EUROFINAS

The Director General

Mr. G. ABBAMONTE
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European Commission

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Brussels, 15 May 2007

Re: Green Paper on the Review of the Consumer Acquis

Dear Mr. Abbamonte,

Eurofinas welcomes the publication of the Green Paper on the Review of the Consumer Acquis and the opportunity to provide comments thereon.

Eurofinas supports the review of the Consumer Acquis.

Our support is conditional, however, upon the objective (and end-result) of the whole exercise being a genuine simplification and a streamlining of the Consumer Acquis. Indeed, the risk is real that such an initiative, however well intended, results, at the end of the co-decision process, in additional red tape.

We believe that the new horizontal instrument (if any) does not necessarily need to be a Directive and that the use of Regulations should be considered (certainly so when it comes to simply harmonizing definitions).

You will find our comments below.

I stay at your entire disposal.

Yours sincerely,

Tanguy van de WERVE
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EUROFINAS' COMMENTS ON THE GREEN PAPER ON THE REVIEW OF THE CONSUMER ACQUIS

Question A1: In your opinion, which is the best approach to the review of the consumer legislation?
Option 1: A vertical approach consisting of the revision of the individual directives.
Option 2: A mixed approach combining the adoption of a framework instrument addressing horizontal issues that are of relevance for all consumer contracts with revisions of existing sectoral directives whenever necessary.
Option 3: Status quo: no revision. Existing inconsistencies and gaps will remain.

Answer
We support Option 2 – mixed approach.

Our support is conditional however upon the objective (and end-result) of the whole exercise being a genuine simplification and a streamlining of the Consumer Acquis. Indeed, the risk is real that such an initiative, however well intended, results at the end of the co-decision process in additional red tape.

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Question A2: What should be the scope of a possible horizontal instrument?
Option 1: It would apply to all consumer contracts whether they concern domestic or cross-border transactions.
Option 2: It would apply to cross-border contracts only.
Option 3: It would apply to distance contracts only whether they are concluded cross-border or domestically.

Answer
We support Option 1 - all consumer contracts.

Unless it covers both domestic and cross-border contracts, the result will merely be further complexity, with suppliers and consumers having to cope with different rules applying to the same situation but with the only difference that one transaction happens to be domestic and another transaction happens to be cross-border.

We urge the Commission not to opt for Option 2 simply for ensuring the buy-in of some Member States.

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Question A3: What should be the level of harmonisation of the revised directives/the new instrument?
Option 1: The revised legislation would be based on full harmonisation.
Option 2: The revised legislation would be based on minimum harmonisation combined with a mutual recognition clause or with the country of origin principle.

Answer
We support Option 1 - full harmonisation.

It will benefit consumers who will be in a position to turn with confidence to suppliers in other Member States.
Consumers will also benefit from an increased offer of products since it will be easier for foreign companies to conduct business abroad. We are sceptical about a combination of full harmonisation and mutual recognition. Such a principle was enshrined in the 2005 CCD proposal. It suffered quite a lot of criticism and was later deleted from the text.

We do not agree with Option 2 as we know by now that such an approach is not conducive to the creation of a single market (at least in the financial services area).

We hope that the Commission does not take it for granted that the new horizontal instrument (if any) necessarily needs to be a Directive. The use of Regulations should be considered as well (certainly so when it comes to simply harmonizing definitions).

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Question B1: How should the notions of consumer and professional be defined? *Option 1*: An alignment would be made of the existing definitions in the Acquis, without changing their scope. Consumers would be defined as natural persons acting for purposes which are outside their trade, business or professions. Professionals would be defined as persons (legal or natural) acting for purposes relating to their trade, business and profession.
Option 2: The notions of consumer and professional would be widened to include natural persons acting for purposes falling *primarily* outside (consumer) or *primarily* within (professional) their trade, business and profession.

Answer
We support Option 1 - an alignment of the existing definitions without changing their scope.

A definition of “professionals” could be considered for all persons who are not deemed to be “consumers”.

Common definitions of “agents”, “suppliers”, “goods” may be envisaged.

