contract law from each relevant country as it would be necessary to check the relevant national laws (both consumer and contract) and draft an amended set of country specific terms and conditions. This exercise could cost around €8,850 per country (5 days work billed at €95 per hour). The cost for entering the market for all the other 26 Member States would therefore be €230,100.

The software developer explains that the current internet platform would need to be adapted to reflect the legal requirements for each country they sell to. The website would need to determine the consumer's country of residence, locate and retrieve the correct set of pages and display them in a correct language. This work would take between 2-6 weeks. The software developer would charge around €1,550 per week. The cost per country would be at least €3,100 and upon entering the other 26 Member States this would rise to €80,600.

The transaction costs for offering products in the whole of the EU would be about €10,000, this would be 50% more than the company's complete turnover of the previous year.

Upon seeing the amounts, the company decides that the maximum it can afford would be €25,000 – the approximate costs of entering two additional Member States. It decides to offer products only in the larger markets of Germany and France instead of selling it to all the other countries.

- *A consumer does not shop cross-border because she is uncertain about her rights and therefore faces a more restricted choice and a higher prices*

Mrs Korhonen lives in Turku, Finland. Her daughter Taru works in Paris. When returning to Finland, Taru is always shocked by the prices she has to pay for the same products in Turku compared to Paris. For example, clothing and footwear are about 30% more expensive in Finland than in France. Taru tries to encourage her mother to start shopping online and buy products like shoes of her favourite brand from France online. She could pay €10 (including the delivery costs) compared to €150 she pays in Turku. Her mother however, is sceptical and asks "what if the delivered shoes are of a different size than I ordered? Can I send them back? What if the sole wears out only after a week – can I ask for a replacement?" Mrs Korhonen is uncertain if she would have the same rights that she enjoys in Finland and is confident about, if she shops cross-border, and decides that it is safer to buy the shoes at a much higher price from the high street shop she goes to in Turku.

- *A business experiences difficulties in negotiating applicable law*

Mr. Kowalski, the owner of a small Polish company in Radom, develops a uniquely designed organic wooden bed for children. He takes part in a furniture fair organised in Kraków for which he pays a €2,500 participation fee. His beds attract the attention of two well known German and Italian retailers at the fair. Mr. Kowalski's company has the capacity to sell to both retailers and starts negotiations with both of them.

A few days later, Mr Kowalski contacts Ms Janowska, a local lawyer who advised him when he was setting up his company. He sends her both sales contracts in English with the agreed price of €750 for legal advice on these contracts. While examining the contracts, Ms Janowska discovers that they are both governed by German and Italian laws respectively. Ms Janowska is not familiar with either of the two legal systems. Therefore she recommends to Mr. Kowalski that he uses his own standard contract which is governed by Polish law. However, both the German and Italian partners do not want this, explaining that they are not familiar with Polish law and therefore prefer the contract to be covered by their national law. Ms Janowska advises Mr Kowalski to hire an international law firm to assist him with the conclusion of the contracts. In view of their ongoing business relationship, she agrees not to bill him for this advice.

Mr Kowalski contacts an international law firm in Warsaw and learns that he will need to pay €5,000 for them to check each contract and to receive legal assistance in negotiating its terms with the other party. In light of his potential profit margin from these contracts, this is a significant amount for Mr Kowalski. He has so far invested €2,500 for the participation in the fair and at least two days of his time in contact with lawyers and his potential clients. He definitely does not want to lose these two deals, but he is frustrated that in order to comply with his legal rights and obligations he needs to check, for every potential client from a new Member State, another contract law regime. He now has a dilemma: Either he will need to spend an additional €10,000 to be sure he is complying with his legal rights and obligations stemming from the contracts or he will need to take the risk, sign the contracts as they stand and hope that no legal problems will arise in future.

### **III. THE MANDATE OF THE EXPERT GROUP ON EUROPEAN CONTRACT LAW**

#### *The working methods*

The Commission asked the Expert Group to select those parts of the Draft Common Frame of Reference – the result of extensive comparative law research launched by the Commission and produced by a network of European contract law experts between 2005 and 2009 – which were of direct relevance to contract law and to simplify, restructure, update and supplement the selected content.

In this process the Expert Group was also asked to take into consideration the *United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)*, the *Unidroit Principles of International Commercial Contracts*, as well as other research work conducted in this area, such as the *Principles of European Contract Law* prepared by the Commission on European Contract Law and the *Principes Contractuels Communs* of the Association Henri Capitant and Société de Legislation Comparée.

#### *The working premises*

The Commission asked the Expert Group to conduct a feasibility study on a draft instrument of European contract law whatever its legal form or nature. Given that the Commission had yet to take a formal position on any of the options set out in the Green Paper, the Expert Group was asked to work on an “as if” basis drafting a study that could be used in different scenarios.

#### Scope of application of the feasibility study

The Commission asked the Expert Group to conduct its feasibility study on a potential European contract law instrument that could be applicable to business-to-consumer contracts and business-to-business contracts.

#### Material scope of the feasibility study

The Commission asked the Expert Group to focus its feasibility study on a potential European contract law instrument covering sales contracts and service contracts associated with sales, such as installation or maintenance, provided by the seller or under the seller's responsibility (e.g. by a sub-contractor).

#### A self-standing instrument of European contract law

The Commission asked the Expert Group to conduct a feasibility study which would result in a self-standing and comprehensive text covering most aspects of a contractual relationship that would be of relevance for the contractual relationship in cross-border situations. Therefore certain topics which would be less relevant for cross-border contracts – such as rules on capacity, representation or assignment – were not covered by the Expert Group's work.

#### A user-friendly and clear text

The Commission asked the Expert Group to develop a text that would not only be concise, but also be user-friendly, both in its language and structure so it could be understood and used by businesses and consumers who would not necessarily be specialists in the area of contract law.

#### A high level of consumer protection

As part of the feasibility study, the Commission tasked the Expert Group with drafting contract law rules which would afford consumers a high level of protection in business-to-consumer contracts. As a starting point, the relevant EU *acquis* (i.e. the existing Directives) as well as the proposed Consumer Rights Directive as it is resulting from the legislative process would need to be incorporated.

#### The distinction between business-to-consumer and business-to-business contracts

For business-to-consumer contracts, the contract law rules providing consumer protection content would need to have a mandatory character once the instrument was chosen. The mandatory character of these consumer protection rules would always need to be clearly pointed out. For business-to-business contracts, freedom of contract would prevail. Almost all rules of the instrument would be default rules from which contractual parties could derogate. Notwithstanding this distinction, mindful of the weaker position of most SMEs, the Expert Group also drafted a number of rules which would afford businesses a degree of protection under certain circumstances. For example, if the other party included an unfair term in its standard terms and conditions that the SME had not expected, the law would give them some protection, by striking down the unfair term.

#### **IV. THE EXPERT GROUP'S TEXT**

The structure of the feasibility study of the Expert Group, which is attached to this document<sup>14</sup>, reflects the necessity to ensure the text is as concise as possible and as comprehensive as necessary, in order to cover the vast majority of practical problems which take place in practice in a cross-border contractual relationship. In order to ensure its user-friendliness and clarity, the Group has used explanatory headings and simple language.

Part I 'Introductory provisions' explains the meaning of certain concepts used in the instrument, such as 'consumer', 'damages' or 'durable medium'. It also states the general principles of contract law which all parties need to observe in their dealings, such as good faith and fair dealing. The principle of freedom of contract also assures parties that save mainly for the mandatory provisions of consumer protection, they can determine the contents of their contracts.

Part II 'Formation of contract and rights to withdraw or avoid' contains rules on how agreements are concluded between two parties as well as specific provisions which give consumers a right to withdraw from distance and off-premises contracts. Other provisions include the consumer's right to receive essential pre-contractual information not only in distance and off-premises contracts, but also in face-to-face contracts, as well as a provision which would enhance the consumer's ability to purchase by widely used payment methods.

Part III 'Assessing what is in the contract' makes general provisions for how contract terms need to be interpreted in case of doubt. It also contains rules on which contract terms may be unfair and are therefore invalid. The text would also ensure that, with the exception of the price and the main subject matter of the contract, terms in consumer contracts could be found unfair not only where they were supplied by the business in a standard form, but also where they were negotiated between the parties, if they significantly disadvantaged the consumer.

Part IV 'Obligations and remedies of the parties to a sales contract' looks closely at the rules specific to sales contracts which contain the obligations of the seller (for example to deliver goods in conformity with the contract) and of the buyer (for example to pay the price). This part also contains rules on the remedies for non-performance of buyers and sellers respectively. For instance, in business-to-business transactions, businesses have a right to cure a defective performance of the contract before the other party can make recourse to more serious remedies, such as termination of the contract or reduction of the price. In business-to-consumer contracts, consumers have a free choice between the right to repair or replacement, the right to withhold their own performance, termination of the contract, reduction of the price and damages for non-performance.

Part V 'Obligations and remedies of the parties to a related services contract' concerns cases where a seller provides, in close connection to a contract of sale, certain services such as installation, repair or maintenance. This part explains what specific rules apply in such a situation, in particular what the parties' rights and obligations under such contracts are.

Part VI 'Damages and interest, restitution and prescription' contains supplementary common rules on damages for loss and on interest to be paid for late payment. It also explains the rules

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<sup>14</sup> Annex IV.

which apply on what must be returned when a contract fails and on the effects of the lapse of time on the exercise of rights under a contract.

## V. NEXT STEPS

In its feasibility study, the Expert Group has delivered a text which strives to constitute a complete set of contract law rules covering those issues which, at a practical level, are relevant in a contractual relationship in the internal market of the European Union. It is now up to the Commission to decide if, how and to what extent this feasibility study could serve as a starting point for the preparation of a political follow-up initiative. In this sense the Commission services will use the Expert Group's text as a 'toolbox' in the preparation of a possible future initiative on European contract law.

The publication of the text of the Expert Group provides all interested parties with the full picture of the Expert Group's work and an additional opportunity for the Commission to receive input on the complete set of rules drawn up by the Expert Group as part of their feasibility study. Therefore all interested parties are invited to submit feedback on the issues listed below, at the latest by 1 July 2011 to the following e-mail address: [JUST-COMMUNICATION-A2@ec.europa.eu](mailto:JUST-COMMUNICATION-A2@ec.europa.eu)

1. On the one hand, a European contract law instrument should cover most of the problems which could appear in contractual practice. On the other hand, the instrument should also be user-friendly and therefore as concise as possible. To which extent does the text developed by the Expert Group meet these objectives? To which extent could it be improved?
2. For consumer contracts, Article 81 of the feasibility study extends the unfairness control of business-to-consumer contract terms, to terms which are individually negotiated (as opposed to covering only non-individually negotiated terms as in the existing EU legislation). Do you think this is appropriate?
3. Article 92 foresees an exceptional possibility to alter a contract due to change of circumstances. Do you think that this provision represents real added-value, especially in consumer contracts? Do you think that the procedure which leads to the alteration of a contract is appropriate?
4. According to Article 110, in business-to-business contracts, the seller of a faulty product has in principle a right to cure the defect. Do you consider this rule appropriate?
5. Article 177 determines that a buyer who avoids or terminates a contract is, as a matter of principle, liable if the goods to be returned have been destroyed in the meantime. Article 178 also includes an obligation for the buyer to pay for the use of the goods to be returned. However, this obligation only exists under certain, restricted circumstances. Thus the risk of destruction of the goods is placed on the buyer and the risk of depreciation mainly on the seller.  
Do you consider these rules appropriate, especially in business-to-consumer transactions?



6. Article 172 contains specific rules for consumers who are late with payments. In particular, the consumer is obliged to pay interest for late payment only 30 days after receipt of a notice informing him about this obligation and the interest rate. The interest rate is set at the average commercial bank short-term lending rate to prime borrowers. Do you think these rules are appropriate?
7. The text of the Expert Group only covers the durable medium on which digital content can be delivered. Do you think that a European contract law instrument should also cover the digital content itself (whether it is delivered on a durable medium or directly downloaded from the internet)?
  - a. If you consider it should, do you then believe that the rules on pre-contractual information in Article 13 should be modified? Do you for instance think that it would be appropriate to include specific rules on the functionality of digital content (i.e. the ways in which digital content can be used including any technical restrictions)?
  - b. If you consider it should, do you then think that the general rules on sales and remedies in Part IV should be modified? Or are you of the opinion that the instrument should provide for specific rules? In the latter case do you think for instance it would be appropriate to include a rule clarifying that for a digital content which is not provided on a one-time permanent basis, the business should ensure that the digital content remains in conformity with the contract throughout the contract period (e.g. by way of updates which are free of bugs)?
  - c. If you consider it should, do you then think that the general rule on passing of risk in Article 145 could be appropriate? Or do you think it may be necessary to include specific rules, for instance to ensure that the risks of loss or damage of the digital content pass only once the consumer or a third person designated by the consumer has obtained the control of the content. Do you think that the notion of 'obtaining control of digital content' would be sufficiently clear?

## **ANNEX I**

### **The composition of the Expert Group on European contract law**

Professor Hugh Beale (United Kingdom), QC, FBA, Law Commissioner for England and Wales from 2000 to 2007 and currently Professor of Law at the University of Warwick and visiting professor at the Universities of Amsterdam in the Netherlands and Oxford in the United Kingdom.

Professor Eric Clive (United Kingdom), CBE, FRSE, member of the Scottish Law Commission from 1981 to 2000 and visiting Professor of Scots Law at the University of Edinburgh.

Dr. Susanne Czech (Austria), Secretary General at the European E-commerce and Mail Order Trade Association.

Professor Fernando Gomez (Spain), Professor of Law and Economics at Universitat Pompeu Fabra in Barcelona.

Professor Luc Grynbaum (France), Professor of Law at Université Paris-Descartes in Paris.

Professor Torgny Håstad (Sweden), judge at the Swedish Supreme Court until December 2010 and currently Professor of Law at Uppsala University.

Professor Martijn Hesselink (Netherlands), Professor of Law at the University of Amsterdam.

Professor Miklos Kiraly (Hungary), Professor of Law at the Eötvös Loránd University in Budapest.

Professor Irene Kull (Estonia), Professor of Law at the Faculty of Law in Tartu.

Maître Pierre Levêque (France), Lawyer at the Paris Bar.

Professor Paulo Mota Pinto (Portugal), Professor of Law at the Universidade de Coimbra.

Professor Jerzy Pisulinski (Poland), Professor of Law at the Jagiellonian University in Kraków.

Mr Bob Schmitz (Luxembourg), representative of the Consumer Union of Luxembourg.

Professor Hans Schulte-Nölke (Germany), Professor of Law and Director at the European Legal Studies Institute in Osnabrück.

Professor Jules Stuyck (Belgium), lawyer at the Brussels Bar and Professor of Law at the University of Leuven.

