A comparison between the provisions of the draft Common Frame of Reference and the European Commission’s proposal for a Consumer Rights Directive

STUDY

EN 2009
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How the CFR can improve the Consumer Rights Directive

[STUDY]

Abstract
This study provides an in-depth and detailed comparison between the draft Common Frame of Reference and the Commission’s proposal for a Consumer Rights Directive. Furthermore, it identifies those provisions of the CFR which could be used when amending the Proposal for a Consumer Rights Directive in the framework of the legislative procedure. In this regard, the study suggests some amendments based on the CFR. A correlation table between the provisions of the CFR and the provisions of the proposed Consumer Rights Directive is provided in the annex of the study.
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EXECUTIVE SUMMARY

The European Commission’s proposal for a Directive on Consumer Rights (CRD) does not refer to the draft Common Frame of Reference (CFR) – a toolbox for the revision of the contract law acquis, prepared at the request of the Commission – that was made available almost a year before the publication of the proposal. The European Parliament, however, may wish to rely on the CFR when tabling amendments. Using the CFR as a toolbox could be beneficial to the CRD in several respects: it would improve the consistency and the quality of the CRD and as a set truly European non-national model rules the CFR could be instrumental in furthering the aim of encouraging cross-border contracts through the CRD. Finally, the CFR could play a crucial role in dealing with the intricate relationship between consumer rights and general contract law.

This study provides an in-depth and detailed comparison between the European Commission’s proposal for a Directive on Consumer Rights (CRD) and the draft Common Frame of Reference (CFR) and contains suggestions for amendments to the CRD based on the CFR. The key findings of the study are the following:

The CRD adopts a more restrictive definition of the notion of consumer than the CFR, which allows a consumer to make occasional professional use of a consumer good, as long as the primary use is personal.

The CRD does not contain any general duty to provide a consumer with the information he can reasonably expect. On the other hand the CFR does not spell out specific information duties in any detail. Furthermore, the CRD leaves the remedies for a failure to comply with the information duties to the Member States, which will leave room for divergence between the Member States, and puzzle the Member States who’s contract law currently does not contain any remedies for a failure to provide pre-contractual information.

With regard to distance and off-premises contracts, the CRD does not place the burden of proof concerning compliance with his information duties explicitly on the trader. In the case of withdrawal from such a contract, the CFR contains clearer rules than the CRD on the starting point of the withdrawal period; under certain circumstances the withdrawal period in the CFR will be longer than under the CRD, and the CFR is more flexible with respect to the way the right of withdrawal is exercised. Moreover, the CRD fails to provide explicitly that the consumer does not incur liability through withdrawal and fails to make sure that payments should be refunded to the consumer without undue delay.

For consumer sales contracts, the CRD is not clear on the meaning and extent of the liability of the trader in case of non-conformity of the goods. In addition, the consumer is confronted with a hierarchy of remedies and it is not clear when he will have a right to damages. The CRD does not explicitly limit the trader’s liability in the case of a force majeure. Unlike the CFR, the CRD contains a duty for the consumer to notify the seller in case of non-conformity failing which he will loose his remedies.

The section on unfair contract terms of the CRD is comparable to the CFR. However, the CRD does not contain a rule to the effect that a lack of transparency alone can make a term unfair. The ‘grey list’ of terms that are presumed to be unfair is more favourable with respect to unilateral adaptation of contract terms by the trader in the CFR.
In general, the CRD could be clearer on the question which rules of the directive are mandatory. In addition, the terminology of the CFR is more in line with the European Union’s aim of better law making, e.g. with respect to consistency, gender-neutral drafting and transparency.
LIST OF ABBREVIATIONS

**CFR**  Common Frame of Reference

**CRD**  Consumer Rights Directive
1. INTRODUCTION

KEY FINDINGS

- The CFR was meant to be a toolbox for revising the contract law acquis but the CRD does not refer to it.

In October 2008 the European Commission published a Proposal for a directive on consumer right.\(^1\) Although an Interim Outline Edition of the draft Common Frame of Reference was published almost a year earlier,\(^2\) the Commission's proposal does not contain a single reference, be it in its preliminary recitals or in the Commission's explanatory memorandum, to the draft CFR. Moreover, there are also considerable differences between the actual rules in the proposal and those in the draft CFR. As was pointed out in an earlier briefing note to the European Parliament,\(^3\) this is quite astonishing in light of the fact that the whole purpose of the Common Frame of Reference was that it could serve as a toolbox for the Commission when revising the *acquis communautaire* in the area of contract law.

This study assesses the differences between the 2009 Outline Edition of the draft Common Frame of Reference (CFR)\(^4\) and the Commission’s proposal for a Consumer Rights Directive (CRD), and suggests possible amendments to the CRD based on the CFR. It is an in-depth follow-up to the earlier briefing note.

In particular, this study:
- identifies those arguments which can be used to encourage the Commission to rely on the toolbox CFR in contract legislation and in any legislative proposal having an impact on contract law (Section 2);
- provides an in-depth and detailed comparison between the CFR and the Consumer Rights Directive (Sections 3-7: Comparison);
- identifies those provisions of the CFR which could be used by the EP when amending the Consumer Rights Directive in the framework of the legislative procedure (Sections 3-7: Suggestions for amendments based on the CFR); and
- provides a Correlation Table between the provisions of the CFR and the provisions of the Consumer Rights Directive (Annex).

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2. THE CFR AS A TOOLBOX FOR AMENDING THE CONSUMER RIGHTS DIRECTIVE

KEY FINDINGS

- There are good reasons for the EP to use the CFR as a toolbox for tabling amendments to the CRD.
- The reasons relate to the consistency of European contract law, the substantive quality of the CFR and its truly European nature.

The first reason to use the CFR as a toolbox for improving the CRD is that this is precisely what the CFR was meant for. In its Action Plan for a more coherent European contract law the European Commission announced that it would revise the acquis communautaire in the area of contract law with a view to improving its coherence. There it presented the idea of a CFR which was supposed to provide for best solutions. In the 'Executive Summary' the Commission formulated its plans as follows:5

> 'In addition to continuing to put forward sector-specific proposals where these are required, the Commission will seek to increase, where necessary and possible, coherence between instruments, which are part of the EC contract law acquis, both in their drafting and in their implementation and application. Proposals will, where appropriate, take into account a common frame of reference, which the Commission intends to elaborate via research and with the help of all interested parties. This common frame of reference should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms like “contract” or “damage” and of the rules that apply for example in the case of non-performance of contracts. A review of the current European contract law acquis could remedy identified inconsistencies, increase the quality of drafting, simplify and clarify existing provisions, adapt existing legislation to economic and commercial developments which were not foreseen at the time of adoption and fill gaps in EC legislation which have led to problems in its application. The second objective of the common frame of reference is to form the basis for further reflection on an optional instrument in the area of European contract law.'

Not only was the CFR meant to provide the Commission with best solutions in the revision of the contract law acquis, a process of which the proposed CRD is the first concrete outcome. The Commission also explicitly encouraged the Council and the European Parliament to rely on the CFR when tabling amendments. In its communication The Way Forward the Commission wrote the following:6

> 'the Commission will consider the necessity for proposals to amend the existing directives. ... Any proposals will take into account work on the draft CFR, as appropriate ... It would also be desirable that the Council and the EP could use the CFR when tabling amendments to Commission proposals. Such use of the CFR would be consistent with the shared goal of achieving high quality EU legislation and the

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commitment of the institutions to promote simplicity, clarity and consistency of the EU legislation.'

Therefore, using the CFR as a source of inspiration, a toolbox containing ‘best solutions’ would simply be part of the revision of the acquis according to the Commission’s plan. Moreover, there are also compelling substantive reasons.

Clearly, using the CFR as a toolbox for amending the proposed CRD can contribute to making European contract law more coherent. This applies in the first place to the relationship between the CRD and the other parts of the contract law acquis, consumer contract law (B2C) and commercial contract law (B2B), especially when those parts will also be revised. But it applies also to the relationship between the CRD and national contract law. In particular, the CFR provides a coherent set of background general contract law rules against which the CRD could be read and with which it could form a more coherent system. Finally, if the European Union is going to adopt an optional European code of contracts (opt-in or opt-out), the CFR can serve as a model. Once the Lisbon Treaty will be in force the political climate in Europe may become more favourable to, for example, the blue button idea, than it was in the last few years.7

Another strong reason, in particular for the European Parliament, to be inspired by the draft CFR is that it provides a truly European system of private law rules. The CFR is European in at least two ways. In the first place it is non-national. This makes it particularly well adapted for the cross-border contracts that EC contract law legislation aims to encourage. Secondly, the CFR is European in the sense that it is based on comparison of the legal system of all the Member States. In that sense it may be said to express a common European identity, that European citizens share in addition to their national, regional and other cultural identities.

7 For that idea see Hans Schulte-Nölke, ‘EC Law on the formation of contract - from the Common Frame of Reference to the "Blue Button"’, 3 ERCL 2007, 332-349.
3. PERSONAL AND MATERIAL SCOPE

**KEY FINDINGS**

- The CRD adopts a more restrictive definition of the notion of consumer.

**Comparison**

The CRD has a different personal and material scope than the CFR. In particular, the CRD offers consumer protection to a more limited group of consumers and in a smaller range of contracts than the CFR.

**Personal scope**

In general, the CRD has a much more restricted scope than the CFR. The CRD concerns consumer contracts only, whereas the CFR covers both B2B and B2C contracts.

What is more, the CRD’s definition of B2C contracts is less extensive than that of the CFR: The CFR contains a broader definition of the notion of ‘consumer’ than the CRD, in the sense that the CFR extends consumer protection to ‘any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession’ (I.-1:105(1), emphasis added). The CRD protects ‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession’ (Art. 2(1)) and thus in principle does not cover contracts containing both a B2B and a B2C component. As a consequence, under the definition in the CRD, a person that purchases a computer with the dual purpose of using it as a word processor for work at home and for playing computer games is not considered to be a consumer, whereas she would be considered a consumer under the CFR if the ‘professional use’ of the desktop computer would not outweigh the ‘private use’ thereof. The definitions of ‘trader’ (Art. 2(2) CRD) and ‘business’ (I.-1:105(2) CFR), on the other hand, largely overlap. Although the CFR specifies that both publicly and privately owned legal persons are included and that it is not relevant whether business activities are conducted with an eye to making profit, it may be assumed that this is equally true for ‘traders’ under the CRD. Interestingly, nevertheless, the CRD explicitly adds that also ‘anyone acting in the name of or on behalf of the trader’ is included in the definition.

**Material scope**

Where the CRD refers to ‘any sales or services contract’, the CFR covers all types of contracts (I.-1:101 and II.-1:101 DCFR). The CRD’s material scope thus is less broad than that of the CFR. Furthermore, its definition of a ‘sales contract’ differs from that used in the CFR: The ‘sales contract’ under the CRD covers contracts for the sale of goods as well as mixed-purpose contracts having as their objects both goods and services (Art. 2(3)). The ‘sales contract’ under the CFR covers the sale of goods as well as the sale of assets (IV.A.-1:202). ‘Assets’ are defined as ‘anything of economic value, including property; rights having a monetary value; and goodwill’ (Annex Definitions). The different approach to the inclusion of ‘assets’ can be explained by the fact that the CFR, unlike the CRD, extends to matters of property law.

**Suggestion for amendment based on the CFR**

- Article 2 (1): ‘consumer’ means any natural person who, in contracts covered by this Directive, is acting primarily for purposes which are outside his trade, business, craft or profession
4. INFORMATION DUTIES IN GENERAL

KEY FINDINGS

- The CRD does not contain any general duty to provide the consumer with the information he can reasonably expect.
- The CRD does not spell out any specific remedies for the failure to provide the required information.

4.1. General information duties

Both the proposed CRD and the CFR include general provisions on information duties. The relevant provisions are the following:

**CRD**

**Article 5: General information requirements**

1. Prior to the conclusion of any sales or service contract, the trader shall provide the consumer with the following information, if not already apparent from the context:
   (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
   (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
   (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
   (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
   (e) the existence of a right of withdrawal, where applicable;
   (f) the existence and the conditions of after-sales services and commercial guarantees, where applicable;
   (g) the duration of the contract where applicable or if the contract is open-ended, the conditions for terminating the contract;
   (h) the minimum duration of the consumer’s obligations under the contract, where applicable;
   (i) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader.

2. In the case of a public auction, the information in paragraph 1(b) may be replaced by the geographical address and the identity of the auctioneer.