The lack of a commonly applied Europe-wide definition of “consumer” is a source of unnecessary legal uncertainty.

Unified definitions are of vital importance and must be as precise as possible.

We do not agree with Option 2: using the word “primarily” would result in legal uncertainty and, most likely, diverging interpretations. This would not be helpful.

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Question B2: Should contracts between private persons be considered as consumer contracts when one of the parties acts through a professional intermediary?
Option 1: Status quo: consumer protection would not apply to consumer-to-consumer contracts where one party makes use of a professional intermediary for the conclusion of the contract.
Option 2: The notion of consumer contracts would include situations where one party acts through a professional intermediary.

Answer
We support Option 1 - status quo. Consumer protection would not apply to consumer-to consumer contracts.

The answer should be nuanced however as it ultimately depends on the precise role of the intermediary in the conclusion of the contract .

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Question C: Should a horizontal instrument include an overarching duty for professionals to act in accordance with the principles of good faith and fair dealing?
Option 1: The horizontal instrument would provide that under EU consumer contract law professionals are expected to act in good faith.
Option 2: The status quo would be maintained: There would be no general clause.
Option 3: A general clause would be added which would apply both to professionals and consumers.

Answer
We support Option 2 - status quo. No general clause.

We note that the Directive on Unfair Terms in Consumer Contracts already provides for an effective basis on which to judge the fairness of contractual terms and, although outside the scope of the review, the Unfair Commercial Practices Directive (2005/29/EC) also covers this area.

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Question D1: To what extent should the discipline of unfair contract terms also cover individually negotiated terms?
Option 1: The scope of application of the Directive on Unfair Terms would be expanded to individually negotiated terms.
Option 2: Only the list of terms annexed to the Directive would be made applicable to individually negotiated terms.
Option 3: Status quo – Community rules would continue to apply exclusively to non-negotiated terms or pre-formulated terms.

Answer
We support Option 3 - status quo. Community rules would continue to apply exclusively to non-negotiated terms or pre-formulated terms.

If a contract term has been duly negotiated and agreed upon, it is not appropriate or reasonable for either party to argue at a later stage that the term was unfair.

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Question D2: What should be the status of any list of unfair contract terms to be included in a horizontal instrument?
Option 1: Status quo. The current indicative list should be maintained.
Option 2: A rebuttable presumption of unfairness (grey list) would be established for some contractual terms. This option would combine guidance with flexibility as to the assessment of fairness.
Option 3: A list of terms – presumably much shorter than the existing list – which are considered to be unfair in all circumstances (black list) would be established.
Option 4: A combination of options 2 and 3: some terms would be banned completely, while a rebuttal presumption of unfairness would apply to the others.

Answer
We support Option 1- status quo. The current indicative list should be maintained.

In general we believe that the question as to whether particular terms are unfair should be solved at national level.

We support the approach taken in the UTD, i.e.:
- a non-exhaustive list of types of terms which may be, but are not necessarily, held to be unfair ("grey list" in § 1 of the Annex to the UTD); and
- a set of adapted "guidelines" ("positive list") for the financial services sector in case where market conditions (duration of contract, interest and exchange rates) would unilaterally endanger the position of the creditor versus his counterpart (§ 2 of the Annex to the UTD).

We take the view that with such a positive list, one avoids a situation whereby certain terms deemed "fair" in the Directive, might be declared "unfair" in a given Member State.

We do not agree with Option 3: a "black list" system might result in the cancellation of terms which, within their context, are not unfair.

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Question D3: Should the scope of the unfairness test of the Directive on Unfair Terms be extended?
Option 1: The unfairness test would be extended to cover the definition of the main subject matter of the contract and the adequacy of the price
Option 2: Status quo - the test of unfairness would be kept in its present form.

Answer
We support Option 2 - status quo. The test of unfairness should be kept in its present form.