Professor Anna Veneziano (Italy), Professor of Law at the Università degli Studi di Teramo.

Ms Ioana Lambrina Vidican (Romania), Notary in Bucharest.

**ANNEX II**

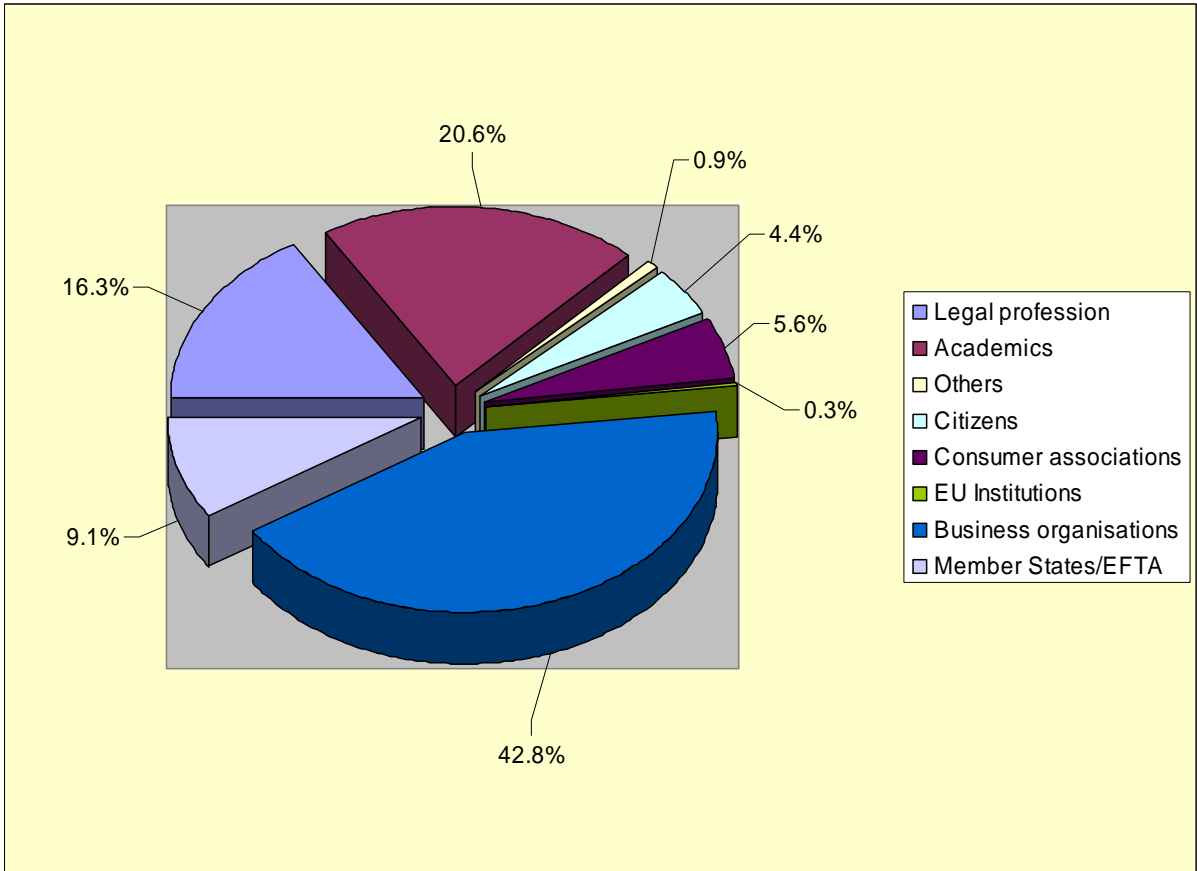


Figure 1: Responses to the Green Paper consultation by type of stakeholder.

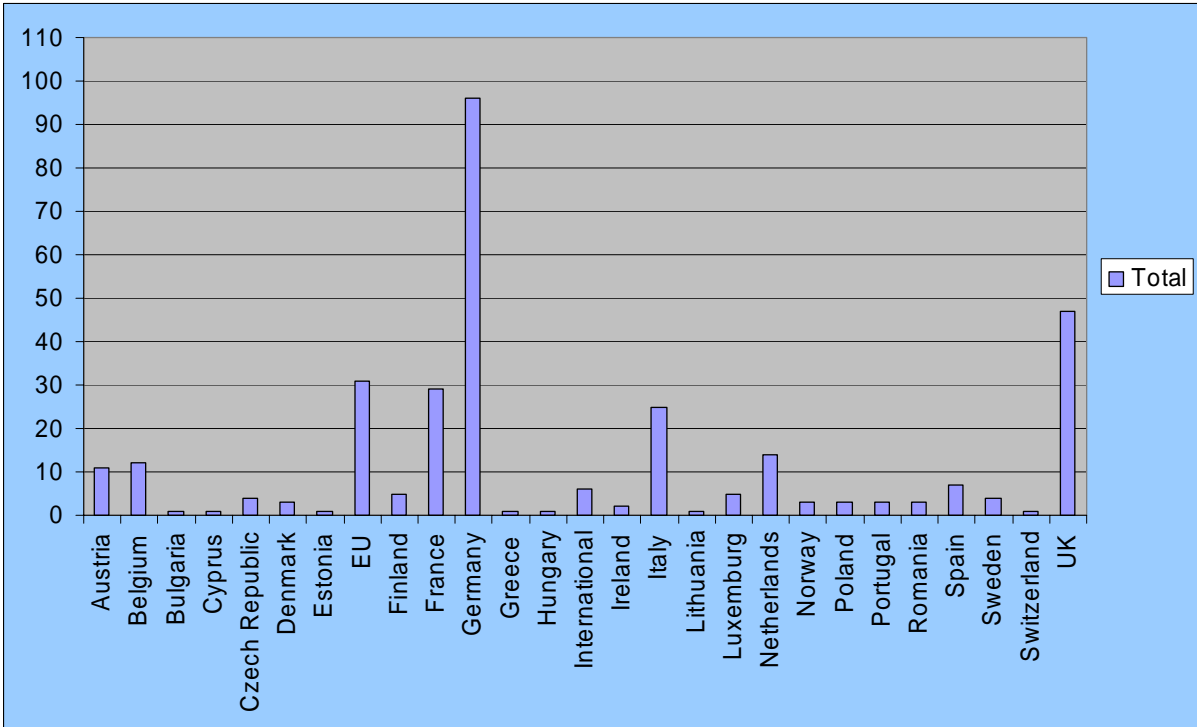


Figure 2: Responses to the Green Paper consultation by origin.

## ANNEX III

### The 'Sounding Board' of key stakeholder experts

- The 'Sounding Board' of key stakeholder experts comprised of the following stakeholders representing businesses (including small and medium sized companies), consumer organisations and the legal profession:

#### *European or international umbrella organisations:*

- European Consumer Organisation (BEUC);
- BusinessEurope;
- European Insurance and Reinsurance Federation (CEA);
- Council of Bars and Law Societies of Europe (CCBE);
- Council of the Notariats of the European Union (CNUE);
- European Banking Industry Committee (EBIC);
- Eurochambres;
- EuroCommerce;
- International Chamber of Commerce (ICC);
- European Association of Craft, Small and Medium-Sized Enterprises (UEAPME).

#### *Stakeholders based in a Member State, nominated by BEUC:*

- Danish Consumer Organisation;
- Slovenian Consumer Organisation;
- Verbraucherzentrale Bundesverband;
- British consumer association Which?.

#### *Stakeholders based in a Member State, nominated by Business Europe, Eurochambres, EuroCommerce, ICC or UEAPME:*

- British Retail Consortium;
- French Federation for Franchise;
- Heating and Ventilating Contractors Association;
- Siemens;
- Teknikforetagen;
- Unie van Zelfstandige Ondernemers (UNIZO);
- Verband Deutscher Maschinen- und Anlagenbau;
- Wirtschaftskammer Österreich;
- Zentralverband des Deutschen Handwerks;
- Zentralverband Elektrotechnik und Elektroindustrie e.V.

#### *Legal practitioners based in a Member State nominated by CCBE or CNUE:*

- Working groups legal practitioners from France, Germany, Italy, Spain and the United Kingdom;
- Österreichische Notariatskammer.

- The 'Sounding Board' of key stakeholder experts held nine half day meetings during which the following topics and chapters of the feasibility study were discussed:

*7th September 2010:*

- the working methods of the 'Sounding Board';
- the structure of the Expert Group's text;
- the definition of a contract.

*30th September 2010:*

- good faith and fair dealing within a contractual relationship;
- interpretation of contracts;
- formation of contracts;
- the relationship between a European contract law instrument and international private law
- contents and effects of contracts.

*28th October 2010:*

- pre-contractual information duties;
- the principle of change of circumstances
- validity of contracts.

*17th November 2010:*

- performance of a contract;
- update on the preparation of the impact assessment.

*20th December 2010:*

- non-performance of a contract;
- update on the preparation of the impact assessment.

*26th January 2011*

- the rights and obligations arising from a contract of sales;
- non-performance and remedies in case of a contract of sales;
- update on the preparation of the impact assessment.

*16th February 2011*

- the rights and obligations arising from a contract of sales;
- Damages;
- update on the preparation of the impact assessment.

*22nd March 2011*

- Prescription;
- the level of consumer protection;
- Restitution;
- update on the preparation of the impact assessment.

*12th April 2011*

- the structure of the Expert Group's text;
- the rights and obligations arising from a services contract;
- Unfair terms.

## ANNEX IV

# Commission Expert Group on European Contract Law Feasibility study for a future instrument in European Contract Law 3 May 2011

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## **Part I      Introductory provisions**

### **Chapter 1    General**

#### **Section 1    Application of the instrument**

##### Article 1: Interpretation and development

- (1) This instrument is to be interpreted and developed autonomously and in accordance with its objectives and the principles underlying it.*
- (2) Issues within the scope of the instrument but not expressly settled by it are to be settled in accordance with the principles underlying it without recourse to national laws.*
- (3) Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.*

##### Article 2: Definitions

*For the purpose of this instrument, the following definitions apply:*

- (1) 'business' means any natural or legal person who is acting for purposes relating to that person's trade, business, craft or profession;*
- (2) 'business premises' means:*
  - (a) any immovable retail premises where a business carries on activity on a permanent basis, or*
  - (b) any movable retail premises where a business carries on activity on a usual basis;*
- (3) 'consumer' means any natural person who is acting for purposes which are outside his or her trade, business, craft or profession;*
- (4) 'consumer sales contract' means a sales contract where the seller is a business and the buyer is a consumer;*
- (5) 'contract' means an agreement between two or more parties giving rise to obligations or other legal effects;*
- (6) 'court' includes an arbitral tribunal;*
- (7) 'damages' means a sum of money to which a person may be entitled as compensation for some loss, injury or damage;*
- (8) 'distance contract' means any sales or service contract between a business and a consumer concluded without the simultaneous physical presence of the business and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;*
- (9) 'durable medium' means any medium which enables a party to store information addressed personally to that party in a way accessible for future reference for a period of*



*time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;*

*(10) 'good faith and fair dealing' means a standard of conduct characterised by honesty, loyalty and consideration for the interests of the other party to the transaction or relationship in question;*

*(11) 'goods' means corporeal movables;*

*(12) 'loss' means economic and non-economic loss; non-economic loss includes pain and suffering, impairment of the quality of life and loss of enjoyment;*

*(13) 'off-premises contract' means any sales or services contract between a business and a consumer:*

*(a) concluded in the simultaneous physical presence of the business, or anyone acting in the name or on behalf of the business, and the consumer in a place which is not the business's premises, or concluded on the basis of an offer made by the consumer in the same circumstances; or*

*(b) concluded on the business premises or through any means of distance communication after the consumer was personally and individually addressed in a place which is not the business's premises in the simultaneous physical presence of the business, or anyone acting in the name or on behalf of the business, and the consumer; or*

*(c) concluded during an excursion organised by the business or of anyone acting in the name or on behalf of the business with the aim or effect of promoting and selling goods or services to the consumer;*

*(14) 'person' means a natural or legal person;*

*(15) 'sales contract' means any contract under which a business transfers or undertakes to transfer the ownership of goods to another person (the buyer), and the buyer undertakes to pay the price; it includes a sales contract under which the seller is to manufacture or produce the goods for the buyer;*

*(16) 'service contract' means any contract under which a business supplies or undertakes to supply a service to a customer;*

*(17) 'standard terms' means terms which have been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties.*

### Article 3: Mixed-purpose contracts

*(1) Any reference to a sales contract in this instrument includes a reference to a sales contract under which the seller undertakes to perform a service for the buyer in relation to the goods.*

*(2) Where a contract provides both for the sale of goods and for the provision of a service, the rules of Part IV apply to the obligations and remedies of the parties as seller and buyer and the rules of Part V apply to the obligations and remedies of the parties as service provider and customer.*

#### Article 4: Reasonableness

*(1) Reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices.*

*(2) Any reference to what can be expected of or by a person, or in a particular situation, is a reference to what can reasonably be expected.*

#### Article 5: Terms “not individually negotiated”

*(1) A term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms.*

*(2) Where one party supplies a selection of terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.*

*(3) A party who claims that a term supplied as part of standard terms has since been individually negotiated bears the burden of proving that it has been.*

*(4) In a contract between a business and a consumer, the business bears the burden of proving that a term supplied by the business has been individually negotiated.*

*(5) In contracts between a business and a consumer, terms drafted by a third party are considered to have been supplied by the business, unless the consumer introduced them to the contract.*

#### Article 6: Meaning and effects of termination of a contract

*(1) To ‘terminate’ a contract means to bring to an end the rights and obligations of both parties under the contract with the exception of those arising under any term of the contract providing for the settlement of disputes or any other term which is to operate even after termination.*

*(2) Payments due and damages for any non-performance before the time of termination remain payable. Where the termination is for non-performance, for anticipated non-performance or for inadequate assurance of performance, the terminating party is also entitled to damages in lieu of the other party’s future performance.*

*(3) The effects of termination regarding the repayment of the price and the return of the goods, and other restitutionary effects, are governed by the rules on restitution in Chapter 18.*

*(4) Where a sales contract is terminated any related services contract is also terminated.*

## **Section 2    General principles**

### Article 7: Freedom of contract

- (1) Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.*
- (2) Parties may exclude the application of any of the following rules, or derogate from or vary their effects, except as otherwise provided.*

### Article 8: Good faith and fair dealing

- (1) Each party has a duty to act in accordance with good faith and fair dealing.*
- (2) Breach of the duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.*
- (3) The duty may not be excluded or limited by contract.*

### Article 9: No form required

*Unless otherwise stated in this instrument, a contract, statement or any other act which is governed by it need not be made in or evidenced by a particular form.*