**CFR**

II. – 3:101: Duty to disclose information about goods, other assets and services

(1) Before the conclusion of a contract for the supply of goods, other assets or services by a business to another person, the business has a duty to disclose to the other person such information concerning the goods, other assets or services to be supplied as the other person can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.

(2) In assessing what information the other person can reasonably expect to be disclosed, the test to be applied, if the other person is also a business, is whether the failure to provide the information would deviate from good commercial practice.

II. – 3:102: Specific duties for businesses marketing to consumers

(1) Where a business is marketing goods, other assets or services to a consumer, the business has a duty not to give misleading information. Information is misleading if it misrepresents or omits material facts which the average consumer could expect to be given for an informed decision on whether to take steps towards the conclusion of a contract. In assessing what an average consumer could expect to be given, account is to be taken of all the circumstances and of the limitations of the communication medium employed.

(2) Where a business uses a commercial communication which gives the impression to consumers that it contains all the relevant information necessary to make a decision about concluding a contract, the business has a duty to ensure that the communication in fact contains all the relevant information. Where it is not already apparent from the context of the commercial communication, the information to be provided comprises:
   (a) the main characteristics of the goods, other
3. The information referred to in paragraph 1 shall form an integral part of the sales or service contract.

assets or services, the identity and address, if relevant, of the business, the price, and any available right of withdrawal;
(b) peculiarities related to payment, delivery, performance and complaint handling, if they depart from the requirements of professional diligence; and
(c) the language to be used for communications between the parties after the conclusion of the contract, if this differs from the language of the commercial communication.

(3) A duty to provide information under this Article is not fulfilled unless all the information to be provided is provided in the same language.

II. – 3:107: Information about price and additional charges
Where under this Chapter a business has a duty to provide information about price, the duty is not fulfilled unless what is provided:
(a) includes information about any deposits payable, delivery charges and any additional taxes and duties where these may be indicated separately;
(b) if an exact price cannot be indicated, gives such information on the basis for the calculation as will enable the consumer to verify the price; and
(c) if the price is not payable in one sum, includes information about the payment schedule.

II. – 3:108: Information about address and identity of business
(1) Where under this Chapter a business has a duty to provide information about its address and identity, the duty is not fulfilled unless the information includes:
(a) the name of the business;
(b) any trading names relevant to the contract in question;
(c) the registration number in any official register, and the name of that register;
(d) the geographical address of the business;
(e) contact details;
(f) where the business has a representative in the consumer's [Member] state of residence, the address and identity of that representative;
(g) where the activity of the business is subject to an authorisation scheme, the particulars of the relevant supervisory authority; and
(h) where the business exercises an activity which is subject to VAT, the relevant VAT identification number.

(2) For the purpose of II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage), the address and identity of the business include only the information indicated in paragraph (1)(a), (c), (d) and (e).
Comparison

The main differences between these provisions are:

The personal scope
As said, the CRD concerns consumer contracts only, whereas the CFR covers both B2B and B2C contracts. ‘Another person’ in II.-3:101(1) thus should be understood as referring both to natural persons and to legal persons. Note, once again, that the CRD uses a less extensive definition of the notion of ‘consumer’ than the CFR, in the sense that the CFR extends consumer protection to ‘any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession’ (I.-1:105(1), emphasis added). The definitions of ‘trader’ (Art. 2(2) CRD) and ‘business’ (I.-1:105(2) CFR), on the other hand, largely overlap (see section 3 above).

The material scope
Where the CRD names ‘any sales or services contract’, the CFR provisions on information duties cover contracts ‘for the supply of goods, other assets or services’. The ‘sales contract’ under the CRD covers contracts for the sale of goods as well as mixed-purpose contracts having as their objects both goods and services (Art. 2(3)). The ‘sales contract’ under the CFR covers the sale of goods as well as the sale of assets (IV.A.-1:202; see further section 3 above).

Closed/open texture
The CRD specifically enumerates the information that the trader should provide to the consumer. The CFR, on the other hand, more generally stipulates that the business should disclose such information ‘as the other person can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances’. II.-3:102 to some extent specifies what information an ‘average consumer’ may expect to be given. The CRD refers to some of the topics that are also mentioned in this provision (compare Art. 5(1)(a)-(e) CRD and II.-3:102(2) CFR). Art. 5(1)(c) CRD largely corresponds to II.-3:107 CFR, which further specifies the information regarding the price. Art. 5(1)(b) CRD, on the other hand, offers a less detailed enumeration than II.-3:108 CFR in regard to the information about the address and identity of businesses. Remarkably, information on after-sales services, the duration and the termination of the contract (Art. 5(1)(f)-(i) CRD) is not mentioned in the CFR. While the CRD thus on the one hand seems to provide less extensive information duties than the CFR requires, on the other hand the CFR does not explicitly ask for information to be given on the latter topics, which might result in less broad information duties.

Suggestion for amendment based on the CFR

- Article 5, Para 1: ‘Prior to the conclusion of any sales or service contract, the trader shall provide the consumer with such information as the consumer can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances. The information must include, in particular, the following, if not already apparent from the context: …’
4.2. Failure to provide information

**CRD**

Article 6

Failure to provide information

1. If the trader has not complied with the information requirements on additional charges as referred to in Article 5(1)(c), the consumer shall not pay these additional charges.

2. Without prejudice to Articles 7(2), 13 and 42, the consequences of any breach of Article 5, shall be determined in accordance with the applicable national law. Member States shall provide in their national laws for effective contract law remedies for any breach of Article 5.

**CFR**

II. – 3:109: Remedies for breach of information duties

1. If a business has a duty under II. – 3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage) to provide information to a consumer before the conclusion of a contract from which the consumer has the right to withdraw, the withdrawal period does not commence until all this information has been provided. Regardless of this, the right of withdrawal lapses after one year from the time of the conclusion of the contract.

2. If a business has failed to comply with any duty imposed by the preceding Articles of this Section and a contract has been concluded, the business has such obligations under the contract as the other party has reasonably expected as a consequence of the absence or incorrectness of the information. Remedies provided under Book III, Chapter 3 apply to non-performance of these obligations.

3. Whether or not a contract is concluded, a business which has failed to comply with any duty imposed by the preceding Articles of this Section is liable for any loss caused to the other party to the transaction by such failure. This paragraph does not apply to the extent that a remedy is available for non-performance of a contractual obligation under the preceding paragraph.

4. The remedies provided under this Article are without prejudice to any remedy which may be available under II. – 7:201 (Mistake).

5. 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.

II. – 3:501: Liability for damages

1. Where any rule in this Chapter makes a person liable for loss caused to another person by a breach of a duty, the other person has a right to damages for that loss.

2. The rules on III. – 3:704 (Loss attributable to creditor) and III. – 3:705 (Reduction of loss) apply with the adaptation that the reference to non-performance of the obligation is to be taken as a reference to breach of the duty.

**Comparison**

The CRD and the CFR have adopted different approaches regarding the remedies for a failure to comply with an information duty. Whilst the CFR provides for remedies within its own system (including the right to damages, II.-3:501), the CRD refers to the national laws...
of the Member States (with the exception of the provision on additional charges, Art. 6(1)). The CRD thus offers specific, targeted provisions on some issues (e.g. the content of information duties), while leaving matters of general contract law (e.g. remedies for breach of information duties) to the national legal systems. The CFR, in contrast, provides a general, systematic background, in line with the idea of it functioning as a ‘toolbox’ for the European legislature.

Most consumers and business would think that what really matters in consumer protection are the remedies provided to the consumer. Thus, different remedies for the violation of information duties will be the real obstacle to cross-border consumer contracts. Especially, in the case of full harmonisation, where it is forbidden for Member States to ‘maintain or introduce, in their national law, ... to ensure a different level of consumer protection’ (Art. 4 CRD), it is not at all clear what amounts to a different level of consumer protection from the one indicated by the directive if the directive leaves the remedies entirely to the Member States. Therefore, an adequate set of consumer remedies spelled out in the directive seems to be indispensable for the aims of the directive. The CFR provides a neutral set of remedies. It is important that these remedies are not limited in the CFR - and should not be in the Member States - to contract remedies, but should also include non-contractual (tort, delict or misrepresentation), restitutionary (unjustified enrichment) remedies.

Obviously, leaving the remedy to national law is particularly unhelpful when national law of a Member State has no existing duty of disclosure and therefore no established remedies. The CFR could therefore be used to indicate what are considered the ‘effective remedies’ that must be provided.

**Suggestions for amendments based on the CFR**

- The CRD could be amended in such a way that it spells out private law remedies for breach of the general information duty in the CRD, in particular to include: a right to annul the contract, a right to recover damages for loss, and a right to restitution where a contract is annulled which has already been performed. The rules can be borrowed from the CFR. More detailed proposals would go beyond the scope of this study.

- Alternatively, Article 6 could be amended as follows: ‘Without prejudice to Articles 7(2), 13 and 42, the consequences of any breach of Article 5, shall be determined in accordance with the applicable national law. Member States shall provide in their national laws for effective private law remedies for any breach of Article 5.'
5. DISTANCE & OFF-PREMISES CONTRACTS

KEY FINDINGS

• The CRD does not explicitly place the burden of proof concerning compliance with information duties on the trader.

• The CFR contains clearer rules on the starting point of the withdrawal period.

• In many cases the withdrawal period in the CRD may be significantly shorter than under the CFR.

• Unlike the CFR, the CRD requires that the withdrawal be in writing.

• The CRD fails to provide explicitly that consumers do not incur any liability through the exercise of the right of withdrawal.

• The CRD fails to provide that the trader has to refund payments made by the consumer without undue delay.

5.1. Information requirements for distance & off-premises contracts

CRD

Article 9
Information requirements for distance and off-premises contracts

As regards distance or off-premises contracts, the trader shall provide the following information which shall form an integral part of the contract:
(a) the information referred to in Articles 5 and 7 and, by way of derogation from Article 5(1)(d), the arrangements for payment, delivery and performance in all cases;
(b) where a right of withdrawal applies, the conditions and procedures for exercising that right in accordance with Annex I;
(c) if different from his geographical address, the geographical address of the place of business of the trader (and where applicable that of the trader on whose behalf he is acting) where the consumer can address any complaints;
(d) the existence of codes of conduct and how they can be obtained, where applicable;
(e) the possibility of having recourse to an amicable dispute settlement, where applicable;
(f) that the contract will be concluded with a trader and as a result that the consumer will benefit from the protection afforded by this Directive.

Article 11
Formal requirements for distance contracts

1. With respect to distance contracts, the information provided for in Article 9(a) shall be given or made available to the consumer prior to

CFR

II. – 3:103: Duty to provide information when concluding contract with a consumer who is at a particular disadvantage

(1) In the case of transactions that place the consumer at a significant informational disadvantage because of the technical medium used for contracting, the physical distance between business and consumer, or the nature of the transaction, the business has a duty, as appropriate in the circumstances, to provide clear information about the main characteristics of any goods, other assets or services to be supplied, the price, the address and identity of the business with which the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available right of withdrawal or redress procedures. This information must be provided a reasonable time before the conclusion of the contract. The information on the right of withdrawal must, as appropriate in the circumstances, also be adequate in the sense of II. – 5:104 (Adequate information on the right to withdraw).

(2) Where more specific information duties are provided for specific situations, these take precedence over the general information duty under paragraph (1).

(3) The business bears the burden of proof that it has provided the information required by this Article.
the conclusion of the contract, in plain and intelligible language and be legible, in a way appropriate to the means of distance communication used.

2. If the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall disclose his identity and the commercial purpose of the call at the beginning of the conversation with the consumer.

3. If the contract is concluded through a medium which allows limited space or time to display the information, the trader shall provide at least the information regarding the main characteristics of the product and the total price referred to in Articles 5(1)(a) and (c) on that particular medium prior to the conclusion of such a contract. The other information referred to in Articles 5 and 7 shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1.

4. The consumer shall receive confirmation of all the information referred to in Article 9(a) to (f), on a durable medium, in reasonable time after the conclusion of any distance contract, and at the latest at the time of the delivery of the goods or when the performance of the service has begun, unless the information has already been given to the consumer prior to the conclusion of any distance contract on a durable medium.

5. Member States shall not impose any formal requirements other than those provided for in paragraphs 1 to 4.

II. – 3:104: Information duties in real time distance communication

(1) When initiating real time distance communication with a consumer, a business has a duty to provide at the outset explicit information on its name and the commercial purpose of the contact.