In addition, we support the approach adopted in the UTD (in a "Whereas") when it comes to assessing the "good faith" of a party, i.e. having regard to factors such as:
- the strength of the bargaining positions of the parties;
- whether the consumer had an inducement to agree to the term;
- whether the goods or services were sold or supplied to the special order of the consumer ; and
- the extent to which the seller or the supplier has dealt fairly and equitably with the consumer.

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Question E: What contractual effects should be given to the failure to comply with information requirements in the Consumer Acquis?
Option 1: The cooling-off period, as a uniform remedy for failure to comply with information requirements, would be extended, e.g. up to three months.
Option 2: There would be different remedies for breaching different groups of information obligations: some breaches at the pre-contractual and contractual level would give rise to remedies (e.g. incorrect information on the price of a product could entitle the consumer to avoid the contract), whilst other failures to inform would be treated differently (e.g. through an extension of the cooling-off period or with no contractual sanction at all).
Option 3: Status quo: The contractual effects of failure to provide information would continue to be regulated differently for different types of contract.

Answer
We support Option 3 - status quo. Different types of contracts require different contractual effects in case of failure to provide information.

The consequences of a failure to comply should depend on the substance of the contract. Option 3 provides this necessary flexibility.

We do not support Option 1, a systematic lengthening of cooling-off periods, particularly in face-to-face operations as in this case parties are in an immediate position to raise any question they deem necessary.

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Question F1: Should the length of the cooling-off periods be harmonised across the Consumer Acquis?
Option 1: There would be one cooling-off period for all cases when the consumer directives grant consumers a right to withdraw from the contract, e.g. 14 calendar days as currently provided for in the timeshare directive.
Option 2: Two categories of directives would be identified and to each of them a specific cooling-off period would be attached (e.g. 10 calendar days for door-to-door and distance contracts as opposed to 14 calendar days for timeshare).
Option 3: Status quo: cooling-off periods would not be harmonised in the Consumer Acquis.

Answer
We support Option 3 - status quo. Cooling-off periods would not be harmonised in the Consumer Acquis.

We understand that the “cooling-off period “is the time period immediately preceding the conclusion of the contract, during which the creditor is unilaterally bound by the pre-contractual information (e.g. Art. 5-2-o in draft CCD dated 2nd May 2007). This is different from a right of withdrawal period which is a time period starting at the (a) moment where the contract is (already) concluded between the two parties.

We are of the opinion that the cooling-off period must be adapted to how rapidly the value of the goods or services diminishes. We note that any lengthening of the current periods would slow transactions down and may be detrimental to the economy.

As far as the right of withdrawal is concerned, we believe that it should be limited to seven working days with no discretion being left to the Member States.

In case of linked credit operations, such a right of withdrawal period should be combined with a waiver mechanism. The latter offers the most appropriate guarantees for the respective parties to the contract: the consumer, the salesperson and the lender.

Harmonization of the length of the right of withdrawal periods across Directives is a long standing request of the industry (to the extent however that the right of withdrawal period is limited to seven working days).

Depending on the Directives, the periods are currently calculated in “days”, “working days” or “calendar days”. For the sake of efficiency and legal certainty, we believe that the use of a single, well defined, criterion is preferable.

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Question F2: How should the right of withdrawal be exercised?
Option 1: Status quo: Member States would be free to determine the form of the notice of withdrawal.
Option 2: One uniform procedure for the notice of withdrawal across the consumer Acquis would be established.
Option 3: All formal requirements for the notification of withdrawal would be excluded. A consumer would then be able to withdraw from the contract by any means (including by returning the goods).

Answer
We support Option 1 - status quo. Member States should be free to determine the form of the notice of withdrawal.

We believe that Member States should be free to determine how the right of withdrawal is exercised. Even within Members States there are differing requirements for how a customer should withdraw from a contract. This is necessary and is determined by the nature of the contract.

A differentiated treatment could be envisaged for face-to-face and remote operations respectively.

Our Swedish Members rather support Option 2.