## **Section 3    Other general rules**

### Article 10: Notice

- (1) This Article applies in relation to the giving of notice for any purpose under these rules. “Notice” includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.*
- (2) A notice may be given by any means appropriate to the circumstances.*
- (3) A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.*

- (4) A notice reaches the addressee:*
- (a) when it is delivered to the addressee;*
  - (b) when it is delivered to the addressee's place of business or, where there is no such place of business or the notice does not relate to a business matter, to the addressee's habitual residence;*
  - (c) in the case of a notice transmitted by electronic means, when it can be accessed by the addressee; or*
  - (d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay.*
- (5) A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.*
- (6) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the rule in paragraph (4) or derogate from or vary its effects.*

#### Article 11: Computation of time

- (1) The provisions of this Article apply in relation to the computation of time for any purpose under this instrument.*
- (2) Subject to the following provisions of this Article:*
- (a) a period expressed in days starts at the beginning of the first hour of the first day and ends with the expiry of the last hour of the last day of the period;*
  - (b) a period expressed in weeks, months or years starts at the beginning of the first hour of the first day of the period, and ends with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs; with the qualification that if, in a period expressed in months or in years, the day on which the period should expire does not occur in the last month, it ends with the expiry of the last hour of the last day of that month;*
  - (c) if a period includes part of a month, the month is considered to have thirty days for the purpose of calculating the length of the part.*
- (3) Where a period expressed in days, weeks, months or years is to be calculated from a specified event, action or time the day during which the event occurs, the action takes place or the specified time arrives is not considered to fall within the period in question.*
- (4) The periods concerned include Saturdays, Sundays and public holidays, save where these are expressly excepted or where the periods are expressed in working days.*
- (5) Where the last day of a period is a Saturday, Sunday or public holiday at the place where a prescribed act is to be done, the period ends with the expiry of the last hour of the following working day. This provision does not apply to periods calculated retroactively from a given date or event.*
- (6) Any period of two days or more is regarded as including at least two working days.*
- (7) Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is*

*to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee.*

*(8) In this Article:*

*(a) “public holiday” with reference to a member state, or part of a member state, of the European Union means any day designated as such for that state or part in a list published in the official journal; and*

*(b) “working days” means all days other than Saturdays, Sundays and public holidays.*

#### Article 12: Unilateral statements or conduct

*(1) A unilateral statement indicating intention is to be interpreted in the way in which it could be expected to be understood by the person to whom it is addressed.*

*(2) However, if the person making the statement intended an expression used in it to have a particular meaning and the other party was aware, or could be expected to have been aware, of this intention, the expression is to be interpreted in the way intended by the person making the statement.*

*(3) Articles 57 to 63 apply with appropriate adaptations to the interpretation of unilateral statements indicating intention.*

*(4) The rules on defects in consent in Chapter 5 apply with appropriate adaptations to unilateral statements indicating intention which are intended to have legal effect.*

*(5) In this Article any reference to a statement includes a reference to conduct which can be regarded as the equivalent of a statement.*

## **Part II Making a binding contract**

### **Chapter 2 Pre-contractual information and negotiation**

#### **Section 1 Pre-contractual information to be given by a business dealing with a consumer**

Article 13: General duty to disclose information about goods and services in contracts with consumers

*(1) Before the conclusion of a contract for the supply of goods or services by a business to a consumer, the business has a duty to supply the following information to the consumer:*

- (a) the main characteristics of any goods or services to be supplied, to an extent appropriate to the goods or services, so far as the characteristics are not evident from the display of the goods;*
- (b) the price inclusive of taxes, or where the nature of the goods or services means that the price cannot be calculated in advance, the manner in which the price is to be calculated;*
- (c) any additional charges the consumer must pay the business in order to obtain possession of the goods;*
- (d) the duration of the contract and the minimum duration of the consumer's obligations where applicable or, if the contract is for an indefinite period, the conditions for terminating the contract; and*
- (e) the address and identity of the business with which the consumer is transacting, in accordance with Article 16.*

*(2) The information provided, other than the addresses required by paragraph (1)(e), forms an integral part of the contract.*

Article 14: Duty to provide information when concluding a distance or off-premises contract with a consumer

*(1) A business concluding a distance contract or off-premises contract with a consumer has a duty to provide the following information to the consumer, before the contract is made or the consumer is bound by any offer:*

- (a) the main characteristics of any goods or services to be supplied, to an extent appropriate to the medium of communication and to the goods or services;*
- (b) the price, in accordance with Article 15;*
- (c) the address and identity of the business with which the consumer is transacting, in accordance with Article 16;*
- (d) the terms of the contract, in accordance with Article 17;*
- (e) any available right of withdrawal, in accordance with Article 18;*
- (f) the existence and the conditions of after-sale customer assistance, after-sale services, commercial guarantees and complaints handling policy where applicable; and*
- (g) the possibility for out-of-court dispute resolution, where applicable.*

***(2) The information provided, other than the addresses required by paragraph(1)(c), forms an integral part of the contract.***

***(3) This Article does not apply where the contract is:***

- (a) for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household, and which are physically supplied by a business on frequent and regular rounds to the consumer's home, residence or workplace;***
- (b) a distance contract concluded by means of an automatic vending machine or automated commercial premises;***
- (c) an off-premises contract if the price or, where multiple contracts were concluded at the same time, the total price of the contracts does not exceed EUR 15 or the equivalent sum in the currency agreed for the contract price.***

Article 15: Information about price and additional charges when concluding a distance or off-premises contract with a consumer

***(1) The information to be provided under Article 14 (1) (b) must include:***

- (a) the price inclusive of taxes, or where the nature of the goods or services means that the price cannot be calculated in advance, the manner in which the price is calculated; and***
- (b) any additional freight, delivery or postal charges and any other costs or, where these cannot reasonably be calculated in advance, the fact that such additional charges and costs may be payable.***

***(2) In the case of a service contract requiring payment of a subscription, the information must include the total subscription costs per periodical time unit. Where the total subscription cost cannot be calculated in advance, the manner in which the price is calculated must be provided.***

***(3) If the business has not complied with the information requirements on additional charges or other costs as referred to in paragraphs (1)(b) and (2), the consumer is not liable to pay the additional costs and charges.***

Article 16: Information about address and identity of business when concluding a distance or off-premises contract with a consumer

***The information to be provided under Articles 13 (1) (e) and 14 (1) (c) must include:***

- (a) the identity of the business, such as its trading name,***
- (b) the geographical address at which the business is established;***
- (c) details enabling the consumer to contact the business rapidly and communicate with it directly and, as the case may be, by electronic means;***
- (d) where applicable, the geographical address and identity of any other business on whose behalf the business is acting; and***
- (e) if it is different from the business's geographical address, the geographical address of the business (and where applicable that of the business on whose behalf it is acting) to which the consumer should address any complaints.***

Article 17: Information about the terms of the contract when concluding a distance or off-premises contract with a consumer

***(1) The information to be provided under Article 14 (1) (d) must include the terms or arrangements as to:***

***(a) payment;***

***(b) the time and methods of delivery of the goods or performance of the services;***

***(c) where relevant, the duration of the contract and the minimum duration of the consumer's obligations or, if the contract is for an indefinite period, the conditions for terminating the contract; and***

***(d) deposits or other financial guarantees to be paid or provided by the consumer at the request of the business, where applicable.***

***(2) The information must also include the existence of the consumer's rights in respect of non-conformity.***

Article 18: Information about withdrawal rights when concluding a distance or off-premises contract with a consumer

***(1) Where the consumer has a right of withdrawal under Chapter 4, the information to be provided under Article 14 (1) (e) must include***

***(a) the conditions, time limit and procedures for exercising that right in accordance with Annex I(A), as well as the standard withdrawal form set out in Annex I(B); and***

***(b) if the consumer can exercise the right of withdrawal after having made a request for the provision of services to begin during the withdrawal period, that the consumer would be liable to pay the business reasonable costs according to Article 43 (9).***

***(2) The duty to provide the information required by paragraph (1) may be fulfilled by supplying to the consumer the Model Withdrawal Information Form set out in Annex I(A).***

***(3) Where a right of withdrawal does not apply in accordance with Article 40 (2) (c) to (h) and (3), the information to be provided under Article 14 (1) (e) must include a statement that the consumer will not benefit from a right of withdrawal.***

Article 19: Off-premises contracts: further information requirements and confirmation

***For an off-premises contract, the business must provide the information to be provided under Article 14 and a confirmation of the contract, in plain, intelligible language and on a durable medium. The business must provide the information and the confirmation on paper if the consumer so requests.***



Article 20: Distance contracts: further information and other requirements

- (1) When a consumer contacts a business with a view to concluding a distance contract, the business must as soon as is feasible inform the consumer of the cost of using the means of distance communication where it is calculated other than at the basic rate.*
- (2) When a business initiates a telephone call to a consumer, with a view to concluding a distance contract, the business must, at the beginning of the conversation with the consumer, disclose its identity and, where applicable, the identity of the person on whose behalf it is making the call and the commercial purpose of the call.*
- (3) For a distance contract, the information required by Article 14 must:*
- (a) be given in a way that is appropriate to the means of distance communication used;*
  - (b) be in plain and intelligible language; and*
  - (c) so far as it is provided on a durable medium, be legible.*
- (4) If the distance contract is concluded through a medium which allows limited space or time to display the information, the business must provide the minimum information required by this paragraph on that particular medium prior to the conclusion of such a contract, and must also inform the consumer where all the information referred to in Article 14 is available. The minimum information required is:*
- (a) the main characteristics of the goods or services, as required by Article 14 (1) (a)*
  - (b) the total price, including all items referred to in Article 14 (1) (b) and Article 15 (1) and (2); and*
  - (c) where relevant, the duration of the contract; and if the contract is for an indefinite period, the requirements for terminating the contract, referred to in Article 17 (1) (c).*
- (5) Where a distance contract which would oblige the consumer to make a payment is to be concluded by electronic means, neither the contract nor any offer is binding on the consumer until the consumer has explicitly confirmed the information required by paragraph 1 and by Articles 15 (1) and (2) and 17 (1) (c). A consumer who elects to treat the contract or offer as not binding is entitled to recover any payments made.*
- (6) When the business takes the initiative of contacting the consumer by telephone with a view to concluding a distance contract, the consumer is not bound until the consumer has received a confirmation from the business and has signed the offer or has sent written consent.*
- (7) The business must give the consumer a confirmation of the contract concluded and all the information referred to in Article 14 on a durable medium, in reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or when the performance of the service begins, unless the information has already been given to the consumer prior to the conclusion of the distance contract on a durable medium.*

## Article 21: Burden of proof

*The business bears the burden of proof that it has provided the information required by this Section.*

## Article 22: Mandatory nature of rules

*In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of the Articles of this Section or derogate from or vary their effects.*

## **Section 2 Pre-contractual information to be given by a business dealing with another business**

### Article 23: Duty to disclose information about goods and services in contracts between businesses

*(1) Before the conclusion of a contract for the supply of goods or services by a business to another business, the supplier has a duty to disclose to the other business any information concerning the main characteristics of any goods or services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.*

*(2) In determining whether paragraph (1) requires a party to disclose any information, regard is to be had to all the circumstances, including:*

- (a) whether the party had special expertise;*
- (b) the cost to the party of acquiring the relevant information;*
- (c) the ease with which the other party could have acquired the information by other means;*
- (d) the nature of the information;*
- (e) the apparent importance of the information to the other party; and*
- (f) good commercial practice in the situation concerned.*

### **Section 3     Duty to ensure information correct**

Article 24: Duty to ensure information supplied is correct

*(1) A party who supplies information before or at the time a contract is made, whether in compliance with the duties imposed by the Articles of this Chapter or otherwise, has a duty to take reasonable care to ensure that the information supplied is correct and is not misleading. A party to whom incorrect or misleading information has been supplied in breach of this duty, and who reasonably relies on that information in concluding a contract with the party who supplied it, has the remedies set out in Article 25.*

*(2) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

### **Section 4     Remedies for breach of information duties**

Article 25: Remedies for breach of information duties

*(1) Where a business has failed to comply with any duty to provide information under the preceding Articles of this Chapter and a contract has been concluded, and as a result of the incorrect information or the absence of information the other party reasonably understood that the business was undertaking an obligation, the business will have that obligation.*

*(2) In cases not falling within paragraph (1), where a party has failed to comply with any duty imposed by the preceding Articles of this Chapter and as a result a contract has been concluded which the other party would not have concluded, or would not have concluded on the same terms, the first party is liable for loss caused to the other party by the failure. Articles 165, 166 and 167 apply with appropriate adaptations.*

*(3) The remedies provided under this Article are without prejudice to any remedy which may be available under Articles 42 (3), 45 or 46.*

*(4) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

## **Section 5     Contracts to be concluded by electronic means**

### Article 26: Duties where contract to be concluded by electronic means

- (1) This Article applies where a business provides the means for concluding a contract and where those means are electronic and do not involve any individual communication on the part of the business.*
- (2) The business must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer.*
- (3) The business must provide information about the following matters before the other party makes or accepts an offer:*
- (a) the technical steps to be taken in order to conclude the contract;*
  - (b) whether or not a contract document will be filed by the business and whether it will be accessible;*
  - (c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;*
  - (d) the languages offered for the conclusion of the contract;*
  - (e) any contract terms used.*
- (4) The business must ensure that the contract terms referred to in paragraph (3)(e) are made available in alphabetical or other intelligible characters by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.*
- (5) The business must acknowledge by electronic means and without undue delay the receipt of an offer or an acceptance sent by the other party.*
- (6) Where a business has failed to comply with a duty under paragraphs (2) – (5) and a contract has been concluded in the circumstances there stated, the other party has:*
- (a) a right to damages in accordance with Article 25; and*
  - (b) a right to withdraw from the contract by giving notice to the business within the period specified in Article 42, even if the other party is not a consumer.*
- (7) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

## **Section 6     Duties to negotiate in good faith and to respect confidentiality**

### Article 27: Negotiations contrary to good faith and fair dealing

- (1) A person is free to negotiate and is not liable for failure to reach an agreement.*

*(2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.*

*(3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach.*

*(4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.*

#### Article 28: Breach of confidentiality

*(1) If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for that party's own purposes.*

*(2) A party who is in breach of the duty is liable for any loss caused to the other party by the breach and may be ordered to pay over to the other party any benefit obtained by the breach.*

## Chapter 3 Conclusion of contract

### Article 29: Requirements for the conclusion of a contract

- (1) A contract is concluded if:*
- (a) the parties reach an agreement;*
  - (b) they intend the agreement to have legal effect; and*
  - (c) the agreement, supplemented if necessary by rules of law, has sufficient content and certainty to be given legal effect.*
- (2) Agreement may be reached by acceptance of an offer or by other statements or conduct.*
- (3) The intention of the parties that the agreement will have legal effect is to be determined from their statements and conduct interpreted in accordance with the rules on interpretation in Article 12.*
- (4) If one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached.*