(2) Real time distance communication means direct and immediate distance communication of such a type that one party can interrupt the other in the course of the communication. It includes telephone and electronic means such as voice over internet protocol and internet related chat, but does not include communication by electronic mail.

(3) The business bears the burden of proof that the consumer has received the information required under paragraph (1).

(4) If a business has failed to comply with the duty under paragraph (1) and a contract has been concluded as a result of the communication, the other party has a right to withdraw from the contract by giving notice to the business within the period specified in II. – 5:103 (Withdrawal period).

(5) A business is liable to the consumer for any loss caused by a breach of the duty under paragraph (1).

II. – 3:105: Formation by electronic means

(1) If a contract is to be concluded by electronic means and without individual communication, a business has a duty to 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.

(2) The business has a duty to ensure that the contract terms referred to in paragraph (1)(e) are available in textual form.

(3) If a business has failed to comply with the duty under paragraph (1) and a contract has been concluded in the circumstances there stated, the other party has a right to withdraw from the contract by giving notice to the business within the period specified in II. – 5:103 (Withdrawal period).

(4) A business is liable to the consumer for any loss caused by a breach of the duty under paragraph (1).
Comparison

General
The CRD contains a separate chapter on consumer information and the right of withdrawal for distance and off-premises contracts (Chapter III of the proposed Directive). The CFR, on the other hand, includes similar provisions in the general section on information duties and does, thus, not limit these provisions to specific contracts. The CRD therefore corresponds to the CFR, albeit within a more narrow scope, i.e. distance and off-premises contracts, with obvious implications for the coherence of (consumer) contract law.

The material scope
The CFR uses a more abstract definition of relevant contracts ‘with a consumer who is at a particular disadvantage’ than the CRD, which specifically names distance and off-premises contracts. Art. 9 CRD’s scope therefore appears to be somewhat more restrictive in comparison to that of its counterpart II.-3:103 CFR. The latter provision includes distance contracts, and most probably also off-premises contracts (‘the nature of the transaction’), but leaves room for other types of contracts the conclusion of which places the consumer at a particular disadvantage, thus allowing for normative consistency.

Information on the right of withdrawal
Both the CRD and the CFR require for information to be given concerning any available right of withdrawal. The CRD then refers to its Annex I for conditions and procedural requirements of which the consumer should be informed. The CFR refers to II.-5:104, in which some instructions are given as to what is considered to be ‘adequate information on the right to withdraw’. The provisions laid down in Annex I of the CRD are, however, more detailed than those in the CFR.

Moment when the information has to be given
The CFR determines that relevant information, including that on the right of withdrawal, has to be given before the conclusion of the contract (II.-3:101(1); II.3:103(1)). The CRD also stipulates that information in principle should be provided prior to the conclusion of the contract (Art. 5(1)). In regard to specific information on off-premises contracts, it adds some formal requirements (Arts. 9 and 10).

Real time distance communication and formation by electronic means
The CFR contains specific provisions on information to be provided in case of contracts concluded through real time distance communication or by electronic means. No corresponding provisions are available in the CRD. The CRD, on the other hand, contains more detailed formal rules regarding information to be given at the time of conclusion of distance contracts.

Burden of proof
The CFR explicitly determines that the business bears the burden of proof that it has provided the information required (II.-3:103(3) and II.-3:104(3). The CRD contains no such provisions.

Suggestion for amendment based on the CFR

• Article 9 could become Article 9, Para 1.; a new Para (2) would be added: ‘The trader bears the burden of proof that it has provided the information required by this Article.’
5.2. **Right of withdrawal for distance & off-premises contracts**

**CRD**

Article 12

**Length and starting point of the withdrawal period**

1. The consumer shall have a period of fourteen days to withdraw from a distance or off-premises contract, without giving any reason.

**CFR**

II.-5:101: Scope and mandatory nature

(1) The provisions in this Section apply where under any rule in Books II to IV a party has a right to withdraw from a contract within a certain period.

(2) The parties may not, to the detriment of the entitled party, exclude the application of the rules in this Chapter or derogate from or vary their effects.

II. – 5:201: Contracts negotiated away from business premises

(1) A consumer is entitled to withdraw from a contract under which a business supplies goods, other assets or services, including financial services, to the consumer, or is granted a personal security by the consumer, if the consumer's offer or acceptance was expressed away from the business premises.

**Comparison**

**Right of withdrawal**

The right of withdrawal implies that a consumer may withdraw from distance and off-premises contracts within a certain period of time, without having to give any reason (Art. 12 CRD, II.-5:101 and II.-5:102 CFR; see also 5.5 below).

**The material scope**

While the CRD relies on the definitions of distance and off-premises given in Art. 2, the CFR regulates the material scope of the particular withdrawal right of II.-5:201 in the provision itself. This entails, in the CFR, a detailed enumeration of contracts falling outside of the scope of this provision (see also 5.10 below). Note, however, that ‘off-premises contracts’ in the context of II.-5:201 CFR include also certain ‘distance contracts’ in the sense of Art. 2(6) CRD. Overall, it seems that the scope of the CRD here is more limited than that of the CFR. The CFR governs not only sales and services contracts, but also contracts regarding other assets and personal securities (see also 3 and 4.1 above). The CRD’s scope may, however, be somewhat broader than that of the CFR insofar as the CFR excludes certain contracts in the detailed enumeration of II.-5:201.
5.3. Withdrawal period

**CRD**

**Article 12**

**Length and starting point of the withdrawal period**

1. The consumer shall have a period of fourteen days to withdraw from a distance or off-premises contract, without giving any reason.

2. In the case of an off-premises contract, the withdrawal period shall begin from the day when the consumer signs the order form or in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium.

In the case of a distance contract for the sale of goods, the withdrawal period shall begin from the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires the material possession of each of the goods ordered.

In the case of a distance contract for the provision of services, the withdrawal period shall begin from the day of the conclusion of the contract.

3. The deadline referred to in paragraph 1 is met if the communication concerning the exercise of the right of withdrawal is sent by the consumer before the end of that deadline.

4. The Member States shall not prohibit the parties from performing their obligations under the contract during the withdrawal period.

**CFR**

**II. – 5:103: Withdrawal period**

(1) A right to withdraw may be exercised at any time after the conclusion of the contract and before the end of the withdrawal period.

(2) The withdrawal period ends fourteen days after the latest of the following times;

(a) the time of conclusion of the contract;

(b) the time when the entitled party receives from the other party adequate information on the right to withdraw; or

(c) if the subject matter of the contract is the delivery of goods, the time when the goods are received.

(3) The withdrawal period ends no later than one year after the time of conclusion of the contract.

(4) A notice of withdrawal is timely if dispatched before the end of the withdrawal period.

**Comparison**

**Length**

Both the CRD and the CFR contain a withdrawal period of fourteen days.

**Starting point**

Although the application of the rules of the CRD and the CFR will probably lead to similar outcomes, their perspectives are different. The CRD describes the starting point of the withdrawal period according to the type of contract concerned, i.e. off-premises contracts, distance contracts for the sale of goods, and distance contracts for the provision of services. The CFR, on the other hand, enumerates the possible starting points of the withdrawal period almost irrespective of the type of contract. Only II.-5:103(2)(c) is limited to contracts concerning the delivery of goods.

**Dispatch theory**

Both the CRD and the CFR stipulate that a notice of withdrawal is on time if it is dispatched within the period of fourteen days.

**Suggestion for amendment based on the CFR**

- It might be advisable to follow the approach taken by the CFR regarding the starting point of the withdrawal period, especially with a view to the possible future inclusion into the CRD of other (existing and new) consumer acquis withdrawal rights.
5.4. Omission of information on the right of withdrawal

**CRD**

**Article 13**

Omission of information on the right of withdrawal

If the trader has not provided the consumer with the information on the right of withdrawal in breach of Articles 9(b), 10(1) and 11(4), the withdrawal period shall expire three months after the trader has fully performed his other contractual obligations.

**CFR**

II. – 3:109: Remedies for breach of information duties

(1) If a business has a duty under II. – 3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage) to provide information to a consumer before the conclusion of a contract from which the consumer has the right to withdraw, the withdrawal period does not commence until all this information has been provided. Regardless of this, the right of withdrawal lapses after one year from the time of the conclusion of the contract.

(2) If a business has failed to comply with any duty imposed by the preceding Articles of this Section and a contract has been concluded, the business has such obligations under the contract as the other party has reasonably expected as a consequence of the absence or incorrectness of the information. Remedies provided under Book III, Chapter 3 apply to non-performance of these obligations.

(3) Whether or not a contract is concluded, a business which has failed to comply with any duty imposed by the preceding Articles of this Section is liable for any loss caused to the other party to the transaction by such failure. This paragraph does not apply to the extent that a remedy is available for non-performance of a contractual obligation under the preceding paragraph.

(4) The remedies provided under this Article are without prejudice to any remedy which may be available under II. – 7:201 (Mistake).

(5) 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.

**II. – 5:103: Withdrawal period**

(3) The withdrawal period ends no later than one year after the time of conclusion of the contract.

(4) A notice of withdrawal is timely if dispatched before the end of the withdrawal period.

**II. – 5:104: Adequate information on the right to withdraw**

Adequate information on the right to withdraw requires that the right is appropriately brought to the entitled party’s attention, and that the information provides, in textual form on a durable medium and in clear and comprehensible language, information about how the right may be exercised, the withdrawal period, and the name and address of the person to whom the withdrawal is to be communicated.
Comparison

The consumer should be adequately informed of the right to withdraw from the contract (Art. 9 CRD; II.-3:103 and II.-5:104 CFR). In case this information duty is not fulfilled, the CRD stipulates that the withdrawal period will expire three months after the trader has fully performed his other contractual obligations. This implies that the withdrawal period may exceed the period of ‘one year after the time of conclusion of the contract’ after which the withdrawal period ends according to the CFR (II.-3:109 and II.-5:103(3), emphasis added). Conversely, if the trader who fails to inform the consumer about his withdrawal right immediately performs his contractual obligations, as is the case in many consumer sales and service contracts, then the maximum withdrawal period in the CRD (three months) is considerably shorter than the one in the CFR.

Suggestions for amendments based on the CFR

• Article 9: ‘If the trader has not provided the consumer with the information on the right of withdrawal in breach of Articles 9(b), 10(1) and 11(4), the withdrawal period shall expire no later than one year after the trader has fully performed his other contractual obligations.’

• Alternatively, Article 9: ‘If the trader has not provided the consumer with the information on the right of withdrawal in breach of Articles 9(b), 10(1) and 11(4), the withdrawal period shall expire no later than one year after the conclusion of the contract.’

5.5. Exercise of the right of withdrawal

CRD

Article 14

Exercise of the right of withdrawal

1. The consumer shall inform the trader of his decision to withdraw on a durable medium either in a statement addressed to the trader drafted in his own words or using the standard withdrawal form as set out in Annex I(B). Member States shall not provide for any other formal requirements applicable to this standard withdrawal form.

2. For distance contracts concluded on the Internet, the trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader’s website. In that case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.

CFR

II. – 5:102: Exercise of right to withdraw

(1) A right to withdraw is exercised by notice to the other party. No reasons need to be given.

(2) Returning the subject matter of the contract is considered a notice of withdrawal unless the circumstances indicate otherwise.

Comparison

While the CRD requires the consumer to inform the trader of his decision to withdraw on a ‘durable medium’, the CFR does not give any formal requirements for withdrawal. According to the CFR, already the returning of the subject matter of the contract in principle constitutes a withdrawal (II.-5:102(2)). Under the CFR, the threshold for making
use of the right of withdrawal thus seems lower than under the CRD. Note, furthermore, that the scope of the notion of a ‘durable medium’ has been the subject of debate during the review of the consumer acquis (e.g. whether new technologies such as SMS should be included).

**Suggestion for amendment based on the CFR**

- Article 14: ‘1. The consumer shall inform the trader of his decision to withdraw. Member States shall not provide for any other formal requirements applicable to the communication of withdrawal form. A communication of withdrawal can be given, in particular on a durable medium, in a statement addressed to the trader drafted in his own words, using the standard withdrawal form as set out in Annex I(B), and, unless the circumstances indicate otherwise, by returning the subject matter of the contract. 2. For distance contracts concluded on the Internet, if the trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader’s website, in that case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.’

### 5.6. Effects of withdrawal

**CRD**

**Article 15**

**Effects of withdrawal**

The exercise of the right of withdrawal shall terminate the obligations of the parties:
(a) to perform the distance or off-premises contract, or
(b) to conclude an off-premises contract, in cases where an offer was made by the consumer.