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Question F3: Which costs should be imposed on consumers in the event of withdrawal?
Option 1: The current regulatory options would be removed - consumers would then not face any costs whatsoever when exercising their right of cancellation.
Option 2: The existing options would be generalised: consumers would then face the same costs when exercising the right to withdrawal irrespective of the type of contract.
Option 3: Status quo: The current regulatory options would be maintained.

Answer
We support Option 3 - status quo. The current regulatory options would be maintained.

We do not agree with Options 1 and 2. There must be a right to compensation in the case of withdrawal and this compensation must be adapted to the kind of product or service in question and the costs incurred in case of withdrawal.

We therefore believe that the rights and remedies in the event of a withdrawal need to be decided on a sector specific basis.

For instance, in the context of the current review of the framework Directive on Distance Selling, Article 6-1 should be amended in order to reinforce the consumer's obligation regarding the return in good condition and fair wear and tear of the goods that he has received. We further believe that Article 6.2 of the same should be amended to make it clear that the consumer is required to return the goods to the supplier upon cancellation and that reimbursement is conditional on the return of the said goods.

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Question G1: Should the horizontal instrument provide for general contractual remedies available to consumers?
Option 1: Status quo: the Acquis would only provide for remedies limited to the particular types of contracts (i.e. sales). The general contractual remedies would be regulated by national law.
Option 2: A set of general contractual remedies available to consumers in the case of a breach of any consumer contract would be provided. These remedies would include: the right of a consumer to terminate the contract, to ask for a reduction of the price and to withhold performance.

Answer
We support Option 1 – status quo. The Acquis would only provide for remedies limited to the particular types of contracts.

We note that a number of EU instruments already provide consumers with appropriate remedies, e.g. the European Order for Payment Procedure, the European Enforcement Order for Uncontested Claims, the Small Claims Procedure , the Resolution of Disputes by use of Mediation , the Proposal for a Directive to improve access to justice in cross-border disputes , the Directive on Injunctions for the protection of consumers interests, and the Consumer Credit Directive under review.

We do not believe that Option 2 would be fair or workable as contractual remedies have to be relevant and proportionate to the nature of the contract in question. A remedy suitable for sale of goods will not necessarily be suitable for a contract for the supply of services and vice versa.

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Question G2: Should the horizontal instrument grant consumers a general right to damages for breach of contract?
Option 1: Status quo: the issue of contractual damages would be governed by national laws (except for package travel).
Option 2: A general right to damages for consumers would be introduced - they would be able to claim damages for all breaches, irrespective of the type of breach and the nature of the contract. It would remain up to the Member States to decide what types of damages could be compensated.

Option 3: A general right to damages for consumers would be introduced and it would be provided that these damages should at least cover purely economic (material) damages that the consumer has suffered as a result of the breach. Member States would then be free to regulate non-economic loss (e.g. moral damages).
Option 4: A general right to damages for consumers would be introduced and it would be provided that these damages should cover both the purely economic (material) damage and the moral losses.

Answer
We support Option 1- status quo. The issue of contractual damages would be governed by national law.

The example mentioned by the EU Commission (Package Travel Directive) is not relevant for our sector.

We note however that our UK Members rather support Option 3.

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Question H1: Should the rules on consumer sales cover additional types of contracts under which goods are supplied to consumers?
Option 1: Status quo: i.e. the scope of application would be limited to sales of consumer goods, with the only exception of goods which are still to be produced.
Option 2: The scope would be extended to additional types of contracts under which goods are supplied to consumers.
Option 3: The scope would be extended to additional types of contracts under which digital content services are provided to consumers (e.g. on-line music).
Option 4: Combination of Option 2 and 3.

Answer
No comments.

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Question H2: Should the rules on consumer sales apply to second-hand goods sold at public auctions?
Option 1: Yes.
Option 2: No, they would be excluded from the scope of Community rules.

Answer
No comments.

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Question I1: How should delivery be defined?
Option 1: Delivery would mean that the consumer materially receives the goods (i.e. the goods are handed over to the consumer).
Option 2: Delivery would mean that goods are placed at the consumer's disposal at the time and place specified in the contract.
Option 3: Delivery would mean, by default, that the consumer takes physical possession of the goods, but the parties can agree otherwise.
Option 4: Status quo: the term delivery would not be defined.