### Article 30: Offer

- (1) A proposal is an offer if:*
- (a) it is intended to result in a contract if it is accepted; and*
  - (b) it has sufficient content and certainty for there to be a contract.*
- (2) An offer may be made to one or more specific persons or to the public.*
- (3) Unless the circumstances indicate otherwise, a proposal by a business to supply goods at a stated price, made by a display of goods or made in a public advertisement or a catalogue referring to an identified stock, is an offer to any person who may lawfully buy the goods to supply them at that price until the goods displayed or the stock is exhausted.*

### Article 31: Revocation of offer

- (1) An offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.*
- (2) An offer made to the public can be revoked by the same means as were used to make the offer.*
- (3) A revocation of an offer is ineffective if:*
- (a) the offer indicates that it is irrevocable;*
  - (b) the offer states a fixed time for its acceptance; or*

*(c) it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.*

#### Article 32: Rejection of offer

*When a rejection of an offer reaches the offeror, the offer lapses.*

#### Article 33: Acceptance

*(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.*

*(2) Silence or inactivity is not in itself acceptance.*

#### Article 34: Time of conclusion of the contract

*(1) Where an acceptance is sent by the offeree the contract is concluded when the acceptance reaches the offeror.*

*(2) Where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror.*

*(3) Where by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by conduct without notice to the offeror, the contract is concluded when the offeree begins to act.*

#### Article 35: Time limit for acceptance

*(1) An acceptance of an offer is effective only if it reaches the offeror within any time limit fixed by the offeror.*

*(2) Where no time limit has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time.*

*(3) Where an offer may be accepted by doing an act without notice to the offeror, the acceptance is effective only if the act is done within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.*

#### Article 36: Late acceptance

*(1) A late acceptance is effective as an acceptance if without undue delay the offeror informs the offeree that the offeror is treating it as an effective acceptance.*

*(2) Where a letter or other communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed.*

#### Article 37: Modified acceptance

*(1) A reply by the offeree which states or implies additional or different terms which materially alter the terms of the offer is a rejection and a new offer.*

*(2) A reply which gives a definite assent to an offer is an acceptance even if it states or implies additional or different terms, provided that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.*

*(3) A reply which states or implies additional or different terms is always a rejection of the offer if:*

*(a) the offer expressly limits acceptance to the terms of the offer;*

*(b) the offeror objects to the additional or different terms without undue delay; or*

*(c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.*

#### Article 38: Conflicting standard terms

*(1) Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard terms, a contract is nonetheless concluded. The standard terms are part of the contract to the extent that they are common in substance.*

*(2) No contract is concluded if one party:*

*(a) has indicated in advance, explicitly, and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or*

*(b) without undue delay, informs the other party of such an intention.*

#### Article 39: Unsolicited goods or services

*(1) Where a business supplies unsolicited goods or unsolicited services to a consumer no contract arises from the consumer's failure to respond or from any other action or inaction*



*by the consumer in relation to the goods or services, and the consumer is exempted from any other liability to pay.*

*(2) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

## Chapter 4 Rights to withdraw

### Article 40: Right of withdrawal

- (1) The consumer has a right to withdraw during the period provided in Article 42, without giving any reason, and at no cost to the consumer except as provided in Article 43, from:*
- (a) a distance contract, or*
  - (b) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 15 or the equivalent sum in the currency agreed for the contract price.*
- (2) Paragraph (1) does not apply to:*
- (a) a contract concluded by means of an automatic vending machine or automated commercial premises;*
  - (b) a contract for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household and which are physically supplied by the business on frequent and regular rounds to the consumer's home, residence or workplace;*
  - (c) a contract for the supply of goods for which the price depends on fluctuations in the financial market which cannot be controlled by the business;*
  - (d) a contract for the supply of goods which are:*
    - (i) made to the consumer's specifications, or*
    - (ii) clearly personalised;*
  - (e) a contract for the supply of goods which are liable to deteriorate or expire rapidly;*
  - (f) a contract for the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after a certain delay and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the business;*
  - (g) a contract for the unit sale of a newspaper, periodical or magazine excluding any form of subscription;*
  - (h) a contract concerning catering or the provision of services related to leisure activities which provides for a specific date or period of performance.*
- (3) Paragraph (1) does not apply in the following situations:*
- (a) where the goods supplied were sealed, have been unsealed by the consumer and are not then suitable for return due to health protection or hygiene reasons;*
  - (b) where the goods supplied have, according to their nature, been inseparably mixed with other items after delivery;*
  - (c) where the goods supplied were sealed audio or video recordings or computer software and have been unsealed by the consumer.*
- (4) Where the consumer has made an offer which, if accepted, would lead to the conclusion of a contract from which there would be a right to withdraw under this Chapter the consumer may withdraw the offer even if it would otherwise be irrevocable.*

#### Article 41: Exercise of right to withdraw

- (1) The consumer may exercise the right to withdraw within the period of withdrawal specified in Article 42.*
- (2) The right to withdraw is exercised by notice to the business at the address indicated by the latter. The consumer may use the standard withdrawal form set out in Annex I(B) or any other unequivocal statement addressed to the business.*
- (3) Where the business gives the consumer the option of submitting the standard withdrawal form electronically on the business's website, and the consumer does so, the business has a duty to communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay. The business is liable for any loss caused to the other party by a breach of this duty.*
- (4) The consumer has the burden of proving that the right of withdrawal has been exercised in accordance with this Article.*

#### Article 42: Withdrawal period

- (1) A right to withdraw may be exercised by the consumer at any time before the end of the withdrawal period specified in paragraphs (2) and (3).*
- (2) The withdrawal period expires after fourteen days from:*
  - (a) in the case of a sales contract, including a sales contract under which the seller also agrees to provide related services:*
    - (i) the day when the consumer has taken delivery of the goods; or*
    - (ii) where the goods consist of multiple lots or pieces, the day when the consumer has taken delivery of the last lot or piece; or*
    - (iii) where the contract is for regular delivery of goods during a defined period of time, the day when the consumer has taken delivery of the first item; or*
    - (iv) where the contract is for the sale of multiple goods ordered by the consumer in one order and delivered separately, for each of the individual items ordered the day when the consumer has taken delivery of that item;*
  - (b) in the case of a contract for related services made after the goods have been delivered, the day of the conclusion of the contract.*
- (3) If the business has not provided the consumer with the information referred to in Articles 14 (1) (a), 15, 16 (a) - (d) or 18 (1), or if the information given does not comply with Articles 19 or 20(7), the withdrawal period expires:*
  - (a) after six months from the day referred to in paragraph 2 (a) – (e); or*
  - (b) where the business provides the consumer with this information within those six months, after fourteen days from the day the consumer receives the information.*
- (4) A notice of withdrawal is timely if dispatched before the end of the withdrawal period.*

## Article 43: Effects of withdrawal

**(1) *Withdrawal terminates:***

- (a) *the obligations of both parties under the contract; or***
- (b) *in the case of a withdrawal of an offer under Article 40 (4), the right of the business to conclude a contract by accepting the offer.***

**(2) *The business must reimburse all payments received from the consumer without undue delay and no later than fourteen days from the day on which the business receives the notice of withdrawal.***

**(3) *In the case of a contract for the sale of goods, the business may withhold the reimbursement until it has received the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earlier, unless the business has offered to collect the goods.***

**(4) *The consumer must return the goods or hand them over to the business or its representative without undue delay and no later than fourteen days from the day on which the consumer informs the business of the withdrawal, unless the business has offered to collect the goods. This deadline is met if the goods are sent back by the consumer before the period of fourteen days has expired.***

**(5) *The consumer is liable for the direct cost of returning the goods, unless the business has agreed to bear that cost. The consumer is not liable for any further costs.***

**(6) *In the case of an off-premises contract where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the business must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.***

**(7) *The consumer is liable for any diminished value of the goods only where that results from handling them in any way other than what is necessary to ascertain the nature and functioning of the goods. The consumer is not liable for diminished value where the business has failed to provide information about the right to withdraw in accordance with Article 18 (1).***

**(8) *Without prejudice to paragraph 7, the consumer is not liable to pay any compensation for the use of the goods during the withdrawal period.***

**(9) *Where the provision of services has already begun during the withdrawal period, a consumer who exercises the right of withdrawal is liable to pay an amount which is in proportion to the extent of the services provided until the time the consumer has informed the business of the exercise of the right of withdrawal only if:***

- (a) *the consumer has made an express request for the provision of services to begin during the withdrawal period; and***
- (b) *in the case of an off-premises contract, the request was made on a durable medium.***

**(10) *The consumer is not liable to pay for services performed, in full or in part, during the withdrawal period where the business has failed to provide information about the right to withdraw in accordance with Article 18 (1).***

#### Article 44: Ancillary contracts

*(1) If a consumer exercises the right of withdrawal from a distance or an off-premises contract in accordance with Articles 41 to 43, any ancillary contracts are automatically terminated at no cost to the consumer except as provided in the rules applicable under paragraphs (2) and (3). For this purpose an ancillary contract means a contract by which a consumer acquires goods or services related to a distance contract or an off-premises contract with a business and these goods or services are provided by the business or a third party on the basis of an arrangement between that third party and the business.*

*(2) The provisions of Article 43 (2) to (10) apply accordingly to ancillary contracts in so far as those contracts are governed by this instrument.*

*(3) For ancillary contracts which are not governed by this instrument the applicable law governs the obligations of the parties in the event of withdrawal.*

## Chapter 5 Defects in consent

### Article 45: Mistake

*(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:*

*(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could be expected to have known this; and*

*(b) the other party:*

*(i) caused the mistake;*

*(ii) knew or could be expected to have known of the mistake and caused the contract to be concluded under a mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out;*

*(iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty under Chapter 2, Sections 1-5; or*

*(iv) made the same mistake.*

*(2) A party may not avoid a contract for mistake if:*

*(a) the mistake was inexcusable in the circumstances; or*

*(b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.*

*(3) In determining whether good faith and fair dealing required a party to point out that the other is mistaken about relevant information for the purposes of paragraph (1)(b)(ii), regard is to be had to all the circumstances, including:*

*(a) whether the party had special expertise;*

*(b) the cost to the party of acquiring the relevant information;*

*(c) the ease with which the other party could have acquired the information by other means;*

*(d) the nature of the information; and*

*(e) the apparent importance of the information to the other party.*

*(4) A party may not avoid a contract for mistake under this Article on the ground that one or both parties made a mistake over the terms of the contract.*

### Article 46: Fraud

*(1) A party may avoid a contract if the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose.*

*(2) Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to*

*induce the recipient to make a mistake. Non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.*

*(3) In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including:*

- (a) whether the party had special expertise;*
- (b) the cost to the party of acquiring the relevant information;*
- (c) the ease with which the other party could have acquired the information by other means;*
- (d) the nature of the information;*
- (e) the apparent importance of the information to the other party; and*
- (f) in contracts between businesses good commercial practice in the situation concerned*

#### Article 47: Threats

*A party may avoid a contract if the other party has induced the conclusion of the contract by the threat of an imminent and serious harm which it is wrongful to inflict, or of an act which it is wrongful to use as a means to obtain the conclusion of the contract.*

#### Article 48: Unfair exploitation

*(1) A party may avoid a contract if, at the time of the conclusion of the contract:*

- (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and*
- (b) the other party knew or could be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.*

*(2) Upon the request of the party entitled to avoid the contract, a court may adapt the contract in order to bring it into accordance with what probably would have been agreed had the requirements of good faith and fair dealing been observed.*

*(3) Upon the request of a party receiving notice of avoidance for unfair exploitation, a court may adapt the contract in order to bring it into accordance with what probably would have been agreed had the requirements of good faith and fair dealing been observed, provided that the party receiving notice informs the party who gave the notice without undue delay after receiving it and before the latter party has acted in reliance on it.*

#### Article 49: Acts by third parties

*Where a person for whose acts a party is not responsible is guilty of fraud, threats or unfair exploitation, remedies under this Chapter are available if the party knew or could be*

*expected to have known of the relevant circumstances, or at the time of avoidance has not acted in reliance on the contract.*

#### Article 50: Notice of avoidance

*(1) Avoidance is effected by notice to the other party.*

*(2) A notice of avoidance is effective only if it is given within a reasonable time after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely.*

#### Article 51: Confirmation

*If the party who is entitled to avoid a contract confirms it, expressly or impliedly, after becoming aware of the relevant circumstances, or becoming capable of acting freely, that party may no longer avoid the contract.*

#### Article 52: Effects of avoidance

*(1) A contract which may be avoided is valid until avoided but, once avoided, is retrospectively invalid from the beginning.*

*(2) Where a ground of avoidance affects only certain terms of a contract, the effect of avoidance is limited to those terms unless it is unreasonable to uphold the remainder of the contract.*

*(3) The question whether either party has a right to the return of whatever has been transferred or supplied under a contract which has been avoided, or to a monetary equivalent, is regulated by the rules on restitution in Chapter 18.*

#### Article 53: Damages for loss

*A party who has the right to avoid a contract under this Section (or who had such a right before it was lost by the effect of time limits or confirmation) is entitled, whether or not the contract is avoided, to damages from the other party for loss suffered as a result of the mistake, fraud, threats or unfair exploitation, provided that the other party knew or could be expected to have known of the relevant circumstances.*



Article 54: Exclusion or restriction of remedies

***(1) Remedies for fraud, threats and unfair exploitation cannot be excluded or restricted.***

***(2) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude or restrict remedies for mistake.***

Article 55: Choice of remedy

***A party who is entitled to a remedy under this Chapter in circumstances which afford that party a remedy for non-performance may pursue either remedy.***

## **Part III Assessing what is in the contract**

### **Chapter 6 Interpretation**

#### Article 56: General rules on interpretation of contracts

*(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the normal meaning of the expressions used in it.*

*(2) If one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of this intention, the expression is to be interpreted in the way intended by the first party.*

*(3) Unless otherwise provided in the preceding paragraphs, the contract is to be interpreted according to the meaning which a reasonable person would give to it in the circumstances.*

#### Article 57: Relevant matters

*In interpreting a contract, regard may be had, in particular, to:*

- (a) the circumstances in which it was concluded, including the preliminary negotiations;*
- (b) the conduct of the parties, even subsequent to the conclusion of the contract;*
- (c) the interpretation which has already been given by the parties to expressions which are similar to those used in the contract;*
- (d) practices which the parties have established between themselves;*
- (e) the meaning commonly given to expressions in the branch of activity concerned;*
- (f) the nature and purpose of the contract;*
- (g) usages; and*
- (h) good faith and fair dealing.*