**CFR**

II. – 5:105: Effects of withdrawal

(1) Withdrawal terminates the contractual relationship and the obligations of both parties under the contract.

... (6) Except as provided in this Article, the withdrawing party does not incur any liability through the exercise of the right of withdrawal.

(7) If a consumer exercises a right to withdraw from a contract after a business has made use of a contractual right to supply something of equivalent quality and price in case what was ordered is unavailable, the business must bear the cost of returning what the consumer has received under the contract.

**Comparison**

**General**

Both according to the CRD and the CFR, withdrawal terminates the obligations of the parties. Art. 15 CRD gives a detailed description of this effect, making clear that it affects the performance of the contract as well as the conclusion of an off-premise contract based on the offer of a consumer. It may be assumed that both situations are also covered by the CFR.

**Restitutionary effects**

On the restitutionary effects see below, Sub-Sections 5.7 and 5.8.

**Liability**

II.-5:105(6) CFR explicitly states that the withdrawing party does not incur any liability through the exercise of the withdrawal right, other than that described in this article. Although the proposed CRD does not expressly mention the topic of liability, it may be
assumed that also according to the CRD, the consumer who makes use of the right of withdrawal in principle is not liable towards the trader. Nevertheless it may be worthwhile to spell this out explicitly.

Suggestion for amendment based on the CFR

- Article 17, new Para 3: ‘Except as provided in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.’

5.7. Obligations of the trader in case of withdrawal

CRD

Article 16
Obligations of the trader in case of withdrawal
1. The trader shall reimburse any payment received from the consumer within thirty days from the day on which he receives the communication of withdrawal.
2. For sales contracts, the trader may withhold the reimbursement until he has received or collected the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest.

CFR

II. – 5:105: Effects of withdrawal
(3) Where the withdrawing party has made a payment under the contract, the business has an obligation to return the payment without undue delay, and in any case not later than thirty days after the withdrawal becomes effective.

Comparison

In case of withdrawal, both under the CRD and the CFR the trader or business has to reimburse any payments that the consumer has already made under the contract. According to the CRD, the trader must reimburse ‘within thirty days from the day on which he receives the communication of withdrawal’ (emphasis added). According to the CFR, the payment has to be returned ‘not later than thirty days after the withdrawal becomes effective’ (emphasis added). I.-1:109(3) CFR stipulates that ‘[t]he notice becomes effective when it reaches the addressee’, in this case the trader/business. Both the CFR and the CRD thus embrace the receipt theory regarding the effectiveness of the notice of withdrawal and the moment from which reimbursement of payments has to take place.

Under the CFR the business has an obligation to return the payment without undue delay. In contrast, under the CRD the trader can wait as long as he remains within the thirty days. This means e.g. that if the consumer brings the object of sale to the premises of the trader under the CRD he will not be entitled to immediate reimbursement.

Pursuant to Art. 16 CRD, in the case of sales contracts, the trader may withhold the reimbursement until he has received or collected the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest. Under the CFR the same seems to follow from the general right to withhold performance of a reciprocal obligation (III.–3:401).

Suggestion for amendment based on the CFR

- Article 16 (1): ‘The trader shall reimburse any payment received from the consumer without undue delay, and in any case not later than within thirty days from the day on which he receives the communication of withdrawal.’
5.8. Obligations of the consumer in case of withdrawal

**CRD**

*Article 17*

**Obligations of the consumer in case of withdrawal**

1. For sales contracts for which the material possession of the goods has been transferred to the consumer or at his request, to a third party before the expiration of the withdrawal period, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive them, within fourteen days from the day on which he communicates his withdrawal to the trader, unless the trader has offered to collect the goods himself.

   The consumer shall only be charged for the direct cost of returning the goods unless the trader has agreed to bear that cost.

2. 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. He shall not be liable for diminished value where the trader has failed to provide notice of the withdrawal right in accordance with Article 9(b). For service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period.

**CFR**

*II. – 5:105: Effects of withdrawal*

4. The withdrawing party is not liable to pay:

   (a) for any diminution in the value of anything received under the contract caused by inspection and testing;

   (b) for any destruction or loss of, or damage to, anything received under the contract, provided the withdrawing party used reasonable care to prevent such destruction, loss or damage.

5. The withdrawing party is liable for any diminution in value caused by normal use, unless that party had not received adequate notice of the right of withdrawal.

*III. – 3:510: Restitution of benefits received by performance*

1. On termination under this Section a party (the recipient) who has received any benefit by the other's performance of obligations under the terminated contractual relationship or terminated part of the contractual relationship is obliged to return it. Where both parties have obligations to return, the obligations are reciprocal.

**Comparison**

*Return of the goods*

In case the consumer has already received the goods ordered under the contract, these have to be returned. Art. 17 CRD lays down this obligation of the consumer. Following II.-5:105(2) CFR (see 5.6 above), the general rules on restitution of the CFR apply to this situation. According to III.-3:510(1) CFR, both the consumer and the business have obligations to return the benefits they have already received under the contract, in case the right of withdrawal is exercised. This implies that the business has to reimburse any payments already made (cf. II.-5:105(3); see 5.7 above). Furthermore, the consumer will have to return any goods he has received or, if a benefit is not transferable, he has to pay its value in money (III.-510(1), (3) and (4) and III.-3:512 CFR). In sum, the results of the CRD and the CFR appear to be the same on this point.

*Liability for diminished value*

Art. 17(2) CRD and II.-5:105(4) and (5) CFR closely correspond to each other. A consumer is not liable for diminished value of the goods resulting from testing them. Furthermore, he is not liable for diminished value in case the trader/business has not adequately informed the consumer of the right of withdrawal. The CRD extends the limitation of liability to services received under service contracts within the withdrawal period. The CFR does not stipulate anything on the specific effects of withdrawal on these types of contracts. It does, nevertheless, determine that a consumer is no longer entitled to withdraw from a contract regarding financial services, if the contract has been ‘fully performed by both parties, at the consumer’s express request, before the consumer exercises his or her right of withdrawal’ (II.-5:201(4) CFR).
Normal use
In line with II.-5:105(5) CFR, Art. 17(2) of the proposed CRD allows the trader/business to claim compensation for the diminished value of the goods caused by ‘normal use’. This implies a deviation from current EU consumer law, under which a consumer is not liable for this diminished value (Case C-489/07 Pia Messner v Firma Stefan Krüger [2009] nyr).

5.9. Effects of withdrawal on ancillary contracts

CRD
Article 18
Effects of the exercise of the right of withdrawal on ancillary contracts
1. Without prejudice to Article 15 of Directive 2008/48/EC, if the consumer exercises his right of withdrawal from a distance or an off-premises contract in accordance with Articles 12 to 17, any ancillary contracts shall be automatically terminated, without any costs for the consumer.
2. The Member States shall lay down detailed rules on the termination of such contracts.

CFR
II. – 5:106: Linked contracts
(1) If a consumer exercises a right of withdrawal from a contract for the supply of goods, other assets or services by a business, the effects of withdrawal extend to any linked contract.
(2) Where a contract is partially or exclusively financed by a credit contract, they form linked contracts, in particular:
(a) if the business supplying goods, other assets or services finances the consumer’s performance;
(b) if a third party which finances the consumer’s performance uses the services of the business for preparing or concluding the credit contract;
(c) if the credit contract refers to specific goods, assets or services to be financed with this credit, and if this link between both contracts was suggested by the supplier of the goods, other assets or services, or by the supplier of credit; or
(d) if there is a similar economic link.
(3) The provisions of II. – 5:105 (Effects of withdrawal) apply accordingly to the linked contract.
(4) Paragraph (1) does not apply to credit contracts financing the contracts mentioned in paragraph (2)(f) of the following Article.

Comparison
The material scope
Both under the CRD and the CFR, the effects of withdrawal extend to ancillary or linked contracts. Unlike the CRD, however, the CFR explicitly names several cases where credit contracts are considered to be ‘linked contracts’ (II.-5:106(2)). However, the CRD refers to art 15 of the Consumer credit directive (2008/48/EC) which seems to cover these same (and maybe even more) cases.

An exception
The CFR also names one contract that in any case falls outside of the scope of the definition, namely a credit contract financing a contract mentioned in II.-5:201(2)(f), i.e. ‘a contract for the supply of goods, other assets or services whose price depends on fluctuations in the financial market outside the supplier’s control, which may occur during the withdrawal period’. Note that this type of contract is also excluded from the right of withdrawal in distance contracts under Art. 19(1)((b) CRD (see further 5.10 below).
Termination

The CFR contains rules on termination of contracts itself. The CRD, on the other hand, leaves room to the Member States to lay down detailed rules on the termination of linked contracts. The difference in approach between the two instruments may again be explained on the basis of their different aims and structures.

Here the same applies, mutatis mutandis, as was said in Section 4.2 concerning information duties. The real obstacles to cross-border consumer contracts are the different remedies in the Member States. In particular in the case of full harmonisation, where it is forbidden for Member States to maintain or introduce, in their national law, … to ensure a different level of consumer protection (Art. 4 CRD), it is not at all clear what amounts a different level of consumer protection from the one indicated by the directive if the directive leaves the remedies entirely to the Member States. Therefore, an adequate set of consumer remedies spelled out in the directive seems to be indispensible for the aims of the directive. The provision, in Para. 2, that ‘The Member States shall lay down detailed rules on the termination of such contracts’ seems almost meaningless and will certainly not create more harmony between the different applicable regimes in the Member States. In contrast, the CFR provides a detailed and neutral set of remedies.

Terminology

The term ‘ancillary contracts’ in the CRD seems less appropriate than the ‘linked contracts’ used by the CFR. The reason is that the former term suggests that only linked contracts which are somehow less important are automatically terminated whereas, for example, a credit contract may well be regarded as equally important.

Suggestions for amendments based on the CFR

- Article 18, Para 1: ‘Without prejudice to Article 15 of Directive 2008/48/EC, if the consumer exercises his right of withdrawal from a distance or an off-premises contract in accordance with Articles 12 to 17, any linked contracts shall be automatically terminated, without any costs for the consumer.’

- Article 18, Para 2 could be substituted with a detailed set of rules on termination. These rules could be borrowed from the CFR. More detailed proposals would go beyond the scope of this study.

5.10. Exceptions from the right of withdrawal

CRD

Article 19

Exceptions from the right of withdrawal

1. In respect of distance contracts, the right of withdrawal shall not apply as regards the following:

(a) services where performance has begun, with the consumer's prior express consent, before the end of the fourteen day period referred to in Article 12;

(b) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader;

(c) the supply of goods made to the consumer's specifications or clearly personalized or which are liable to deteriorate or expire rapidly;

(d) the supply of wine, the price of which has been agreed upon at the time of the conclusion of

CFR

II. – 5:201: Contracts negotiated away from business premises

... (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 concluded with telecommunications operators through the use of public payphones;

(c) a contract for the construction and sale of immovable property or relating to other immovable property rights, except for rental;

(d) a contract for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer by regular roundsmen;
the sales contract, the delivery of which can only take place beyond the time-limit referred to in Article 22(1) and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;
(e) the supply of sealed audio or video recordings or computer software which were unsealed by the consumer;
(f) the supply of newspapers, periodicals and magazines;
(g) gaming and lottery services;
(h) contracts concluded at an auction.
2. In respect of off-premises contracts, the right of withdrawal shall not apply as regards the following:
(a) contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, selected in advance by the consumer by means of distance communication and physically supplied to the consumer’s home, residence or workplace by the trader who usually sells such goods on his own business premises;
(b) contracts for which the consumer, in order to respond to an immediate emergency, has requested the immediate performance of the contract by the trader; if, on this occasion, the trader provides or sells additional services or goods other than those which are strictly necessary to meet the immediate emergency of the consumer, the right of withdrawal shall apply to those additional services or goods;
(c) contracts for which the consumer has specifically requested the trader, by means of distance communication, to visit his home for the purpose of repairing or performing maintenance upon his property; if on this occasion, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal shall apply to those additional services or goods.
3. The parties may agree not to apply paragraphs 1 and 2.