Answer
We support Option 4 - status quo. No definition.

The Directive on the Sale of Consumer Goods (SCG) does not define the concept of "delivery". To our knowledge, this has not given rise to specific problems. Therefore we see no need for EU action in this area.

We note that our UK Members take the view that a consumer would usually expect delivery to occur at the time that he takes physical possession (Option 3).

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Question I2: How should the passing of the risk in consumer sales be regulated?
Option 1: The passing of the risk would be regulated at Community level and be linked to the moment of delivery.
Option 2: Status quo: the passing of risk would be regulated by the Member States, with the consequence of divergent solutions.

Answer
We support Option 2 – status quo. The passing of risk would be regulated by the Member States.

As with the definition of "delivery", we believe that this matter is better dealt at national level.

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Question J1: **Should the horizontal instrument extend the time limits applying to lack of conformity for the period during which remedies were performed?**
Option 1: Status quo: no changes would be made.
Option 2: Yes. The horizontal instrument would provide that the duration of the legal guarantee is extended for a period during which the consumer was not able to use the goods due to remedies being performed.

Answer
We support Option 1 - status quo. No extension of time limits.

We do not agree with Option 2 as it could prove extremely difficult in practice to establish the *exact* period during which the consumer was not able to use the goods due to remedies being performed.

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Question J2: **Should the guarantee be automatically extended in case of repair of the goods to cover recurring defects?**
Option 1: Status quo: The guarantee would not be extended.
Option 2: The duration of the legal guarantee would be extended for a period to be specified after the repair to cover the future re-emergence of the same defect.

Answer
We support Option 1 – status quo. The guarantee would not be extended.

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Question J3: **Should specific rules exist for second hand-goods?**
Option 1: A horizontal instrument would not include any derogation for second hand goods: the seller and consumer would not be able to agree on a shorter period of liability for defects in second hand goods.
Option 2: A horizontal instrument would contain specific rules for second hand goods: the seller and the consumer may agree on a shorter period of liability for defects in second hand goods (but not less than one year).

Answer
No comments.

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Question J4: Who should bear the burden to prove that the defects existed already at the time of delivery?
Option 1: Status quo: During the first six months it would be up to the professional to prove that the defect did not exist at the time of delivery.
Option 2: It would be up to the professional to prove that the defect did not exist at the time of the delivery for the entire duration of the legal guarantee as long as this would be compatible with the nature of the goods and the defects.

Answer
We support Option 1 – status quo. During the first six months, it is up to the professional to prove that the defect did not exist at the time of delivery.

This is a question of finding the appropriate balance as between supplier and consumer. As a general proposition, it is for the party to a contract who alleges breach to prove his case.
The six month rule reverses this in order to allow for a reasonable period for defects to become apparent.
In practice, we doubt whether there are many cases where a defect which existed at the time of delivery does not become apparent within the six month period and, therefore, this protection probably serves the purpose intended.

We do not agree with Option 2: it would be unreasonable to adopt an extended period as there is the distinct risk that defects could arise which were not, in reality, in existence at the time of delivery.
The supplier would have ever increasing difficulty in proving that these defects (which arose later on) did not exist at that time. This would mean to prove *a posteriori* the absence of a defect.

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Question K1: Should the consumer be free to choose any of the available remedies?
Option 1: Status quo: consumers would be obliged to request repair/replacement first, and ask for a price reduction or termination of contract only if the other remedies are unavailable.
Option 2: Consumers would be able to choose any of the available remedies from the start. However, termination of the contract would only be possible under specific conditions.
Option 3: Consumers would be obliged to request repair, replacement or reduction of price first, and would be able to ask for termination of contract only if these remedies are unavailable.

Answer
We support Option 1 - status quo. Consumers would be obliged to request repair/replacement first.

Option 1 reflects a more gradual process than the two other options. We do not believe that the current range of remedies results in any particular problems for consumers and we believe that they work quite well.