#### Article 58: Reference to contract as a whole

*Expressions used in a contract are to be interpreted in the light of the contract as a whole.*

#### Article 59: Linguistic discrepancies

*Where a contract document is in two or more language versions none of which is stated to be authoritative and where there is a discrepancy between the versions, there is a preference for interpretation according to the version in which the contract was originally drawn up.*

Article 60: Preference for negotiated terms

***Terms which have been individually negotiated prevail over those which have not.***

Article 61: Preference for interpretation which gives terms effect

***An interpretation which renders the terms of the contract effective is to be preferred to one which would not.***

Article 62: Interpretation in favour of consumers

***(1) Where there is doubt about the meaning of a term in a contract between a business and a consumer, the interpretation most favourable to the consumer prevails unless the term was supplied by the consumer.***

***(2) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.***

Article 63: Interpretation against supplier of term

***Where, in a contract which does not fall under Article 62, there is doubt about the meaning of a term which has not been individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.***

## Chapter 7 Contents and effects

### Article 64: Terms of a contract

*The terms of a contract are derived from:*

- (a) the agreement of the parties, subject to any mandatory rules of this instrument;*
- (b) any usage or practice by which the parties are bound under Article 65;*
- (c) any rule of this instrument which applies in the absence of an agreement of the parties to the contrary;*
- (d) any term implied under Article 66.*

### Article 65: Usages and practices

- (1) The parties to a contract are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves.*
- (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.*
- (3) Usages and practices do not bind the parties to the extent to which they conflict with the express terms of the contract or any mandatory rules of this instrument*

### Article 66: Terms which may be implied when necessary to fill a gap

- (1) Where it is necessary to provide for a matter which is not regulated by the agreement of the parties, any usage or practice or any rule of law, an additional term may be implied, having regard in particular to:
  - (a) the nature and purpose of the contract;*
  - (b) the circumstances in which the contract was concluded; and*
  - (c) the requirements of good faith and fair dealing.**
- (2) Any term implied under paragraph (1) is, where possible, to be such as to give effect to what the parties, had they provided for the matter, would probably have agreed.*
- (3) Paragraph (1) does not apply if the parties have deliberately left a matter unprovided for, accepting that one or other party would bear the risk.*

Article 67: Terms derived from certain pre-contractual statements

*(1) If one of the parties to a contract is a business and before the contract is concluded makes a statement, either to the other party or publicly, about the characteristics of what is to be supplied by that business under the contract, the statement becomes a term of the contract unless:*

*(a) the other party was aware when the contract was concluded, or could be expected to have been so aware, that the statement was incorrect or could not otherwise be relied on as such a term; or*

*(b) the other party's decision to conclude the contract could not have been influenced by the statement.*

*(2) For the purposes of paragraph (1), a statement made by a person engaged in advertising or marketing for the business is regarded as being made by the business.*

*(3) Where the other party is a consumer then, for the purposes of paragraph (1), a public statement made by or on behalf of a producer or other person in earlier links of the chain of transactions leading to the contract is regarded as being made by the business unless the business, at the time of conclusion of the contract, did not know and could not be expected to have known of it.*

*(4) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

Article 68: Merger clauses

*(1) Where a contract document contains a clause stating that the document embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the document do not form part of the contract.*

*(2) Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.*

*(3) In a contract between a business and a consumer, the consumer is not bound by a merger clause.*

Article 69: Modification in certain form only

*A term in a contract requiring any modification or termination by agreement to be in a certain form establishes only a presumption that any such agreement is not intended to be legally binding unless it is in that form.*

#### Article 70: Determination of price

*Where the amount of the price payable under a contract cannot be otherwise determined, the price payable is, in the absence of any indication to the contrary, the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.*

#### Article 71: Unilateral determination by a party

*Where the price or any other term of the contract is to be determined by one party and that party's determination is grossly unreasonable then, notwithstanding any provision in the contract to the contrary, a reasonable price or other term is substituted.*

#### Article 72: Determination by a third party

*(1) Where a third party is to determine the price or any other term of the contract and cannot or will not do so, a court may, unless this is inconsistent with the terms of the contract, appoint another person to determine it.*

*(2) Where a price or other term determined by a third party is grossly unreasonable, a reasonable price or term is substituted.*

#### Article 73: Language

*Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract.*

#### Article 74: Contracts of indefinite or perpetual duration

*Where, in a case involving continuous or periodic performance of a contractual obligation, the terms of the contract do not say when the contractual relationship is to end or say that it will never end, it may be terminated by either party by giving a reasonable period of notice.*

## Article 75: Tacit prolongation

*Where a contract provides for continuous or repeated performance of obligations for a definite period and the obligations continue to be performed by both parties after that period has expired, the contract becomes a contract for an indefinite period, unless the circumstances are inconsistent with the tacit consent of the parties to such prolongation.*

## Article 76: Contract terms in favour of third parties

*(1) The parties to a contract may, by the contract, confer a right on a third party. The third party need not be in existence or identified at the time the contract is concluded.*

*(2) The nature and content of the third party's right are determined by the contract. The right may take the form of an exclusion or limitation of the third party's liability to one of the contracting parties.*

*(3) A contracting party who is bound under the contract to perform an obligation in favour of the third party may assert against the third party all defences which the contracting party could assert against the other party to the contract.*

*(4) The third party may reject the right by notice to either of the contracting parties, if that is done without undue delay after being notified of the right and before it has been expressly or impliedly accepted. On such rejection, the right is treated as never having accrued to the third party.*

*(5) The contracting parties may remove or modify the term of the contract conferring the right if this is done before either of them has given the third party notice that the right has been conferred.*

## **Chapter 8 Unfair contract terms and default options**

### **Section 1 General provisions un unfair terms**

#### Article 77: Effects of unfair terms

*(1) A contract term which is supplied by one party and which is unfair under Sections 2, 3 or 4 of this Chapter is not binding on the other party.*

*(2) If the contract can reasonably be maintained without the unfair term, the other terms remain binding.*

#### Article 78: Exclusions from unfairness test

*(1) Contract terms are not subjected to an unfairness test under Sections 2 or 3 of this Chapter if they reflect provisions of the law which would apply if the terms did not regulate the matter.*

*(2) The unfairness test under Section 2 of this Chapter does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the relevant contract terms are presented in an accessible and comprehensible way.*

*(3) The unfairness test under Section 3 of this Chapter does not extend to the definition of the main subject matter of the contract or to the appropriateness of the price to be paid.*

#### Article 79: Mandatory nature of following provisions

*The parties may not exclude the application of the provisions in this Chapter or derogate from or vary their effects.*

### **Section 2 Unfair terms in contracts between a business and a consumer**

#### Article 80: Duty of transparency in terms not individually negotiated

*Where a business supplies terms which have not been individually negotiated with the consumer, it has a duty to ensure that they are presented in an accessible and comprehensible way. Terms are not presented in an accessible way if they are in a place where the consumer cannot be expected to find them.*



Article 81: Meaning of “unfair”

*(1) In a contract between a business and a consumer, a term supplied by the business is unfair for the purposes of this Section if it significantly disadvantages the consumer, contrary to good faith and fair dealing.*

*(2) For this purpose a term is supplied by the business if a version of it was included in terms originally supplied by the business, even if it has subsequently been the subject of negotiations with the consumer.*

Article 82: Factors to be taken into account in assessing unfairness

*When assessing the unfairness of a term for the purposes of this Section, regard is to be had to whether it is accessible and comprehensible to the consumer, to the nature of what is to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to whether the term has been individually negotiated, to the other terms of the contract and to the terms of any other contract on which the contract depends.*

Article 83: Terms which are always unfair

*A term is always unfair for the purposes of this Section if its object or effect is to:*

*(a) exclude or limit the liability of the business for death or personal injury caused to the consumer through an act or omission of the business or by someone acting on behalf of the business;*

*(b) exclude or limit the liability of the business for any loss or damage to the consumer caused deliberately or as a result of gross negligence*

*(c) limit the business's obligation to be bound by commitments undertaken by its authorised agents or make its commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the business;*

*(d) exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a business and a consumer;*

*(e) confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the business is domiciled unless the chosen court is also the court for the place where the consumer is domiciled;*

*(f) give the business the exclusive right to determine whether the goods or services supplied are in conformity with the contract or gives the business the exclusive right to interpret any term of the contract;*

*(g) provide that the consumer is bound by the contract when the business is not;*

*(h) make the initial contract period, or any renewal period, of a contract for the protracted provision of goods or services longer than one year, unless the consumer may terminate at all times with a termination period of no more than one month;*

*(i) require the consumer, if terminating the contract, to use a more formal method than that by which the contract was concluded;*

- (j) grant the business a shorter notice period to terminate than the one required of the consumer;*
- (k) oblige the consumer pay for goods or services not actually delivered or rendered at all;*
- (l) determine that non-individually negotiated terms of the contract prevail or have preference over terms which have been individually negotiated.*

Article 84: Terms which are presumed to be unfair

*A term is presumed to be unfair for the purposes of this Section if its object or effect is to:*

- (a) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the business;*
- (b) inappropriately exclude or limit the remedies available to the consumer against the business or a third party for non-performance by the business of obligations under the contract;*
- (c) inappropriately exclude or limit the right to set-off claims that the consumer may have against the business against what the consumer may owe to the business;*
- (d) permit a business to keep money paid by the consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the business in the reverse situation;*
- (e) require a consumer who fails to perform his or her obligations to pay a disproportionately high amount by way of damages or a stipulated payment for non-performance ;*
- (f) entitle a business to withdraw from or terminate the contract on a discretionary basis without giving the same right to the consumer, or entitle a business to keep money paid for services not yet supplied in the case where the business withdraws from or terminates the contract;*
- (g) enable a business to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;*
- (h) automatically extend a contract of fixed duration unless the consumer indicates otherwise, in cases where the terms of the contract provide for an unreasonably early deadline for giving notice;*
- (i) enable a business to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; this does not affect terms under which a business reserves the right to alter unilaterally the terms of a contract of indeterminate duration, provided that the business is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contract;*
- (j) enables a business to alter unilaterally without a valid reason any characteristics of the goods or services to be provided or any other features of performance;*
- (k) provide that the price of goods or services is to be determined at the time of delivery or supply, or allow a business to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;*
- (l) oblige a consumer to perform all his or her obligations where the business fails to perform its own;*

- (m) allow a business to transfer its rights and obligations under the contract without the consumer's consent, unless it is to a subsidiary controlled by the business, or as a result of a merger or a similar lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer;*
- (n) allow a business, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the business must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to reject performance;*
- (o) allow a business to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;*
- (p) allow a business to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;*
- (q) inappropriately exclude or limit the remedies available to the consumer against the business or the defences available to the consumer against claims by the business;*
- (r) subject performance of obligations under the contract by the business, or subject other beneficial effects of the contract for the consumer, to particular formalities that are not legally required and are unreasonable;*
- (s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;*
- (t) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;*
- (u) unjustifiably bundle the contract with another one with the business, a subsidiary of the business, or a third party, in a way that cannot reasonably be expected by the consumer;*
- (v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration.*

### **Section 3    Unfair terms in contracts between businesses**

Article 85: Meaning of “unfair” in contracts between businesses

- (1) A term in a contract between businesses is unfair for the purposes of this Section only if:
 
  - (a) it is a term forming part of not individually negotiated terms supplied by one party;*
  - (b) it significantly disadvantages the other party; and*
  - (c) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.**
- (2) When assessing the unfairness of a term for the purposes of this Section, regard is to be had to the nature of what is to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the other terms of the contract and to the terms of any other contract on which the contract depends.*

## **Section 4 Terms which are unfair because of the way the other party's agreement was obtained**

Article 86: Terms not sufficiently drawn to the other party's attention

*(1) Terms supplied by one party and not individually negotiated are unfair for the purposes of this Section if the other party was not aware of them, or if the party supplying the terms did not take reasonable steps to draw the other party's attention to them, before or when the contract was concluded.*

*(2) In relations between a business and a consumer, terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document.*

Article 87: Surprising terms included in standard terms

*A term contained in standard terms supplied by one party which is of such a surprising nature that the other party could not have expected it is unfair for the purposes of this Section unless it was expressly accepted.*

## **Section 5 Agreement obtained by use of default options**

Article 88: Agreement obtained by use of default options

*In a contract between a business and a consumer, a term which obliges the consumer to make any payment in addition to the remuneration stated for the business's main contractual obligation, and which has been obtained by the use of default options which the consumer is required to reject in order to avoid the additional payment, is not binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment. If the consumer has made the additional payment, the consumer may recover it.*

# **Part IV Obligations and remedies of the parties to a sales contract**

## **Chapter 9 General provisions**

### Article 89: Co-operation

*The parties are obliged to co-operate with each other when and to the extent that this can be expected for the performance of their contractual obligations.*

### Article 90: Non-performance and fundamental non-performance

*(1) Non-performance of an obligation is any failure to perform the obligation, whether or not excused, and includes non-delivery of the goods, delayed delivery, delivery of goods which are not in conformity with the contract, non-payment of the price, late payment of the price and any other purported performance which is not in conformity with the contract.*

*(2) Non-performance of an obligation by one party is fundamental if:*

- (a) it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result; or*
- (b) it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.*

### Article 91: Excused non-performance

*(1) A party's non-performance of an obligation is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken the impediment into account at the time when the obligation was incurred, or to have avoided or overcome the impediment or its consequences.*

*(2) Where the excusing impediment is only temporary the excuse has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such.*

*(3) Where the excusing impediment is permanent the contract is terminated automatically. The rules on restitution after termination in Chapter 18 apply.*

*(4) The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party within a reasonable time*

*after the first party knew or could be expected to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.*

Article 92: Change of circumstances

*(1) A party is bound to perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.*

*(2) If, however, performance becomes excessively onerous because of an exceptional change of circumstances which satisfies the requirements of paragraph (5), the parties have a duty to enter into negotiations in accordance with good faith and fair dealing with a view to adapting or terminating the contract.*

*(3) If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:*

*(a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or*

*(b) terminate the contract at a date and on terms to be determined by the court.*

*(4) Subject to paragraph (5), the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.*

*(5) This Article applies only if:*

*(a) the change of circumstances occurred after the time when the obligation was incurred;*

*(b) the aggrieved party did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and*

*(c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.*

Article 93: Extended application of rules on payment and goods not accepted

*(1) Unless otherwise provided, the rules on payment of the price by the buyer in Chapter 12, Section 2, apply with appropriate adaptations to other payments.*

*(2) Article 100 applies with appropriate adaptations to other cases where a person is left in possession of goods because of a failure by another person to take them when that person is bound to do so.*