Article 20
Excluded distance and off-premises contracts
1. Articles 8 to 19 shall not apply to distance and off-premises contracts:
(a) for the sale of immovable property or relating to other immovable property rights, except for rental and works relating to immovable property;
(b) concluded by means of automatic vending machines or automated commercial premises;
(c) concluded with telecommunications operators through public payphones for their use;
(d) for the supply of foodstuffs or beverages by a trader on frequent and regular rounds in the neighbourhood of his business premises.
2. Articles 8 to 19 shall not apply to off-premises contracts relating to:
(a) insurance,
(b) financial services whose price depends on
(e) a contract concluded by means of distance communication, but outside of an organised distance sales or service-provision scheme run by the supplier;
(f) a contract for the supply of goods, other assets or services whose price depends on fluctuations in the financial market outside the supplier’s control, which may occur during the withdrawal period;
(g) a contract concluded at an auction;
(h) travel and baggage insurance policies or similar short-term insurance policies of less than one month’s duration.
3. If the business has exclusively used means of distance communication for concluding the contract, paragraph (1) also does not apply if the contract is for:
(a) the supply of accommodation, transport, catering or leisure services, where the business undertakes, when the contract is concluded, to supply these services on a specific date or within a specific period;
(b) the supply of services other than financial services if performance has begun, at the consumer’s express and informed request, before the end of the withdrawal period referred to in II. – 5:103 (Withdrawal period) paragraph (1);
(c) the supply of goods made to the consumer’s specifications or clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly;
(d) the supply of audio or video recordings or computer software
(i) which were unsealed by the consumer, or
(ii) which can be downloaded or reproduced for permanent use, in case of supply by electronic means;
(e) the supply of newspapers, periodicals and magazines;
(f) gaming and lottery services.
4. With regard to financial services, paragraph (1) also does not apply to contracts that have been fully performed by both parties, at the consumer’s express request, before the consumer exercises his or her right of withdrawal.
fluctuations in the financial market outside the trader’s control, which may occur during the withdrawal period, as defined in Article 6(2)(a) of Directive 2002/65/EC16 and (c) credit which falls within the scope of Directive 2008/48/EC.

3. Articles 8 to 19 shall not apply to distance contracts for the provision of accommodation, transport, car rental services, catering or leisure services as regards contracts providing for a specific date or period of performance.

Comparison

Scope of exclusion
Art. 19 CRD contains a list of distance and off-premises contracts to which the right of withdrawal does not apply. Art. 20 CRD, moreover, enumerates contracts that are excluded from all provisions on information duties regarding distance and off-premises contracts, including those concerning the right of withdrawal. The list laid down in Arts. 19 and 20 to some extent overlaps with that of II.-5:201 CFR, although the latter does not entail the exclusion of certain contracts from the entire Chapter on information duties and withdrawal.

Genus and species
In this context, it should be noted that II.-5:201 CFR appears to govern not only off-premises contracts, but also distance contracts included in the definition of off-premises contracts (see also 5.2 above). The CRD seems to take the opposite approach, naming first the distance contracts to which the right of withdrawal does not apply (Art. 19(1)), then the off-premises contracts (two of which involve distance communication; Art. 19(2)).

Compliance of CRD with CFR
Most of the provisions of Arts. 19 and 20 CRD have an equivalent in the CFR. Art. 19(1)(a), (c), (e), (f) and (g) CRD correspond with II.-5:201 (3) (b)-(f) CFR. A remarkable difference concerns the required ‘express consent’ of the consumer (Art. 19(1)(a) CRD) as opposed to the ‘express and informed request’ of the consumer (II.-5:201 (3) (b) CFR); the CFR seems to take a more consumer-friendly approach here, making the exclusion of the right of withdrawal dependent on a stricter condition than the CRD. Note, furthermore, that Art. 19(1)(d) and (h) CRD, regarding the supply of wine and contracts concluded at an auction respectively, are not covered by the exceptions of the CFR. As regards the contracts mentioned in Art. 20 CRD (entailing a general exclusion from the proposed Directive's provisions on information duties), the CFR only excludes them from the right of withdrawal, insofar as they concern off-premises contracts (compare Art. 20(1)(b)-(d) CRD to II.-5:201(2)(a), (b) and (d) CFR).

Suggestion for amendment based on the CFR

- Art. 19, Para 1 sub a: ‘services where the performance has begun, with the consumer’s prior express consent, at the consumer’s express and informed consent, …’
6. OTHER CONSUMER RIGHTS SPECIFIC TO SALES CONTRACTS

KEY FINDINGS

- It is not clear to what extent the rules on passing of risk in the CRD are mandatory.
- When the goods are unfit for a particular purpose of the consumer, for non-conformity the CRD requires that the seller has accepted that purpose.
- The CRD is not clear on meaning and extent of the liability of the trader.
- Contrary to the CFR the CRD contains a hierarchy of remedies. Moreover, the CRD is not clear on how the right to damages relates to the hierarchy.
- The CRD does not limit the trader’s liability to the case where the non-performance is not excused.
- Unlike the CFR, the CRD contains a duty for the consumer to notify the seller in case of non-conformity.

6.1. Scope

**CRD**

**Article 21**

**Scope**

1. This Chapter shall apply to sales contracts. Without prejudice to Article 24(5), where the contract is a mixed-purpose contract having as its object both goods and services, this Chapter shall only apply to the goods.
2. This Chapter shall also apply to contracts for the supply of goods to be manufactured or produced.
3. This Chapter shall not apply to the spare parts replaced by the trader when he has remedied the lack of conformity of the goods by repair under Article 26.
4. Member States may decide not to apply this Chapter to the sale of second-hand goods at public auctions.

**CFR**

**IV. A. – 1:101: Contracts covered**

(1) This Part of Book IV applies to contracts for the sale of goods and associated consumer guarantees.
(2) It applies with appropriate adaptations to:
   (a) contracts for the sale of electricity;
   (b) contracts for the sale of stocks, shares, investment securities and negotiable instruments;
   (c) contracts for the sale of other forms of incorporeal property, including rights to the performance of obligations, industrial and intellectual property rights and other transferable rights;
   (d) contracts conferring, in exchange for a price, rights in information or data, including software and databases;
   (e) contracts for the barter of goods or any of the other assets mentioned above.
(3) It does not apply to contracts for the sale or barter of immovable property or rights in immovable property.

**IV. A. – 1:102: Goods to be manufactured or produced**

A contract under which one party undertakes, for a price, to manufacture or produce goods for the other party and to transfer their ownership to the other party is to be considered as primarily a contract for the sale of the goods.
Comparison

Chapter IV of the proposed CRD applies to ‘sales contracts’. There are some differences between the scope of the Chapter in comparison with the corresponding provisions of the CFR:

Sale of goods
Chapter IV CRD applies to contracts for the sale of goods. In case of mixed-purposes contracts, its provisions apply only to the supply of goods. In this context, it may be noted that the definition of ‘goods’ under the proposed Directive excludes electricity (Art. 2(4)(c)). The CFR, on the other hand, extends to contracts for the sale of electricity, albeit ‘with appropriate adaptations’ (IV.A-1:101(2)(a)).

Goods to be manufactured or produced
Both the CRD and the CFR extend their applicability to contracts regarding goods to be manufactured or produced. The manner in which this applicability is constructed, however, slightly differs: While the CRD stipulates that the provisions of Chapter IV shall apply analogously to these types of contracts (Art. 21(2)), the CFR brings these contracts within the scope of IV.A-1:101 by determining that their subject matter should be considered as primarily concerning the sale of goods (IV.A.-1:102).

Installation
The CRD expressly provides that the applicability of Art. 24(5), concerning the incorrect installation of the goods, is not affected by the limitation of the scope of Chapter IV to the sale of goods (Art. 21(1), second sentence). The CFR does not contain any specific provisions on this point, but it may be assumed that it does not differ from the CRD here. In particular, IV.A.-2:304 CFR governs the installation of the goods (see also 6.4 below).

Second-hand goods at public auctions
According to Art. 21(4) CRD, Member States may exclude the sale of second-hand goods on public auctions from the scope of Chapter IV. The CFR does not exclude these types of contracts from consumer protection.

Other assets
Again, the material scope of the CFR is broader than that of the proposed CRD, in the sense that it extends to contracts for the sale of other assets (IV.A.-1:101(b)-(e)) such as stocks, intellectual property rights, and software.

Suggestion for amendment based on the CFR

• Delete Article 21, Para 4: ‘Member States may decide not to apply this Chapter to the sale of second-hand goods at public auctions.’

6.2. Delivery

<table>
<thead>
<tr>
<th>CRD</th>
<th>CFR</th>
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<tbody>
<tr>
<td>Article 22</td>
<td>IV. A. – 2:201: Delivery</td>
</tr>
<tr>
<td>Delivery</td>
<td>(1) The seller fulfils the obligation to deliver 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.</td>
</tr>
<tr>
<td>1. Unless the parties have agreed otherwise, the trader shall deliver the goods by transferring the material possession of the goods to the consumer or to a third party, other than the carrier and</td>
<td>(2) If the contract involves carriage of the goods</td>
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indicated by the consumer, within a maximum of thirty days from the day of the conclusion of the contract.

2. Where the trader has failed to fulfil his obligations to deliver, the consumer shall be entitled to a refund of any sums paid within seven days from the date of delivery provided for in paragraph 1.

by a carrier or series of carriers, the seller fulfils the obligation to deliver by handing over the goods to the first carrier for transmission to the buyer and by transferring to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods.

(3) In this Article, any reference to the buyer includes a third person to whom delivery is to be made in accordance with the contract.

IV. A. – 2:202: Place and time for delivery

(1) The place and time for delivery are determined by III. – 2:101 (Place of performance) and III. – 2:102 (Time of performance) as modified by this Article.

(2) If the performance of the obligation to deliver requires the transfer of documents representing the goods, the seller must transfer them at such a time and place and in such a form as is required by the contract.

(3) If in a consumer contract for sale the contract involves carriage of goods by a carrier or a series of carriers and the consumer is given a time for delivery, the goods must be received from the last carrier.

Comparison

Transfer of possession
With regard to delivery, the CRD only mentions the transfer of the material possession of the goods, whereas the CFR also explicitly refers to the delivery of documents representing the goods. This difference may be explained by the fact that the CRD is limited to the sale of tangible movable items to consumers (Art. 2(3) and 2(4)), while the CFR extends to commercial contracts as well. In commercial contracts, it is not unusual for the delivery of goods to take place through the transfer of the relevant documents rather than the physical transfer of the goods. Furthermore, the CRD explicitly allows parties to deviate from the rules on delivery, while the CFR does not.

Carrier
The CFR determines that delivery may already take place when the goods are handed over to a carrier (IV.A.-2:201(2)). Again, this rule seems mostly written for commercial contracts. The CRD, on the other hand, expressly provides that delivery in principle cannot take place by transferring the material possession of the goods to a carrier (Art. 22(1)). As said, this rule is not mandatory; parties may agree otherwise.

Place and time of delivery
The CFR contains specific rules on the place and time for delivery, while the CRD leaves this to the laws of the Member States.
6.3. Passing of risk

**CRD**

*Article 23*

*Passing of risk*

1. The risk of loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer has acquired the material possession of the goods.

2. The risk referred to in paragraph 1 shall pass to the consumer at the time of delivery as agreed by the parties, if the consumer or a third party, other than the carrier and indicated by the consumer has failed to take reasonable steps to acquire the material possession of the goods.

**CFR**

*IV. A. – 5:101: 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.

*IV. A. – 5:102: Time when risk passes*

1. The risk passes when the buyer takes over the goods or the documents representing them.

2. However, if the contract relates to goods not then identified, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

3. The rule in paragraph (1) is subject to the Articles in Section 2 of this Chapter.

*IV. A. – 5:103: Passing of risk in a consumer contract for sale*

1. In a consumer contract for sale, the risk does not pass until the buyer takes over the goods.

2. Paragraph (1) does not apply if the buyer has failed to perform the obligation to take over the goods and the non-performance is not excused under III. – 3:104 (Excuse due to an impediment) in which case IV. A. – 5:201 (Goods placed at buyer’s disposal) applies.

3. Except in so far as provided in the preceding paragraph, Section 2 of this Chapter does not apply to a consumer contract for sale.

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

**Comparison**

Both according to Art. 23 CRD and IV.A.-5:103(1) CFR, the risk of loss or damage to the goods in a consumer contract for sale passes when the consumer takes over the goods ('material possession'). The CRD leaves open the possibility that a third party, other than the carrier and indicated by the consumer, take over the goods. In case the consumer (or, under the CRD, a third party) fails to take reasonable steps to acquire the material possession of the goods, the risk passes at the time of delivery as agreed by the parties (Art. 2(2) CRD; IV.A.-5:103(2) CFR). Finally, note that the CFR explicitly states the mandatory nature of IV.A.-5:103, which means that parties may not to the detriment of the consumer deviate from the CFR’s rules on the passing of risk. For the CRD this seems to follow from Art. 43 (Imperative nature of the Directive) even thought it seems a bit strained to consider the passing of risk a ‘right’ that cannot be waived.