If there is a problem at present, it may arise from the relative complexity of the existing provisions. Consumers, as well as traders, may misunderstand them.
If there needs to be any change, it should be to review the current wording in order to make it more transparent and understandable, not to change the substance.

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Question K2: Should consumers have to notify the seller of the lack of conformity?
Option 1: A duty to notify the seller of any defect would be introduced.
Option 2: A duty to notify in certain circumstances would be introduced (e.g. when the seller acted contrary to the requirement of good faith or was grossly negligent).
Option 3: The duty to notify within a certain period would be eliminated.

Answer
We support Option 1.

The notification obligation simply reflects the duty of a "*bonus pater familias*" as referred to in Article 5-2 of SCG. Most Member States have enacted a duty to notify. It is reasonable to require consumers to do so.

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Question L: Should the horizontal instrument introduce direct liability of producers for non-conformity?
Option 1: Status quo: no rules on direct liability of producers would be introduced at EU level.
Option 2: A direct liability for producers would be introduced.

Answer
We support Option 1 - status quo. No rules on direct liability of producers to be introduced at EU level.

The mechanism in the SCG offers a balanced possibility to the seller to first pursue remedies against a previous seller in the same chain of contracts or any other intermediary before starting judicial claims against the producer itself (Article 4).

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Question M1: Should a horizontal instrument provide for a default content of a commercial guarantee?
Option 1: Status quo: the horizontal instrument would contain no default rules.
Option 2: Default rules for commercial guarantees would be introduced.

Answer
We support Option 1 - status quo. No default rules in the horizontal instrument.

The horizontal instrument should not be prescriptive of the contents of contractual guarantees. We note that, in any event, the Unfair Terms Directive provides that, in case of doubt, the interpretation most favourable to the consumer shall prevail.

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Question M2: Should a horizontal instrument regulate the transferability of the commercial guarantee?
Option 1: Status quo: the possibility to transfer a commercial guarantee would not be regulated by Community rules.
Option 2: A mandatory rule that the guarantee is automatically transferred to the subsequent buyers would be introduced.
Option 3: The horizontal instrument would provide for the transferability as a default rule, i.e. a guarantor would be able to exclude or limit the possibility to transfer a commercial guarantee.

Answer
We support Option 1– status quo. Transferability of the commercial guarantee would not be regulated by Community rules.

Our reasons are similar to the reasons given under Question M1 above.

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Question M3: Should the horizontal instrument regulate commercial guarantees limited to a specific part?
Option 1: Status quo: the possibility to provide commercial guarantee limited to specific part would not be regulated by the horizontal instrument.
Option 2: The horizontal instrument would only provide for the information obligation.
Option 3: The horizontal instrument would include an information obligation and would provide that, by default, a guarantee covers the entire contract goods.

Answer
We support Option 1 - status quo. The possibility to provide commercial guarantee limited to specific part would not be regulated by the horizontal instrument.

Our reasons are similar to the reasons given under Question M1 above.

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Question N: Is/are there any other issue(s) or area(s) that requires to be explored further or addressed at EU level in the context of consumer protection?

Answer
Eurofinas does not have any suggestion at this stage.

About Eurofinas

Eurofinas is the main voice of the consumer credit industry at European level. It currently represents 15 National Associations, in turn bringing together more than 1,150 finance and credit institutions. Together, Eurofinas' members financed over 352 billion euros worth of new loans during 2005, with outstandings reaching above 600 billion euros at the end of 2005. Companies represented by Eurofinas employ some 69 500 individuals.

Consumer credit providers may be of several natures and our members' members can be grouped into the categories below. Around 90% of the companies represented through Eurofinas are specialised lenders, falling into the first three categories:

- Finance houses: specialised consumer credit providers without a banking licence
- Captive companies: parent companies of these companies are manufacturers (e.g. car manufacturers). Captives may or may not have a banking licence
- Specialised banks : institutions with a banking licence but an activity limited to consumer credit or/and mortgage lending
- Universal banks: banks providing all kinds of products retail, corporate, etc., including consumer credit