## **Chapter 10 Obligations of the seller**

### **Section 1 General**

#### Article 94: Overview

- (1) The seller must:*
- (a) deliver the goods;*
  - (b) transfer the ownership of the goods; and*
  - (c) deliver such documents representing or relating to the goods as may be required by the contract.*
- (2) The goods must be in conformity with the contract.*

#### Article 95: Performance by a third party

- (1) A seller may entrust performance to another person, unless personal performance by the seller is required.*
- (2) A seller who entrusts performance to another person remains responsible for performance.*
- (3) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the rule in paragraph (2) or derogate from or vary its effects.*

### **Section 2 Delivery**

#### Article 96: Place of delivery

- (1) Where the place of delivery cannot be otherwise determined, it is:*
- (a) in the case of a consumer sales contract which is a distance or off-premises contract, or in which the seller has undertaken to arrange carriage to the buyer, the consumer's place of residence at the time of the conclusion of the contract;*
  - (b) in any other case,*
    - (i) where the contract of sale involves carriage of the goods by a carrier or series of carriers, the nearest collection point of the first carrier ;*
    - (ii) where the contract does not involve carriage, the seller's place of business at the time of conclusion of the contract.*
- (2) If the seller has more than one place of business, the place of business for the purposes of paragraph (1) (b) is that which has the closest relationship to the obligation.*

#### Article 97: Method of delivery

***Unless agreed otherwise, the seller fulfils the obligation to deliver:***

- (a) in the case of a consumer sales contract which is a distance or off-premises contract or in which the seller has undertaken to arrange carriage to the buyer, by transferring the physical possession or control of the goods to the consumer;***
- (b) in other cases in which the contract involves carriage of the goods by a carrier, by handing over the goods to the first carrier for transmission to the buyer and by handing over to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods; or***
- (c) in cases that do not fall within (a) or (b) above, by making the goods, or where it is agreed that the seller need only deliver documents representing the goods, the documents, available to the buyer.***

#### Article 98: Time of delivery

***Where the time of delivery cannot be otherwise determined, the goods must be delivered without undue delay after the conclusion of the contract.***

#### Article 99: Seller's obligations regarding carriage of the goods

- (1) If the contract requires the seller to arrange for carriage of the goods, the seller must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.***
- (2) If the seller, in accordance with the contract, hands over the goods to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.***
- (3) If the contract does not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance.***

#### Article 100: Goods not accepted by buyer

- (1) A seller who is left in possession of the goods because the buyer, when bound to do so, has failed to take delivery must take reasonable steps to protect and preserve them.***
- (2) The seller may obtain discharge from the obligation to deliver:***



- (a) by depositing the goods on reasonable terms with a third party to be held to the order of the buyer, and notifying the buyer of this; or*
  - (b) by selling the goods on reasonable terms after notice to the buyer, and paying the net proceeds to the buyer.*
- (3) The seller is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.*

Article 101: Effect on passing of risk

*The effect of delivery on the passing of risk is regulated by Chapter 14.*

### **Section 3    Conformity of the goods**

Article 102: Conformity with the contract

- (1) The goods do not conform with the contract unless they:*
- (a) are of the quantity, quality and description required by the contract;*
  - (b) are contained or packaged in the manner required by the contract; and*
  - (c) are supplied along with any accessories, installation instructions or other instructions required by the contract.*
- (2) Where the parties have not agreed otherwise, the goods do not conform with the contract if the requirements of Articles 103, 104 and 105 are not met.*
- (3) In a consumer sales contract, any agreement derogating from the requirements of Articles 103 and 105 is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and accepted the goods as being in conformity with the contract when concluding it. The parties may not, to the detriment of the consumer, exclude the application of this paragraph or derogate from or vary its effects.*

Article 103: Criteria for conformity of the goods

*The goods must:*

- (a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement;*
- (b) be fit for the purposes for which goods of the same description would ordinarily be used;*
- (c) possess the qualities of goods which the seller held out to the buyer as a sample or model;*

- (d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;*
- (e) be supplied along with such accessories, installation instructions or other instructions as the buyer may reasonably expect to receive;*
- (f) possess the qualities and performance capabilities held out in any statement which forms part of the terms of the contract by virtue of Article 67; and*
- (g) possess such qualities and performance capabilities as the buyer may reasonably expect.*

Article 104: Incorrect installation under a consumer sales contract

- (1) Where goods supplied under a consumer sales contract are incorrectly installed, any non-conformity resulting from the incorrect installation is regarded as a non-conformity of the goods if:
  - (a) the goods were installed by the seller or under the seller's responsibility; or*
  - (b) the goods were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.**
- (2) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

Article 105: Third party rights or claims

*The goods must be free from any right or not obviously unfounded claim of a third party, including rights or claims based on intellectual property.*

Article 106: Buyer's knowledge of non-conformity in a contract between businesses

*In a contract between businesses, the seller is not liable for any non-conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the non-conformity.*

Article 107: Relevant time for establishing conformity

- (1) The seller is liable for any non-conformity which exists at the time when the risk passes to the buyer under Chapter 14.*
- (2) In a consumer sales contract, any non-conformity which becomes apparent within six months of the time when risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or the nature of the non-conformity.*

*(3) In a case governed by Article 104 any reference in paragraphs (1) or (2) to the time when risk passes to the buyer is to be read as a reference to the time when the installation is complete.*

## Chapter 11 Buyer's remedies

### Section 1 General

#### Article 108: Overview of buyer's remedies

- (1) In the case of a non-performance of an obligation by the seller, the buyer may:
  - (a) require performance under Section 3 of this Chapter;*
  - (b) withhold the buyer's own performance under Section 4 of this Chapter;*
  - (c) terminate the contract under Section 5 of this Chapter and claim the return under Chapter 18 of any price already paid;*
  - (d) reduce the price under Section 6 of this Chapter; and*
  - (e) claim damages under Chapter 17.**
- (2) If the buyer is a business:
  - (a) the buyer's rights to exercise any remedy except withholding of performance are subject to the seller's right to cure set out in Section 2 of this Chapter; and*
  - (b) the buyer's rights to rely on a non-conformity are subject to the requirements of examination and notification set out in Section 7 of this Chapter.**
- (3) If the buyer is a consumer:
  - (a) the buyer's rights are not subject to the seller's right to cure; and*
  - (b) the requirements of examination and notification set out in Section 7 of this Chapter do not apply.**
- (4) Paragraph (3)(a) does not apply in relation to any obligation of the seller to provide a service and accordingly in such a case the buyer's rights to exercise any remedy except withholding of performance are subject to the seller's right to cure set out in Section 2 of this Chapter.*
- (5) If the seller's non-performance is excused, the buyer may resort to any of the remedies mentioned in paragraph (1) except requiring performance and damages.*
- (6) The buyer may not resort to any of the remedies mentioned in paragraph (1) to the extent that the buyer caused the seller's non-performance.*
- (7) Remedies which are not incompatible may be cumulated.*

#### Article 109: Limits on derogation from consumer's remedies for non-conformity

*In a contract between a business and a consumer, any agreement concluded before a non-conformity is brought to the business' attention which directly or indirectly waives or restricts the remedies of the consumer in respect of the non-conformity is not binding on the consumer.*

## **Section 2 Seller's right to cure**

### Article 110: Right to cure

- (1) A seller who has delivered goods early and who is notified that they are not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance.*
- (2) In cases not covered by paragraph (1) a seller who has tendered a performance which is not in conformity with the contract may, on being notified of the non-conformity, offer to cure it at the seller's own expense.*
- (3) The buyer may refuse the offer of cure only if:*
  - (a) cure cannot be effected promptly and without significant inconvenience to the buyer;*
  - (b) the buyer has reason to believe that the seller's future performance cannot be relied on; or*
  - (c) delay in performance would amount to a fundamental non-performance.*
- (4) The right to cure is not precluded by notice of termination.*
- (5) If the offer of cure is not refused by the buyer, the seller has a reasonable period of time to effect cure.*
- (6) The buyer may withhold performance pending cure but rights of the buyer which are inconsistent with allowing the seller a period of time to effect cure are suspended until that period has expired.*
- (7) Notwithstanding cure, the buyer retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.*
- (8) This Article does not apply to a consumer sales contract unless it includes a service element, in which case it applies only to that element.*

## **Section 3 Requiring performance**

### Article 111: Requiring performance of seller's obligations

- (1) The buyer is entitled to require performance of the seller's obligations.*
- (2) The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.*
- (3) Performance cannot, however, be required where:*
  - (a) performance would be unlawful or impossible; or*
  - (b) the burden or expense of performance would be disproportionate to the benefit the buyer would obtain.*

## Article 112: Consumer's choice between repair and replacement

*(1) Where, in a consumer sales contract, the business must remedy a non-conformity under Article 111 paragraph (2) the consumer may choose between repair and replacement unless the one chosen would be unlawful or impossible or, compared to the other, would impose a burden on the seller that would be disproportionate to the benefit the consumer would obtain.*

*(2) If the consumer has required the remedying of the non-conformity by repair or replacement in accordance with paragraph (1), the consumer may resort to other remedies, except withholding performance, only if the business has not completed repair or replacement within a reasonable time, not exceeding one month.*

## Article 113: Return of replaced item

*(1) Where the seller has, whether voluntarily or in compliance with an order under Article 111, remedied a non-conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller's expense.*

*(2) The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.*

*(3) In a contract between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

## Section 4 Withholding performance of buyer's obligations

### Article 114: Right to withhold performance

*(1) A buyer who is to perform at the same time as, or after, the seller performs has a right to withhold performance until the seller has tendered performance or has performed.*

*(2) A buyer who is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when the seller's performance becomes due may withhold performance for as long as the reasonable belief continues. However, the right to withhold performance is lost if the seller gives an adequate assurance of due performance or provides adequate security.*

*(3) The performance which may be withheld under this Article is the whole or part of the performance as may be reasonable in the circumstances.*

## **Section 5 Termination**

### Article 115: Termination for non-performance

*(1) A buyer may terminate the contract if the seller's non-performance under the contract is fundamental.*

*(2) In a contract between a business and a consumer the consumer may terminate for non-performance in the case of any non-conformity, unless the non-conformity is insignificant.*

### Article 116: Termination after notice fixing additional time for performance

*(1) A buyer may terminate the contract in a case of delay in performance which is not in itself fundamental if the buyer gives a notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period. A notice which fixes a period of time which is unreasonably short is ineffective.*

*(2) The period is taken to be of reasonable length if the seller does not object to it without undue delay.*

*(3) Where the notice provides for automatic termination if the seller does not perform within the period fixed by the notice, termination takes effect after that period without further notice.*

*(4) In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

### Article 117: Termination for anticipated non-performance

*A buyer may terminate before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination.*

### Article 118: Termination for inadequate assurance of performance

*A buyer who reasonably believes that there will be a non-performance by the seller such as to justify termination may terminate if the buyer demands an adequate assurance of due performance or adequate security and no such assurance or security is provided within a reasonable time.*

Article 119: Scope of right to terminate

*(1) Where the seller's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part to which a part of the price can be apportioned, the buyer may terminate only in relation to that part, unless the buyer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.*

*(2) Where the seller's obligations under the contract are not divisible or a part of the price cannot be apportioned, the buyer may terminate only if the non-performance is such as to justify termination of the contract as a whole.*

Article 120: Notice of termination

*A right to terminate under this Section is exercised by notice to the seller.*

Article 121: Loss of right to terminate

*(1) The buyer loses the right to terminate under this Section unless notice of termination is given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.*

*(2) This Article does not apply:*

- (a) where the buyer is a consumer; or*
- (b) where no performance at all has been tendered.*

*(3) The parties may not, to the detriment of the consumer, exclude the application of paragraph (2) or derogate from or vary its effects.*

**Section 6 Price reduction**

Article 122: Right to reduce price

*(1) A buyer who accepts a performance not conforming to the contract may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received in performance at the time it was made compared to the value of what would have been received by a conforming performance.*

*(2) A buyer who is entitled to reduce the price under paragraph (1) and who has already paid a sum exceeding the reduced price may recover the excess from the seller.*



*(3) A buyer who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.*

## **Section 7     Requirements of examination and notification in a contract between businesses**

Article 123: Examination of the goods in contracts between businesses

*(1) In a contract between businesses the buyer is expected to examine the goods, or cause them to be examined, within as short a period as is reasonable in the circumstances. Failure to do so may result in the buyer losing the right to rely on the non-conformity under Article 124.*

*(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.*

*(3) If the goods are redirected in transit, or redispached by the buyer before the buyer has had a reasonable opportunity to examine them, and at the time of the conclusion of the contract the seller knew or could be expected to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.*

Article 124: Requirement of notification of non- conformity in sales contracts between businesses

*(1) In a contract between businesses the buyer may not rely on a non-conformity unless the buyer gives notice to the seller within a reasonable time specifying the nature of the non-conformity.*

*(2) The reasonable time runs from the time when the goods are supplied or from the time, if it is later, when the buyer discovered or could be expected to have discovered the non-conformity.*

*(3) The buyer in any event loses the right to rely on a non-conformity if the buyer does not give the seller notice of the non-conformity at the latest within two years from the time at which the goods were actually handed over to the buyer in accordance with the contract.*

*(4) If the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice under paragraph (3) does not expire before the end of the agreed period.*

*(5) Paragraph (3) does not apply in respect of third party claims or rights pursuant to Article 105.*

*(6) The buyer does not have to notify the seller that not all the goods have been delivered if the buyer has reason to believe that the remaining goods will be delivered.*

*(7) The seller is not entitled to rely on the provisions of this Article if the non-conformity relates to facts of which the seller knew or could be expected to have known and which the seller did not disclose to the buyer.*

## **Chapter 12 Obligations of the buyer**

### **Section 1 Overview**

Article 125: Main obligations of the buyer

*The buyer must:*

- (a) pay the price;*
- (b) take delivery of the goods; and*
- (c) take over documents representing or relating to the goods as may be required by the contract.*

### **Section 2 Payment of the price**

Article 126: Method of payment

*(1) Payment may be made by any method used in the ordinary course of business at the place of payment taking into account the nature of the transaction .*

*(2) A seller who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The seller may enforce the original obligation to pay only if the order or promise is not honoured.*

*(3) The buyer's original obligation is extinguished if the seller accepts a promise to pay from:*

- (a) a third party with whom the seller has a pre-existing arrangement to accept the third party's promise as a means of payment by debtors who are members of a scheme of which that third party is also a member;*
- (b) a third party who the seller could be expected to know has already been paid by the buyer; or*
- (c) a third party who the seller knows or could be expected to know will be entitled to payment by the buyer irrespective of whether that third party pays the seller.*

Article 127: Place of payment

*(1) Where the place of payment cannot otherwise be determined it is the seller's place of business at the time of conclusion of the contract.*