**Suggestions for amendments based on the CFR**

- To make the mandatory nature of the rules (including its extent and implications), here and elsewhere, clearer, preferably for each Article separately.
6.4. Conformity of the goods

**CRD**

**Article 24**

**Conformity with the contract**

1. The trader shall deliver the goods in conformity with the sales contract.
2. Delivered goods shall be presumed to be in conformity with the contract if they satisfy the following conditions:
   (a) they comply with the description given by the trader and possess the qualities of the goods which the trader has presented to the consumer as a sample or model;
   (b) they are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted;
   (c) they are fit for the purposes for which goods of the same type are normally used; or
   (d) they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.
3. There shall be no lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or should reasonably have been aware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the buyer.
4. The trader shall not be bound by public statements, as referred to in paragraph 2(d) if he shows that one of the following situations existed:
   (a) he was not, and could not reasonably have been, aware of the statement in question;
   (b) by the time of conclusion of the contract the statement had been corrected;
   (c) the decision to buy the goods could not have been influenced by the statement.
5. Any lack of conformity resulting from the incorrect installation of the goods shall be considered as a lack of conformity of the goods where the installation forms part of the sales contract and the goods were installed by the trader or under his responsibility. The same shall apply equally if the goods, intended to be installed by the consumer, are installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

**CFR**

**IV. A. – 2:301: Conformity with the contract**

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;
   (c) are supplied along with any accessories, installation instructions or other instructions required by the contract; and
   (d) comply with the remaining Articles of this Section.

**IV. A. – 2:302: Fitness for purpose, qualities, packaging**

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 judgment;
   (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 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; and
   (f) possess such qualities and performance capabilities as the buyer may reasonably expect.

**IV. A. – 2:303: Statements by third persons**

The goods must possess the qualities and performance capabilities held out in any statement on the specific characteristics of the goods made about them by a person in earlier links of the business chain, the producer or the producer’s representative which forms part of the terms of the contract by virtue of II. – 9:102 (Certain pre-contractual statements regarded as contract terms).

**IV. A. – 2:304: Incorrect installation under a consumer contract for sale**

Where goods supplied under a consumer contract for sale are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as a lack of conformity of the goods if:
   (a) the goods were installed by the seller or under the seller’s responsibility;
   (b) the goods were intended to be installed by
the consumer and the incorrect installation was due to a shortcoming in the installation instructions.

**IV. A. – 2:305: Third party rights or claims in general**
The goods must be free from any right or reasonably well founded claim of a third party. However, if such a right or claim is based on industrial property or other intellectual property, the seller’s obligation is governed by the following Article.

**IV. A. – 2:306: Third party rights or claims based on industrial property or other intellectual property**
(1) The goods must be free from any right or claim of a third party which is based on industrial property or other intellectual property and of which at the time of the conclusion of the contract the seller knew or could reasonably be expected to have known.
(2) However, paragraph (1) does not apply where the right or claim results from the seller’s compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

**IV. A. – 2:307: Buyer’s knowledge of lack of conformity**
(1) The seller is not liable under IV. A. – 2:302 (Fitness for purpose, qualities, packaging), IV. A. – 2:305 (Third party rights or claims in general) or IV. A. – 2:306 (Third party rights or claims based on industrial property or other intellectual property) if, at the time of the conclusion of the contract, the buyer knew or could reasonably be assumed to have known of the lack of conformity.
(2) The seller is not liable under IV. A. – 2:304 (Incorrect installation under a consumer contract for sale) sub-paragraph (b) if, at the time of the conclusion of the contract, the buyer knew or could reasonably be assumed to have known of the shortcoming in the installation instructions.

**Comparison**
The proposed CRD’s and CFR’s provisions on non-conformity show many similarities but also some differences. The main points of interest are the following:

**Burden of proof**
The CRD enumerates the conditions under which delivered goods ‘shall be presumed to be in conformity with the contract’ (Art. 24(2)), which indicates that the burden of proof of non-conformity rests on the consumer, albeit with a presumption in his favour. The CFR, on the other hand, stipulates that the goods ‘do not conform with the contract, unless’ they fulfil the conditions of IV.A.-2:301. This seems to imply that under the CFR the seller has to prove that he has fulfilled the conditions for conformity. Note that, in any case, both the
CRD and the CFR provide a presumption of non-conformity within the first six months after the risk has passed to the consumer (see 6.9 below).

**Conditions**
The conditions for conformity in the CRD and the CFR largely overlap. Both take into account the characteristics (description, quality) of the goods that the parties have agreed upon, as well as the normal and particular use of the goods.

**Packaging**
Unlike the CRD, the CFR explicitly includes the packaging of the goods in its definition of conformity.

**Particular purpose**
Regarding the use of goods for a particular purpose, the CRD states that the trader must have *accepted* the consumer’s request for a good suitable for the particular purpose in order for this aspect to fall within the definition of conformity (Art. 24(2)(b). The CFR, on the other hand, makes the condition of a good being ‘fit for any particular purpose’ dependent on the buyer’s (actual or reasonable) *reliance* on the seller’s skill and judgement (IV.A.-2:302).

**Knowledge of non-conformity**
The CRD and the CFR both determine that a trader/seller cannot be held liable for non-conformity of which the buyer was or could have been aware (Art. 24(3) CRD; IV.A.-2:307 CFR).

**Public statements**
Both the CRD and the CFR stipulate that the goods should in principle comply with statements about their quality and performance made by earlier links in the business chain or by the producer (Art. 24(2)(d) CRD; IV.A.-2:303 CFR). Art. 24(4) CRD, however, mitigates this condition by formulating certain exceptions. The CFR’s layered system is reflected in the reference to II.-9:102, which contains similar exceptions to the rule on public statements.

**Installation**
Both the CRD and the CFR include incorrect installation of the goods in the definition of non-conformity (Art. 24(5) CRD; IV.A.-2:304 CFR). Note, however, that the CRD, unlike the CFR, determines that the installation should form part of the sales contract. This seems to imply that a consumer who concludes a separate contract for the installation of the goods cannot claim non-conformity of the goods on the basis of Art. 24(5) CRD, even if the contract for installation of the goods is concluded with or through the same trader/business. That would make it very easy for the seller to circumvent this consumer protection.

**Third party rights and claims**
Unlike the CRD, the CFR contains the condition that a good must to be free from third party rights and claims in order to comply with the contract (IV.A.-2:305 and 306). This may be explained by the broader material scope of the CFR.

**Suggestions for amendments based on the CFR**

- Art. 22 (2) ‘(b) they are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the
contract and which the trader has accepted, 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;’

- Art. 24 (5): ‘Any lack of conformity resulting from the incorrect installation of the goods shall be considered as a lack of conformity of the goods where the installation forms part of the sales contract and the goods were installed by the trader or under his responsibility. The same shall apply equally if the goods, intended to be installed by the consumer, are installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.’

### 6.5. Liability for lack of conformity

**CRD**

Article 25

Legal rights – Liability for lack of conformity

The trader shall be liable to the consumer for any lack of conformity which exists at the time the risk passes to the consumer.

**CFR**

III. – 3:101: Remedies available

1. If an obligation is not performed by the debtor and the non-performance is not excused, the creditor may resort to any of the remedies set out in this Chapter.

2. If the debtor’s non-performance is excused, the creditor may resort to any of those remedies except enforcing specific performance and damages.

3. The creditor may not resort to any of those remedies to the extent that the creditor caused the debtor’s non-performance.

IV. A. – 2:101: Overview of obligations of the seller

The seller must:

(d) ensure that the goods conform to the contract.

IV.A.–2:308: Relevant time for establishing conformity

1. The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, even if the lack of conformity becomes apparent only after that time.

2. In a consumer contract for sale, any lack of 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 lack of conformity.

3. In a case governed by IV.A.–2:304 (Incorrect installation under a consumer contract for sale) 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.
**Comparison**

Both the CRD and the CFR stipulate that the trader/seller shall be liable to the consumer for non-conformity of the delivered goods. Under both instruments, the relevant time for establishing the conformity of the goods is the moment when the risk of loss and damage to the goods passes to the consumer. However, under the CRD it is not entirely clear what exactly this liability means. In particular, the question arises whether this liability includes liability in damages and, if so, how this liability relates to the remedies set out in the Articles 26 and (notably) 27, and (in the case of consequential loss) to any concurring non-contractual liability.

**Suggestion for amendment based on the CFR**

- Make clear what the liability of the trader to the consumer amounts to respectively what is expected from (and permitted to – full harmonisation) the Member States in this regard.

**6.6. Remedies for lack of conformity**

**CRD**

Article 26

Remedies for lack of conformity

1. As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:

   (a) have the lack of conformity remedied by repair or replacement;
   (b) have the price reduced;
   (c) have the contract rescinded.

2. The trader shall remedy the lack of conformity by either repair or replacement according to his choice.

3. Where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded.

A trader’s effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity.

The consumer may only rescind the contract if the lack of conformity is not minor.

4. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:

   (a) the trader has implicitly or explicitly refused to remedy the lack of conformity;
   (b) the trader has failed to remedy the lack of conformity within a reasonable time;
   (c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;
   (d) the same defect has reappeared more than once within a short period of time.

5. The significant inconvenience for the consumer

**CFR**

III. – 3:101: Remedies available

(1) If an obligation is not performed by the debtor and the non-performance is not excused, the creditor may resort to any of the remedies set out in this Chapter.

(2) If the debtor’s non-performance is excused, the creditor may resort to any of those remedies except enforcing specific performance and damages.

(3) The creditor may not resort to any of those remedies to the extent that the creditor caused the debtor’s non-performance.

III. – 3:202: Cure by debtor: general rules

(1) The debtor may make a new and conforming tender if that can be done within the time allowed for performance.

(2) If the debtor cannot make a new and conforming tender within the time allowed for performance but, promptly after being notified of the lack of conformity, offers to cure it within a reasonable time and at the debtor’s own expense, the creditor may not pursue any remedy for non-performance, other than withholding performance, before allowing the debtor a reasonable period in which to attempt to cure the nonconformity.

(3) Paragraph (2) is subject to the provisions of the following Article.

III. – 3:203: When creditor need not allow debtor an opportunity to cure

The creditor need not, under paragraph (2) of the preceding Article, allow the debtor a period in which to attempt cure if:

(a) failure to perform a contractual obligation within the time allowed for performance amounts to a fundamental non-performance;

(b) the creditor has reason to believe that the
and the reasonable time needed for the trader to remedy the lack of conformity shall be assessed taking into account the nature of the goods or the purpose for which the consumer acquired the goods as provided for by Article 24(2)(b).

debtor’s performance was made with knowledge of the non-conformity and was not in accordance with good faith and fair dealing;
(c) the creditor has reason to believe that the debtor will be unable to effect the cure within a reasonable time and without significant inconvenience to the creditor or other prejudice to the creditor’s legitimate interests; or
(d) cure would be inappropriate in the circumstances.
III. – 3:204: Consequences of allowing debtor opportunity to cure
(1) During the period allowed for cure the creditor may withhold performance of the creditor’s reciprocal obligations, but may not resort to any other remedy.
(2) If the debtor fails to effect cure within the time allowed, the creditor may resort to any available remedy.
(3) Notwithstanding cure, the creditor retains the right to damages for any loss caused by the debtor’s initial or subsequent non-performance or by the process of effecting cure.
III. – 3:205: Return of replaced item
(1) Where the debtor has, whether voluntarily or in compliance with an order under III. – 3:302 (Enforcement of non-monetary obligations), remedied a non-conforming performance by replacement, the debtor has a right and an obligation to take back the replaced item at the debtor’s expense.
(2) The creditor is not liable to pay for any use made of the replaced item in the period prior to the replacement.
IV. A. – 4:201: Termination by consumer for lack of conformity.
In a consumer contract for sale, the buyer may terminate the contractual relationship for non-performance under Book III, Chapter 3, Section 5 (Termination) in the case of any lack of conformity, unless the lack of conformity is minor.