*(2) If the seller has more than one place of business, the place of business is that which has the closest relationship to the obligation to pay.*

#### Article 128: Time of payment

- (1) Payment of the price is due at the moment of delivery.*
- (2) The seller may reject an offer to pay before payment is due if the seller has a legitimate interest in so doing.*

#### Article 129: Payment by a third party

- (1) A buyer may entrust payment to another person. A buyer who entrusts payment to another person remains responsible for payment.*
- (2) The seller cannot refuse payment by a third party if:  
(a) the third party acts with the assent of the buyer; or  
(b) the third party has a legitimate interest in paying and the buyer has failed to pay or it is clear that the buyer will not pay at the time payment is due.*
- (3) Payment by a third party in accordance with paragraphs (1) or (2) discharges the buyer from liability to the seller.*
- (4) Where the seller accepts payment by a third party in circumstances not covered by paragraphs (1) or (2) the buyer is discharged from liability to the seller but the seller is liable to the buyer for any loss caused by that acceptance.*

#### Article 130: Imputation of payment

- (1) Where a buyer has to make several payments to the seller and the payment made does not suffice to cover all of them, the buyer may at the time of payment notify the seller of the obligation to which the payment is to be imputed.*
- (2) If the buyer does not make a notification under paragraph (1) the seller may, by notifying the buyer within a reasonable time, impute the performance to one of the obligations.*
- (3) An imputation under paragraph (2) is not effective if it is to an obligation which is not yet due or is disputed.*
- (4) In the absence of an effective imputation by either party, the payment is imputed to that obligation which satisfies one of the following criteria in the sequence indicated:  
(a) the obligation which is due or is the first to fall due;  
(b) the obligation for which the seller has no or the least security;  
(c) the obligation which is the most burdensome for the buyer; or  
(d) the obligation which arose first.*

*If none of the preceding criteria applies, the payment is imputed proportionately to all the obligations.*

*(5) The payment may be imputed under paragraph (2) or (4) to an obligation which is unenforceable as a result of prescription only if there is no other obligation to which the payment could be imputed in accordance with those paragraphs.*

*(6) In relation to any one obligation a payment by the buyer is to be imputed, first, to expenses, secondly, to interest, and thirdly, to principal, unless the seller makes a different imputation.*

### **Section 3    Taking delivery**

#### Article 131: Taking delivery

*The buyer fulfils the obligation to take delivery by:*

- (a) doing all the acts which could be expected in order to enable the seller to perform the obligation to deliver; and*
- (b) taking over the goods, or the documents representing the goods, as required by the contract.*

#### Article 132: Early delivery and delivery of wrong quantity

*(1) If the seller delivers the goods before the time fixed, the buyer may take delivery or, if the buyer has a legitimate interest in so doing, refuse to take delivery.*

*(2) If the seller delivers a quantity of goods less than that provided for in the contract the buyer may take delivery or, if the buyer has a legitimate interest in so doing, refuse to take delivery.*

*(3) If the seller delivers a quantity of goods greater than that provided for by the contract, the buyer may retain or refuse the excess quantity.*

*(4) If the buyer retains the excess quantity it is regarded as having been supplied under the contract and must be paid for at the contractual rate.*

*(5) In a consumer sales contract paragraph (4) does not apply if the buyer believes on reasonable grounds that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered. In such a case Article 39 applies.*

## **Chapter 13 Seller's remedies**

### **Section 1 General**

#### Article 133: Overview

- (1) In the case of a non-performance of an obligation by the buyer, the seller may:
  - (a) require performance under Section 2 of this Chapter;*
  - (b) withhold the seller's own performance under Section 3 of this Chapter;*
  - (c) terminate the contract under Section 4 of this Chapter; and*
  - (d) claim interest on the price or damages under Chapter 17.**
- (2) If the buyer's non-performance is excused, the seller may resort to any of those remedies except requiring performance and damages.*
- (3) The seller may not resort to any of those remedies to the extent that the seller caused the buyer's non-performance.*
- (4) Remedies which are not incompatible may be cumulated.*

### **Section 2 Requiring performance**

#### Article 134: Requiring performance of buyer's obligations

- (1) The seller is entitled to recover payment of the price when it is due, and to require performance of any other obligation undertaken by the buyer.*
- (2) Where the buyer has not yet taken over the goods and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery, and may recover the price, unless:
  - (a) the seller could have made a reasonable substitute transaction without significant effort or expense; or*
  - (b) performance would be unreasonable in the circumstances.**

### **Section 3 Withholding performance of seller's obligations**

#### Article 135: Right to withhold performance

- (1) A seller who is to perform at the same time as, or after, the buyer performs has a right to withhold performance until the buyer has tendered performance or has performed.*

*(2) A seller who is to perform before the buyer performs and who reasonably believes that there will be non-performance by the buyer when the seller's performance becomes due may withhold performance for as long as the reasonable belief continues. However, the right to withhold performance is lost if the buyer gives an adequate assurance of due performance or provides adequate security.*

*(3) The performance which may be withheld under this Article is the whole or part of the performance as may be reasonable in the circumstances.*

## **Section 4 Termination**

### Article 136: Termination for fundamental non-performance

*A seller may terminate the contract if the buyer's non-performance under the contract is fundamental.*

### Article 137: Termination after notice fixing additional time for performance

*(1) A seller may terminate in a case of delay in performance which is not in itself fundamental if the seller gives a notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period. A notice which fixes a period of time which is unreasonably short is ineffective.*

*(2) The period is taken to be of reasonable length if the buyer does not object to it without undue delay.*

*(3) Where the notice provides for automatic termination if the buyer does not perform within the period fixed by the notice, termination takes effect after that period without further notice.*

*(4) In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

### Article 138: Termination for anticipated non-performance

*A seller may terminate before performance is due if the buyer has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental.*

Article 139: Termination for inadequate assurance of performance

*A seller who reasonably believes that there will be a fundamental non-performance by the buyer may terminate if the seller demands an adequate assurance of due performance or adequate security and no such assurance or security is provided within a reasonable time.*

Article 140: Scope of right to terminate

*(1) Where the buyer's obligations under the contract are to be performed in separate parts, then if there is a ground for termination under this Section of a part which corresponds to a divisible part of the seller's obligations, the seller may terminate only in relation to that part, unless the non-performance is fundamental in relation to the contract as a whole.*

*(2) Where the buyer's obligations under the contract are not to be performed in separate parts, the seller may terminate only if the non-performance is fundamental in relation to the contract as a whole.*

Article 141: Notice of termination

*A right to terminate under this Section is exercised by notice to the buyer.*

Article 142: Loss of right to terminate

*(1) If performance has been tendered late or a tendered performance otherwise does not conform to the contract the seller loses the right to terminate under this Section unless notice of termination is given within a reasonable time from when the seller has become, or could be expected to have become, aware of the tender or the non-conformity.*

*(2) A seller loses a right to terminate by notice under Articles 138 or 139 unless the seller gives notice of termination within a reasonable time after the right has arisen.*

*(3) If the buyer has not paid the price or has not performed in some other way which is fundamental, the seller retains the right to terminate.*



## **Chapter 14 Passing of risk**

### **Section 1 General provisions**

#### Article 143: Effect of passing of risk

*Loss of, or damage to, the goods after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.*

#### Article 144: Identification of goods to contract

*The risk does not pass to the buyer until the goods are clearly identified to the contract, whether by the initial agreement, by notice given to the buyer or otherwise.*

### **Section 2 Passing of risk in consumer sales contracts**

#### Article 145: Passing of risk in a consumer sales contract

*(1) In a consumer sales contract, the risk does not pass until the consumer or a third party, other than the carrier, designated by the consumer for this purpose has acquired the physical possession of the goods.*

*(2) Except where the contract is a distance or off-premises contract, paragraph (1) does not apply where the consumer fails to perform the obligation to take over the goods and the non-performance is not excused under Article 91. In this case the risk passes at the time when the consumer, or the third party designated by the consumer, would have acquired the physical possession of the goods if the obligation to take them over had been performed.*

*(3) Where the consumer arranges the carriage of the goods independently from the business, the risk passes when the goods are handed over to the carrier.*

*(4) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

### **Section 3    Passing of risk in contracts between businesses**

#### Article 146: Time when risk passes

*(1) In a contract between businesses the risk passes when the buyer takes over the goods or the documents representing them.*

*(2) The rule in paragraph (1) is subject to the following Articles in this Section.*

#### Article 147: Goods placed at buyer's disposal

*(1) If the goods are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer from the time when the goods should have been taken over, unless the buyer was entitled to withhold taking of delivery under Article 114.*

*(2) If the goods are placed at the buyer's disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at the buyer's disposal at that place.*

#### Article 148: Carriage of the goods

*(1) This Article applies to a contract of sale which involves carriage of goods.*

*(2) If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract.*

*(3) If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.*

*(4) The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk.*

#### Article 149: Goods sold in transit

*(1) This Article applies to a contract of sale which involves goods sold in transit.*

*(2) The risk passes to the buyer as from the time the goods were handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer as from the time of the conclusion of the contract.*

***(3) If at the time of the conclusion of the contract the seller knew or could be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.***

# **Part V Obligations and remedies of the parties to a related services contract**

## **Chapter 15 General provisions**

### Article 150: Scope

*(1) This Part applies to contracts under which a seller of goods (in this Part called “the service provider”) undertakes to provide the buyer (in this Part called “the customer”) with services related to the goods, such as installation, maintenance or repair (“the service”), whether under the sales contract or under a separate service contract which was concluded at the same time as the sales contract or provided for, even if only as an option, in the sales contract.*

*(2) This Part does not apply to transport services, training services, telecommunications support services, or financial services.*

*(3) This Part applies whether or not a separate price was agreed for the service.*

### Article 151: Application of certain general rules on sales contracts

*The rules in Part IV, Chapter 9, apply for the purposes of this Part.*

## **Chapter 16 Obligations and remedies of the parties**

### **Section 1 Obligations of the service provider**

#### Article 152: Obligation to achieve result and obligation of care and skill

*(1) The service provider must achieve any specific result required by the contract.*

*(2) In the absence of any express or implied contractual obligation to achieve a specific result, the service provider must perform the service with the care and skill which a reasonable service provider would exercise under the circumstances and in conformity with any statutory or other binding legal rules which are applicable to the service.*

*(3) In determining the reasonable care and skill required of the service provider, regard is to be had, among other things, to:*

*(a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the service for the customer;*

*(b) if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring; and*  
*(c) the time available for the performance of the service.*

*(4) Where in a contract between a business and a consumer the service includes installation of the goods, the installation must be such that the installed goods conform to the contract as required by Article 104.*

*(5) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the rule in paragraph (2) or derogate from or vary its effects.*

#### Article 153: Obligation to prevent damage

*The service provider must take reasonable precautions in order to prevent any damage to the goods or physical injury or any other loss or damage in the course of or as a consequence of the performance of the service.*

#### Article 154: Performance by a third party

*(1) A service provider may entrust performance to another person, unless personal performance by the service provider is required.*

*(2) A service provider who entrusts performance to another person remains responsible for performance.*

*(3) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the rule in paragraph (2) or derogate from or vary its effects.*

#### Article 155: Obligation to provide invoice

*Where a separate price is payable for the service, and the price is not a lump sum agreed at the time of conclusion of the contract, the service provider must provide the customer with an invoice which explains, in a clear and intelligible way, how the price was calculated.*

#### Article 156: Obligation to warn of unexpected or uneconomic cost

*(1) The service provider must warn the customer and seek the consent of the customer to proceed if:*

*(a) the cost of the service would be greater than already indicated by the service provider to the customer; or*

*(b) the service would cost more than the value of the goods after the service has been provided, so far as this is known to the service provider.*

*(2) A service provider who fails to obtain the consent of the customer in accordance with paragraph (1) is not entitled to a price exceeding the cost already indicated or, as the case may be, the value of the goods after the service has been provided.*

## **Section 2      Obligations of the customer**

### Article 157: Payment of the price

*(1) The customer must pay any price that is payable for the service in accordance with the contract.*

*(2) The price is payable when the service is completed and the object of the service is made available to the customer.*

*(3) If the goods are destroyed or lost, because of an event which was not due to an act or omission of the service provider, the price remains payable, even if the goods have not been returned to the customer.*

### Article 158: Allowing access

*Where it is necessary for the service provider to obtain access to the customer's premises in order to perform the service the customer must provide such access at reasonable hours.*

## **Section 3      Remedies**

### Article 159: Remedies of the customer

*(1) In the case of a non-performance of an obligation by the service provider, the customer has, with the adaptations noted below, the same remedies as are provided for the buyer in Chapter 11, namely:*

- (a) to require performance;*
- (b) to withhold the customer's own performance;*
- (c) to terminate the contract;*
- (d) to reduce the price; and*
- (e) to claim damages.*

*(2) The customer's remedies are subject to a right of the service provider to cure whether or not the customer is a consumer.*

*(3) The customer, if a consumer, has the right to terminate the contract for any non-conformity in the service provided unless the non-conformity is insignificant.*

*(4) Chapter 11 therefore applies:*

- (a) with the adaptation that Article 110 applies even if the customer is a consumer;*
- (b) with the adaptation that in relation to the remedying of a non-conforming performance Articles 112 and 113 do not apply;*
- (c) with the adaptation that Article 124 is replaced by Article 160; and*
- (d) with any other necessary adaptations.*

Article 160: Requirement of notification of non-conformity in service contracts between businesses

*(1) In a service contract between businesses, the customer may not rely on a non-conformity unless the customer gives notice to the service provider within a reasonable time specifying the nature of the non-conformity.*

*(2) The reasonable time runs from the time when the service was completed or from the time, if it is later, when the customer discovered or could be expected to have discovered the non-conformity.*

*(3) The service provider is not entitled to rely on the provisions of this Article if the non-conformity relates to facts of which the service provider knew or could be expected to have known and which the service provider did not disclose to the buyer.*

Article 161: Remedies of the service provider

*(1) In the case of a non-performance by the customer, the service provider has, with the adaptations noted below, the same remedies as are provided for the seller in Chapter 13, namely:*

- (a) to require performance;*
- (b) to withhold the service provider's own performance;*
- (c) to terminate the contract; and*
- (d) to claim interest on the price or damages.*

*(2) Chapter 13 therefore applies:*

- (a) with the adaptation that Article 134 paragraph (2) is replaced by Article 162; and*
- (b) with any other necessary adaptations.*

Article 162: Customer's right to decline performance

*(1) The customer may at any time give notice to the service provider that performance, or further performance, of the service is no longer required.*

*(2) Where notice is given under paragraph (1):*

- (a) the service provider no longer has the right or obligation to provide the service; and*

*(b) the customer, if there is no ground for termination under any other provision, remains liable to pay the price less the expenses that the service provider has saved or could be expected to have saved by not having to complete performance.*

*(3) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*



## **Part VI Damages, stipulated payments for non-performance and interest**

### **Chapter 17 Damages, stipulated payments for non-performance and interest**

#### **Section 1 Damages**

##### Article 163: Right to damages

*(1) A party (in this Part, “the creditor”) is entitled to damages for loss caused by the non-performance of an obligation by the other party (in this Part, “the debtor”), unless the non-performance is excused.*

*(2) The loss for which damages are recoverable includes future loss which is reasonably likely to occur.*

##### Article 164: General measure of damages

*The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.*

##### Article 165: Foreseeability of loss

*The debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a likely result of the non-performance.*

##### Article 166: Loss attributable to creditor

*The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.*

Article 167: Reduction of loss

*(1) The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.*

*(2) The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.*

Article 168: Substitute transaction

*A creditor who has terminated a contract in whole or in part and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as entitled to damages, recover the difference between the value of what would have been payable under the terminated contract and the value of what is payable under the substitute transaction, as well as damages for any further loss.*

Article 169: Current price

*Where the creditor has terminated the contract and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.*

## **Section 2 Stipulated payment for non-performance**

Article 170: Stipulated payment for non-performance

*(1) Where the contract provides that a debtor who fails to perform the obligation is to pay a specified sum to the creditor for such non-performance, the creditor is entitled to that sum irrespective of the actual loss.*

*(2) However, despite any provision to the contrary, the sum so specified in the contract may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances.*

### **Section 3 Interest on late payments: general rules**

#### Article 171: Interest on late payments

*(1) If payment of a sum of money is delayed, the creditor is entitled, without the need to give notice, to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place where payment is due.*

*(2) The creditor may in addition recover damages for any further loss.*

#### Article 172: Special provisions on interest when the debtor is a consumer

*(1) When the debtor is a consumer, interest for delay in payment is due at the rate provided in Article 171 only when non-performance is not excused.*

*(2) Interest does not start to run until 30 days after the creditor has given notice to the debtor specifying the obligation to pay interest and its rate. Notice may be given before the date when payment is due.*

*(3) A term of the contract which fixes a rate of interest higher than the one provided in the preceding Article, or accrual earlier than the time provided in paragraph (2) is not binding to the extent that this would be unfair according to Article 81.*

*(4) Interest for delay in payment cannot be added to capital in order to produce interest.*

*(5) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.*

### **Section 4 Provisions combating late payments by commercial debtors**

#### Article 173: Rate of interest and accrual

*(1) If a business delays the payment of a price due under a contract for the supply of goods or services without being excused under Article 91, interest is due at the rate specified in paragraph (5).*

*(2) Interest at the rate specified in paragraph (5) starts to run on the day which follows the date or the end of the period for payment provided in the contract. If there is no such date or period, interest at that rate starts to run:*

*(a) 30 days after the date when the debtor receives the invoice or an equivalent request for payment; or*

*(b) 30 days after the date of receipt of the goods or services, if the date under (a) is earlier or uncertain, or if it is uncertain whether the debtor has received an invoice or equivalent request for payment.*

*(3) If conformity of goods or services to the contract is to be ascertained by way of acceptance or verification, the 30 day period under paragraph (2) (b) starts to run on the date of acceptance or verification. The maximum duration of the verification procedure cannot exceed 30 calendar days from the date of receipt of the goods or services, unless the parties expressly agree otherwise and this agreement is not unfair according to Article 175.*

*(4) The period for payment determined under (2) cannot exceed 60 days, unless the parties expressly agree otherwise and this agreement is not unfair according to Article 175.*

*(5) The interest rate for delayed payment is the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank ("the reference rate"), plus eight percentage points. For the currency of a Member State which is not participating in the third stage of economic and monetary union, the reference rate is the equivalent rate set by its national central bank.*

*(6) The creditor may in addition recover damages for any further loss.*

#### Article 174: Compensation for recovery costs

*(1) Where interest is payable in accordance with Article 173, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 or the equivalent sum in the currency agreed for the contract price as compensation for the creditor's recovery costs.*

*(2) The creditor is entitled to obtain from the debtor reasonable compensation for any recovery costs exceeding the fixed sum referred to in paragraph (1) and incurred due to the debtor's late payment.*

#### Article 175: Unfair terms relating to interest for late payment

*(1) A term providing for a time or period of payment or a rate of interest less favourable to the creditor than the time or rate specified in Article 173, or a term providing for an amount of compensation for recovery costs lower than the amount specified in Article 174 is not binding to the extent that this would be unfair.*

*(2) A term whereby a debtor is allowed to pay the price for goods or services later than the time when interest starts to run under Article 173 does not deprive the creditor of interest to the extent that this would be unfair.*

*(3) A term is unfair for the purposes of this Article if it grossly deviates from good commercial practice, contrary to good faith and fair dealing.*

*(4) A term excluding interest for late payment or compensation for recovery costs is considered unfair under paragraph (1).*

## **Part VII Restitution**

### **Chapter 18 Restitution**

#### Article 176: Restitution on avoidance or termination

*(1) In so far as a contract is avoided or terminated by either party, each party is obliged to return what that party (“the recipient”) has received from the other party. Where both parties are bound to return, the obligations are reciprocal.*

*(2) The obligation to return extends to any natural and legal fruits derived from what was received.*

*(3) On the termination of a contract for performance in instalments or parts, restitution is not required in relation to any instalment or part where the obligations on both sides have been fully performed, unless the nature of the contract is such that part performance is of no value to one of the parties.*

#### Article 177: Payment for monetary value

*(1) If what was received (including fruits where relevant) cannot be returned restitution is made by paying its monetary value. If return is possible but would cause unreasonable effort or expense, restitution may be made by paying the monetary value, provided that such conversion would not harm the other party’s proprietary interests.*

*(2) The monetary value of goods is the value they would have had at the date when payment of the monetary value is to be made if they had been kept by the recipient without destruction or damage until that date.*

*(3) If the recipient has obtained a substitute in exchange when it knew or could be expected to have known of the ground for avoidance or termination, the other party may choose to claim the substitute or the monetary value of the substitute. A recipient who has obtained a substitute in money or kind in exchange for goods when the recipient did not know and could not be expected to have known of the ground for avoidance or termination may choose to return the monetary value of the substitute or, if the other party agrees, the substitute.*

*(4) If a services contract is avoided or terminated by the customer after the service has been performed or partly performed, the customer's obligation to compensate the provider in money is limited to the amount the customer saved by receiving the service.*

Article 178: Payment for use and interest on money received

*(1) A recipient who has made use of goods received must pay the other party the monetary value of that use for any period if, and only if:*

*(a) the recipient caused the ground for avoidance or termination;*

*(b) the recipient, prior to the start of that period, was aware of the ground for avoidance or termination; or*

*(c) having regard to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods for that period.*

*(2) A recipient who is obliged to return money must pay interest, at the rate stipulated in Article 171, only if :*

*(a) the other party is obliged to pay for use; or*

*(b) it would otherwise be inequitable that interest is not paid, in particular when the recipient gave cause for the contract to be avoided.*

Article 179: Compensation for expenditure

*(1) If a recipient has incurred expenditure on goods, the recipient is entitled to compensation to the extent that the expenditure benefited the other party provided that the expenditure was made when the recipient did not know and could not be expected to know of the ground for avoidance or termination.*

*(2) A recipient who knew or could be expected to know of the ground for avoidance or termination is entitled to compensation only for expenditure that was necessary to protect the goods from being lost or diminished in value, provided that the recipient had no opportunity to ask the other party for advice.*

Article 180: Equitable modification

*Any obligation to return or to pay under this Chapter may be modified to the extent that its performance would be grossly inequitable, taking into account in particular whether the obliged party did not cause, or lacked knowledge of, the ground for avoidance or termination.*

## **Part VIII Prescription**

### **Chapter 19 Prescription**

#### **Section 1 General provision**

Article 181: Rights subject to prescription

*A right to performance of an obligation, and any right ancillary to such a right, is subject to prescription by the expiry of a period of time in accordance with the rules in this Chapter.*

#### **Section 2 Periods of prescription and their commencement**

Article 182: Short and long period

*There are two periods of prescription. The short period is three years. The long period is ten years or, in the case of a right to damages for personal injuries, thirty years.*

Article 183: Commencement

*(1) The short period of prescription begins to run from the time when the creditor knows or could be expected to know the facts as a result of which the right can be exercised.*

*(2) The long period of prescription begins to run from the time when the debtor has to effect performance or, in the case of a right to damages, from the time of the act which gives rise to the right.*

*(3) Where the debtor is under a continuing obligation to do or refrain from doing something, the creditor is regarded as having a separate right in relation to each non-performance of the obligation.*

### **Section 3    Extension of period**

#### Article 184: Suspension in case of judicial and other proceedings

*(1) The running of both periods of prescription is suspended from the time when judicial proceedings to assert the right are begun.*

*(2) Suspension lasts until a decision has been made which has the effect of res judicata, or until the case has been otherwise disposed of. Where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended.*

*(3) These provisions apply, with appropriate adaptations, to arbitration proceedings, to mediation proceedings, to proceedings whereby an issue between two parties is referred to a third party for a binding decision and to all other proceedings initiated with the aim of obtaining a decision relating to the right or to avoid insolvency.*

*(4) Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the national law. Mediation ends by an agreement of the parties or by declaration of the mediator or one of the parties.*

#### Article 185: Postponement of expiry in the case of negotiations

*If the parties negotiate about the right, or about circumstances from which a claim relating to the right might arise, neither period of prescription expires before one year has passed since the last communication made in the negotiations or since one of the parties communicated to the other that it does not wish to pursue the negotiations.*

#### Article 186: Postponement of expiry in case of incapacity

*If a person subject to an incapacity is without a representative, the short and long periods of prescription of a right held by that person do not expire before one year has passed after either the incapacity has ended or a representative has been appointed.*



## **Section 4    Renewal of period**

### Article 187: Renewal by acknowledgement

*If the debtor acknowledges the right vis-à-vis the creditor, by part payment, payment of interest, giving of security, set-off or in any other manner, a new three-year period of prescription begins to run.*

## **Section 5    Effects of prescription**

### Article 188: Effects of prescription

*(1) After expiry of the period of prescription the debtor is entitled to refuse performance and the creditor loses all remedies for non-performance except withholding performance.*

*(2) The prescribed right may nonetheless be relied on as a defence or for purposes of set-off.*

*(3) Whatever has been paid or transferred by the debtor in performance of the obligation may not be reclaimed merely because the period of prescription had expired.*

*(4) The period of prescription for a right to payment of interest, and other rights of an ancillary nature, expires not later than the period for the principal right.*

## **Section 6    Modification by agreement**

### Article 189: Agreements concerning prescription

*(1) The requirements for prescription may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription.*

*(2) The short period of prescription may not, however, be reduced to less than one year or extended to more than ten years.*

*(3) The long period of prescription may not be reduced to less than one year or extended to more than thirty years.*

*(4) In a contract between a business and a consumer this Article may not be applied to the detriment of the consumer.*

## Annex I (A)

### INFORMATION CONCERNING THE EXERCISE OF THE RIGHT OF WITHDRAWAL

#### Information notice to be provided with the withdrawal form

##### Right of withdrawal

The consumer shall have the right to withdraw from this contract within fourteen calendar days without giving any reason.

The withdrawal period shall expire fourteen days from the day <sup>1</sup>

To exercise the right of withdrawal, the consumer shall inform the business <sup>2</sup> of his decision to withdraw from the contract by giving notice (e.g. written letter sent by post, fax, email). The consumer may use the following model withdrawal form, but it is not obligatory or any other unequivocal statement addressed to the business. <sup>3</sup>

To meet the withdrawal deadline, it shall be sufficient if the communication concerning the exercise of the right of withdrawal is sent by the consumer before the withdrawal period has expired.

##### Consequences of withdrawal

If the consumer exercises his right of withdrawal, the business shall reimburse all payments received from the consumer without undue delay and no later than fourteen days from the day on which he receives the communication of withdrawal. <sup>4</sup>

<sup>5</sup>

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Instructions for completion:

- 1 Here the following is to be inserted:
  - a) in the case of a service contract: "of the conclusion of the contract.";
  - b) in the case of a sales contract: "when the consumer has taken delivery of goods.";
  - c) in the case of a contract relating to multiple goods ordered by the consumer in one order and delivered separately: "when the consumer has taken delivery of each of the goods ordered.";
  - d) in the case of a contract relating to delivery of a good consisting of multiple lots or pieces: "on which the consumer has taken delivery of the last lot or piece.";
  - e) in the case of a contract for regular delivery of goods during defined period of time: "on which the consumer has taken delivery of the first good."
- 2 Here the name, geographical address and email address of the business are to be inserted.
- 3 Here the following is to be inserted if the business gives the option to the consumer to electronically fill in and submit the model withdrawal form on the business's website: "The consumer shall also have the option to electronically fill in and submit the model withdrawal form on the business's website [insert internet address]. If the consumer uses this option, the business shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay."
- 4 Here the following is to be inserted in the case of a contract for the sales of goods: "Unless the business has offered to collect the goods himself, he may withhold the reimbursement until he has received the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest."

5 Here the following is to be inserted if the consumer has received goods in connection with the contract: "The consumer shall send back the goods or hand them over to the business or to a person authorised by the business to receive them, without undue delay and no later than fourteen days from the day on which he informs the business of the withdrawal, unless the business has offered to collect the goods himself. The deadline is met if the goods are sent back by the consumer before the period of fourteen days has expired. The consumer shall only bear the direct cost of returning the goods unless the business has agreed to bear that cost. The consumer shall only be liable for any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods."

In case of off-premises contracts where the goods have been delivered to the consumer's home at the time of the conclusion of the contract the following is to be inserted: "The business shall collect the goods at his own cost if the goods by their nature cannot be normally returned by post."

In the case of a contract dealing with the provision of services the following is to be inserted: "If the consumer has requested to begin the provision of services during the withdrawal period, he shall pay to the business a reasonable amount which shall not exceed an amount which is in proportion to the extent of the services provided until the time the consumer has informed the business of the exercise of the right of withdrawal, in comparison with the full coverage of the contract."

## **Annex I (B)**

### **STANDARD WITHDRAWAL FORM**

(complete and return this form only if you wish to withdraw from the contract)

- To:
  
- I/We\* hereby give notice that I/We\* withdraw from my/our\* contract of sale of the following goods\*/provision of the following service\*
  
- Ordered on\*/received on\*
  
- Name of consumer(s)
  
- Address of consumer(s)
  
- Signature of consumer(s) (only if this form is notified in writing)
  
- Date

\* Delete as appropriate.