Comparison

The CRD and the CFR have adopted very different approaches regarding the consumer’s choice among remedies for non-conformity. The CRD maintains the hierarchy of remedies of the Consumer Sales Directive, which means that the consumer in principle has to allow the trader to repair or replace a good before he may resort to price reduction or rescission of the contract (Art. 26(2) and (3)). Moreover, it leaves the choice between repair and replacement to the seller (Art. 26(2)). The CFR, on the other hand, allows the consumer/buyer to choose freely among the remedies set out in its IIIrd Chapter (III.-3:101). If the seller offers to cure the non-conformity, the consumer has to give him the possibility to do so (III.-3:202 and III.-3:203). Nevertheless, the CFR allows the consumer to terminate the contract in case of any lack of conformity, unless it is of a minor nature (IV.A.-4:201).
Suggestion for amendment based on the CFR

- Abolish the hierarchy of remedies for non-conformity in consumer sales and leave the choice to the consumer, just like, in most Member States, in other consumer contracts and in B2B sales contracts:

  2. The trader shall remedy the lack of conformity by either repair or replacement according to his choice.

  3. Where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded. A trader’s effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity.

  The consumer may only rescind the contract if the lack of conformity is not minor.

  4. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:

  - the trader has implicitly or explicitly refused to remedy the lack of conformity;
  - the trader has failed to remedy the lack of conformity within a reasonable time;
  - the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;
  - the same defect has reappeared more than once within a short period of time.

  5. The significant inconvenience for the consumer and the reasonable time needed for the trader to remedy the lack of conformity shall be assessed taking into account the nature of the goods or the purpose for which the consumer acquired the goods as provided for by Article 24(2)(b).

6.7. Costs of remedy for the debtor

CRD

Article 27

Costs and damages

1. The consumer shall be entitled to have the lack of conformity remedied free of any cost.

2. Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.

CFR

III. – 3:202: Cure by debtor: general rules

(2) If the debtor cannot make a new and conforming tender within the time allowed for performance but, promptly after being notified of the lack of conformity, offers to cure it within a reasonable time and at the debtor’s own expense, the creditor may not pursue any remedy for non-performance, other than withholding performance, before allowing the debtor a reasonable period in which to attempt to cure the nonconformity.

(3) Paragraph (2) is subject to the provisions of the following Article.

III.-3:701: Right to damages

(1) The creditor is entitled to damages for loss caused by the debtor’s non-performance of an obligation, unless the non-performance is excused.

Comparison

The proposed CRD’s and CFR’s provisions on costs and damages relating to non-conformity appear to lead to similar results. Both determine that the lack of conformity should be
remedied free of cost and that the consumer is entitled to damages resulting from the non-conformity of the goods. However, the wording of Article 27 seems to imply that the buyer is also entitled to damages where the non-conformity is excused. Moreover, in the current wording of the CRD the consumer ‘may claim damages’ whereas what matters, of course, especially in a Consumer Rights directive, is not what a consumer may claim but whether such a claim will be successful.

**Suggestion for amendment based on the CFR**

- Article 27(2): ‘. Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26, unless the non-conformity is excused.

### 6.8. Right to damages not affected by other remedy

**CRD**

*Article 27*

**Costs and damages**

2. Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.

**CFR**

*III. – 3:102: Cumulation of remedies*

Remedies which are not incompatible may be cumulated. In particular, a creditor is not deprived of the right to damages by resorting to any other remedy.

**Comparison**

Under the CFR the consumer buyer’s entitlement to damages is not affected by the resort to other remedies. It is not clear whether Art. 27 CRD is meant to have the same effect. Rather, it seems that (in line with the hierarchy of remedies) the consumer is only entitled to compensation for damage that could not be restored by other remedies including notably repair and replacement.

**Suggestions for amendments based on the CFR**

- Make clearer how the consumer’s right to damages relates to the hierarchy of remedies

### 6.9. Time limits and notification of non-conformity

**CRD**

*Article 28*

**Time limits and burden of proof**

1. The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the risk passed to the consumer.
2. When the trader has remedied the lack of conformity by replacement, he shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the consumer or a third party indicated by the consumer has acquired the material possession of the replaced goods.
3. In the case of second-hand goods, the trader and the consumer may agree on a shorter

**CFR**

*IV.A.–2:308: Relevant time for establishing conformity*

(1) The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, even if the lack of conformity becomes apparent only after that time.

(2) In a consumer contract for sale, any lack of 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 lack of conformity.

*III.–3:107: Failure to notify non-conformity*
liability period, which may not be less than one year.
4. In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within two months from the date on which he detected the lack of conformity. 5. Unless proved otherwise, any lack of conformity which becomes apparent within six months of the time when the risk passed to the consumer, shall be presumed to have existed at that time unless this presumption is incompatible with the nature of the goods and the nature of the lack of conformity.

(1) If, in the case of an obligation to supply goods, other assets or services, the debtor supplies goods, other assets or services which are not in conformity with the terms regulating the obligation, the creditor may not rely on the lack of conformity unless the creditor gives notice to the debtor within a reasonable time specifying the nature of the lack of conformity.

(2) The reasonable time runs from the time when the goods or other assets are supplied or the service is completed or from the time, if it is later, when the creditor discovered or could reasonably be expected to have discovered the non-conformity.

(3) The debtor is not entitled to rely on paragraph (1) if the failure relates to facts which the debtor knew or could reasonably be expected to have known and which the debtor did not disclose to the creditor.

(4) This Article does not apply where the creditor is a consumer.

**IV.A.–4:302: Notification of lack of conformity**
(1) In a contract between two businesses the rule in III.–3:107 (Failure to notify non-conformity) requiring notification of a lack of conformity within a reasonable time is supplemented by the following rules. (…)

**Comparison**

The CRD and the CFR show major differences in regard to time limits and notification of non-conformity.

**Two years limit**
The proposed CRD limits claims based on non-conformity to a period of two years after the passing of the risk to the consumer (Art. 28(1)). In the case of second-hand goods, the parties to the contract may even agree on a shorter liability period, though this may not be less than one year (Art. 28(3)). The CFR contains no such limitation for consumer sales contracts.

**Notification of non-conformity within two months**
The proposed CRD stipulates that the consumer must inform the trader of the non-conformity of the good within a period of two months from the date on which he detected the non-conformity in order to hold the trader liable (Art. 28(4)). Although the CFR contains some provisions on similar notification duties, these explicitly exclude consumer contracts from their scope (see III.–3:107(4) and IV.A.–4:302(1) CFR). This seems to imply that the CFR does not impose any notification duties on consumers in B2C sales contracts.

There is, nevertheless, some similarity between the provisions as well.
Presumption of non-conformity within six months
The proposed CRD and the CFR both follow the Consumer Sales Directive, where it provides a presumption of non-conformity in case of any lack of conformity which becomes apparent within six months after the risk has passed to the consumer (Art. 28(5) CRD; IV.A.-2:308 CFR).

Suggestions for amendments based on the CFR

- Article 28, Para 1: '1. The trader shall be held liable under Article 25 for any lack of conformity which exists at the time when the risk passes to the consumer, even if the lack of conformity becomes apparent only after that time.'
- Delete Article 28, Para 4: 'In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within two months from the date on which he detected the lack of conformity.'

6.10. Commercial guarantees

CRD
Article 2
Definitions

(18) 'commercial guarantee' means any undertaking by the trader or producer (the 'guarantor') to the consumer to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

Article 29
Commercial guarantees
1. A commercial guarantee shall be binding on the guarantor under the conditions laid down in the guarantee statement. In the absence of the guarantee statement, the commercial guarantee shall be binding under the conditions laid down in the advertising on the commercial guarantee.
2. The guarantee statement shall be drafted in plain intelligible language and be legible. It shall include the following:
   (a) legal rights of the consumer, as provided for in Article 26 and a clear statement that those rights are not affected by the commercial guarantee,
   (b) set the contents of the commercial guarantee and the conditions for making claims, notably the duration, territorial scope and the name and address of the guarantor,
   (c) without prejudice to Articles 32 and 35 and Annex III(1)(j), set out, where applicable, that the commercial guarantee cannot be transferred to a subsequent buyer.
3. If the consumer so requests, the trader shall make the guarantee statement available in a durable medium.
4. Non compliance with paragraph 2 or 3 shall

CFR
IV. A. – 6:101: Definition of a consumer goods guarantee
(1) A consumer goods guarantee means any undertaking of a type mentioned in the following paragraph given to a consumer in connection with a consumer contract for the sale of goods:
   (a) by a producer or a person in later links of the business chain; or
   (b) by the seller in addition to the seller's obligations as seller of the goods.
(2) The undertaking may be that:
   (a) apart from misuse, mistreatment or accident the goods will remain fit for their ordinary purpose for a specified period of time, or otherwise;
   (b) the goods will meet the specifications set out in the guarantee document or in associated advertising; or
   (c) subject to any conditions stated in the guarantee,
      (i) the goods will be repaired or replaced;
      (ii) the price paid for the goods will be reimbursed in whole or in part; or
      (iii) some other remedy will be provided.

IV. A. – 6:102: Binding nature of the guarantee
(1) A consumer goods guarantee, whether contractual or in the form of a unilateral undertaking, is binding in favour of the first buyer, and in the case of a unilateral undertaking is so binding without acceptance notwithstanding any provision to the contrary in the guarantee document or the associated advertising.
(2) If not otherwise provided in the guarantee document, the guarantee is also binding without acceptance in favour of every owner of the goods within the duration of the guarantee.
(3) Any requirement in the guarantee whereby it is conditional on the fulfilment by the guarantee
IV. A. – 6:103: Guarantee document
(1) A person who gives a consumer goods guarantee must (unless such a document has already been provided to the buyer) provide the buyer with a guarantee document which:
(a) states that the buyer has legal rights which are not affected by the guarantee;
(b) points out the advantages of the guarantee for the buyer in comparison with the conformity rules;
(c) lists all the essential particulars necessary for making claims under the guarantee, notably:
   – the name and address of the guarantor;
   – the name and address of the person to whom any notification is to be made and the procedure by which the notification is to be made;
   – any territorial limitations to the guarantee;
(d) is drafted in plain, intelligible language; and
(e) is drafted in the same language as that in which the goods were offered.
(2) The guarantee document must be in textual form on a durable medium and be available and accessible to the buyer.
(3) The validity of the guarantee is not affected by any failure to comply with paragraphs (1) and (2), and accordingly the guarantee holder can still rely on the guarantee and require it to be honoured.
(4) If the obligations under paragraphs (1) and (2) are not observed the guarantee holder may, without prejudice to any right to damages which may be available, require the guarantor to provide a guarantee document which conforms to those requirements.
(5) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

IV. A. – 6:104: Coverage of the guarantee
If the guarantee document does not specify otherwise:
(a) the period of the guarantee is 5 years or the estimated life-span of the goods, whichever is shorter;
(b) the guarantor’s obligations become effective if, for a reason other than misuse, mistreatment or accident, the goods at any time during the period of the guarantee become unfit for their ordinary purpose or cease to possess such qualities and performance capabilities as the guarantee holder may reasonably expect;
(c) the guarantor is obliged, if the conditions of the guarantee are satisfied, to repair or replace the goods; and
(d) all costs involved in invoking and performing the guarantee are to be borne by the guarantor.

IV. A. – 6:105: Guarantee limited to specific parts
A consumer goods guarantee relating only to a specific part or specific parts of the goods must clearly indicate this limitation in the guarantee document; otherwise the limitation is not binding on the consumer.

**IV. A. – 6:106: Exclusion or limitation of the guarantor’s liability**

The guarantee may exclude or limit the guarantor’s liability under the guarantee for any failure of or damage to the goods caused by failure to maintain the goods in accordance with instructions, provided that the exclusion or limitation is clearly set out in the guarantee document.

**IV. A. – 6:107: Burden of proof**

(1) Where the guarantee holder invokes a consumer goods guarantee within the period covered by the guarantee the burden of proof is on the guarantor that:
   (a) the goods met the specifications set out in the guarantee document or in associated advertisements; and
   (b) any failure of or damage to the goods is due to misuse, mistreatment, accident, failure to maintain, or other cause for which the guarantor is not responsible.

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

**IV. A. – 6:108: Prolongation of the guarantee period**

(1) If any defect or failure in the goods is remedied under the guarantee then the guarantee is prolonged for a period equal to the period during which the guarantee holder could not use the goods due to the defect or failure.

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

**Comparison**

The CFR contains more, and more detailed rules on commercial guarantees than the proposed CRD.

**Definition**

The CFR gives a more detailed description of the undertaking the trader or producer may give to the consumer (compare IV.A.-6:101 CFR to Art. 2(18) CRD).

**Binding nature**

Although both instruments stipulate that the guarantee shall be binding, the CFR contains more specific provisions on the conditions for relying on a commercial guarantee and the parties that may benefit from it, such as subsequent owners of the goods (IV.A.-6:102 CFR). The CRD merely provides that the commercial guarantee shall be binding on the guarantor ‘under the conditions laid down in the guarantee statement’ (Art. 29(1) CRD) and
thus leaves considerable freedom to the parties to negotiate the terms and the conditions of the binding nature of the guarantee. This may not always be in the interest of the consumer, who usually holds a weaker bargaining position than the trader or producer. Note, moreover, that the conditions of the commercial guarantee are often included in standard terms, which leaves even less room for negotiations.

**Guarantee document**

The CRD provides that the trader shall make the guarantee statement available in a ‘durable medium’ if the consumer so requests (Art. 29(3)). The CFR imposes a stronger duty on the guarantor, in the sense that a guarantee document *must* be given to the consumer (IV.A.-6:103).

**Further provisions**

Finally, the CFR contains several specific provisions on commercial guarantees in IV.A.-6:104 to IV.A.-6:108 that do not have equivalents in the proposed CRD.

**Suggestion for amendment based on the CFR**

- To substitute Art. 29 CRD, partly or wholly, with Arts. IV. A.-6:101 to IV. A.-6:108 CFR with a view to increasing legal certainty (especially the rules concerning the duty to provide the consumer with a guarantee document) and improving consumer protection (especially the rules concerning the binding nature of the guarantee).
7. UNFAIR TERMS

KEY FINDINGS

- The CRD contains no rule to the effect that a lack of transparency alone can make a term unfair.
- The ‘grey list’ of terms in the CFR is more protective with regard to unilateral adaptation of contracts.

7.1. Scope

CRD

Article 30

Scope

1. This Chapter shall apply to contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, in particular where such contract terms are part of a pre-formulated standard contract.

2. The fact that the consumer had the possibility of influencing the content of certain aspects of a contract term or one specific term, shall not exclude the application of this Chapter to other contract terms which form part of the contract.

3. This Chapter shall not apply to contract terms reflecting mandatory statutory or regulatory provisions, which comply with Community law and the provisions or principles of international conventions to which the Community or the Member States are party.

CFR

II. – 9:403: Meaning of “unfair” in contracts between a business and a consumer

In a contract between a business and a consumer, a term [which has not been individually negotiated] is unfair for the purposes of this Section if it is supplied by the business and if it significantly disadvantages the consumer, contrary to good faith and fair dealing.

II.–1:110: 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) If 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) If it is disputed whether a term supplied by one party as part of standard terms has since been individually negotiated, that party 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 person are considered to have been supplied by the business, unless the consumer introduced them to the contract.

II. – 9:406: Exclusions from unfairness test

(1) Contract terms are not subjected to an unfairness test under this Section if they are based on:

(a) provisions of the applicable law;

(b) international conventions to which the Member States are parties, or to which the European Union is a party; or

(c) these rules.

(2) For contract terms which are drafted in plain
How the CFR can improve the Consumer Rights Directive

and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the contract, nor to the adequacy of the price to be paid.

Comparison

The scope of the rules on ‘unfair terms’ in the CRD is limited to contract terms which the consumer agreed to without having the possibility of influencing their content and excludes contract terms reflecting certain mandatory statutory rules. In the CFR, on the other hand, it has remained undecided whether the scope of the unfairness test should be limited to individually negotiated terms (in accordance with the Acquis Group’s opinion – hereafter: CFRAcquis) or not (as suggested by the Study Group on a European Civil Code - hereafter: CFRSGECC). The latter solution would considerably broaden the scope of consumer protection in regard to unfair terms.

Individually negotiated terms

The CRD describes its scope in a positive manner, indicating that its Chapter on unfair terms shall apply to ‘contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, in particular where such contract terms are part of a pre-formulated standard contract’ (Art. 30(1)). The CFRAcquis defines the scope of the unfairness test in a negative manner, defining when terms have not been individually negotiated (II.-1:110). It focuses on the question if a party has been able to influence the content of the terms. The CFRAcquis’s scope is slightly wider than that of the CRD, in the sense that it names the fact that terms have been drafted in advance as an indication only, whereas the CRD expressly includes it in its definition of terms that have not been individually negotiated. Furthermore, the CFRAcquis adds some more precise provisions on scope and burden of proof (II.-1:110(2)-(4)), which are not in the CRD.

Mandatory statutory and regulatory provisions

Both the CRD and the CFR exclude terms based on certain mandatory rules of national and European origin from the scope of the unfairness test. The CFR, moreover, provides that terms based on its own rules will not be subject to an unfairness test (II.-9:406).

Suggestion for amendment based on the CFRSGECC

- Article 30 (1): ‘This Chapter shall apply to contract terms supplied by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, in particular where such contract terms are part of a pre-formulated standard contract.’

7.2. Transparency requirements of contract terms

CRD
Article 31
Transparency requirements of contract terms
1. Contract terms shall be expressed in plain, intelligible language and be legible.
2. Contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them.

CFR
II. – 9:402: Duty of transparency in terms not individually negotiated
(1) A person who supplies terms which have not been individually negotiated has a duty to ensure that they are drafted and communicated in plain, intelligible language.

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before the conclusion of the contract, with due regard to the means of communication used.
3. The trader shall seek the express consent of the consumer to any payment in addition to the remuneration foreseen for the trader’s main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.
4. Member States shall refrain from imposing any presentational requirements as to the way the contract terms are expressed or made available to the consumer.

(2) In a contract between a business and a consumer a term which has been supplied by the business in breach of the duty of transparency imposed by paragraph (1) may on that ground alone be considered unfair.

II. – 9:407: Factors to be taken into account in assessing unfairness
(1) When assessing the unfairness of a contractual term for the purposes of this Section, regard is to be had to the duty of transparency under II. – 9:402 (Duty of transparency in terms not individually negotiated), 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.
(2) For the purposes of II. – 9:403 (Meaning of “unfair” in contracts between a business and a consumer) the circumstances prevailing during the conclusion of the contract include the extent to which the consumer was given a real opportunity to become acquainted with the term before the conclusion of the contract.

Comparison

Both the CRD and the CFR require that contract terms should be expressed in plain, intelligible language. The CFR adds that a breach of this duty of transparency in consumer contracts may lead to the contract term being considered unfair. Furthermore, both the CRD and the CFR stipulate that the duty of transparency should be taken into account when assessing the fairness of contractual terms (Art. 32(2) CRD; II.-9:407 CFR; see also 7.3 below).

Suggestion for amendment based on the CFR

- Insert a new Para 2 (and renumber the following Para’s): ‘A term which has been supplied by the trader in breach of the duty of transparency imposed by paragraph (1) may on that ground alone be considered unfair.’

7.3. General principles

CRD
Article 32
General principles
1. Where a contract term is not included in Annex II or III, Member States shall ensure that it is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
2. Without prejudice to Articles 34 and 38, the unfairness of a contract term shall be assessed, taking into account the nature of the products for which the contract was concluded and by
referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion and to all the other terms of the contract or of another contract on which the former is dependent. When assessing the fairness of a contract term, the competent national authority shall also take into account the manner in which the contract was drafted and communicated to the consumer by the trader in accordance with Article 31.

3. Paragraphs 1 and 2 shall not apply to the assessment of the main subject matter of the contract or to the adequacy of the remuneration foreseen for the trader’s main contractual obligation, provided that the trader fully complies with Article 31.

assessing unfairness
(1) When assessing the unfairness of a contractual term for the purposes of this Section, regard is to be had to the duty of transparency under II. – 9:402 (Duty of transparency in terms not individually negotiated), 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.

(2) For the purposes of II. – 9:403 (Meaning of “unfair” in contracts between a business and a consumer) the circumstances prevailing during the conclusion of the contract include the extent to which the consumer was given a real opportunity to become acquainted with the term before the conclusion of the contract.

Comparison

Unfairness test
The unfairness test of the CRD entails an assessment of whether a contract term ‘causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’. The unfairness test included in the CFR does not refer to the contractual balance between the parties, but regards the question whether a term ‘significantly disadvantages the consumer’. It is not clear whether any substantive difference is intended here.

Circumstances
When assessing the unfairness of contract terms, the circumstances concerning the conclusion of the contract have to be taken into account, both according to the CRD and the CFR.

Exclusion from test
The unfairness test does not regard the main subject matter of the contract or the adequacy of the remuneration foreseen for the trader’s main contractual obligation (Art. 32(3) CRD; II.-9:406(2) CFR). In other words, both the CRD and the CFR reject the iustum pretium doctrine.

7.4. Burden of proof

CRD
Article 33
Burden of proof
Where the trader claims that a contract term has been individually negotiated, the burden of proof shall be incumbent on him.

CFR
II. – 1:110: Terms “not individually negotiated”
(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.

Comparison

The CRD and CFR both determine that the burden of proving that a term supplied by a trader/business has been individually negotiated rests on the trader/business.
7.5. Terms considered to be unfair in all circumstances

**CRD**

Article 34

*Terms considered unfair in all circumstances*

Member States shall ensure that contract terms, as set out in the list in Annex II, are considered unfair in all circumstances. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40.

**Annex II**

*Contract Terms which are Considered Unfair under All Circumstances*

Contract terms, which have the object or effect of the following, shall be unfair in all circumstances:

(a) excluding or limiting the liability of the trader for death or personal injury caused to the consumer through an act or omission of that trader;

(b) limiting the trader’s obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular condition which depends exclusively on the trader;

(c) excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions;

(d) restricting the evidence available to the consumer or imposing on him a burden of proof which, according to the applicable law, should lie with the trader;

(e) giving the trader the right to determine whether the goods or services supplied are in conformity with the contract or giving the trader the exclusive right to interpret any term of the contract.

**CFR**

II. – 9:409: Exclusive jurisdiction clauses

(1) A term in a contract between a business and a consumer is unfair for the purposes of this Section if it is supplied by the business and if it confers exclusive jurisdiction for all disputes arising under the contract on the court for the place where the business is domiciled.

(2) Paragraph (1) does not apply if the chosen court is also the court for the place where the consumer is domiciled.

**Comparison**

Both the proposed CRD and the CFR black list certain contract terms. These terms are considered to be unfair under all circumstances. There is a considerable difference between the contents of the lists: while the CFR only names exclusive jurisdiction clauses (such as the one at stake in the *Océano* case, ECJ 27 June 2000, Cases C-240/98 to C-244/98), the CRD lists several other clauses. Most of the clauses mentioned in the CRD can be found on the grey list of the CFR (see II.-9:410(a), (l), (m) and (p)), which means that under the CFR they are only presumed to be unfair rather than to be considered unfair under all circumstances. For these clauses, the CRD provides a higher level of consumer protection than the CFR.
7.6. Terms presumed to be unfair

**CRD**

**Article 35**

**Terms presumed to be unfair**

Member States shall ensure that contract terms, as set out in the list in point 1 of Annex III, are considered unfair, unless the trader has proved that such contract terms are fair in accordance with Article 32. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40.

**Annex III**

**Contract Terms which are Presumed to be Unfair**

1. Contract terms, which have the object or effect of the following, are presumed to be unfair:

   (a) excluding or limiting the legal rights of the consumer vis-à-vis the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the rights of the consumer of offsetting a debt owed to the trader against a claim which the consumer may have against him;

   (b) allowing the trader to retain a payment by the consumer where the latter fails to conclude or perform the contract, without giving the consumer the right to be compensated of the same amount if the trader fails to conclude or perform the contract;

   (c) requiring any consumer who fails to fulfill his obligation to pay damages which significantly exceed the harm suffered by the trader;

   (d) allowing the trader to terminate the contract at will where the same right is not granted to the consumer;

   (e) enabling the trader to terminate an open-ended contract without reasonable notice except where the consumer has committed a serious breach of contract;

   (f) automatically renewing a fixed-term contract where the consumer does not indicate otherwise and has to give a long notice to terminate the contract at the end of each renewal period;

   (g) allowing the trader to increase the price agreed with the consumer when the contract was concluded without giving the consumer the right to terminate the contract;

   (h) obliging the consumer to fulfil all his obligations where the trader has failed to fulfil all his obligations;

   (i) giving the trader the possibility of transferring his obligations under the contract, without the consumer's agreement;

   (j) restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the trader;

   (k) enabling the trader to unilaterally alter the terms of the contract including the characteristics of the goods by limiting the transferability of any commercial guarantee provided by the trader;

   (l) restricting the consumer's right to re-sell the consumer's agreement;

   (m) giving the trader the possibility of transferring his obligations where the trader has failed to fulfil all his obligations;

   (n) obliging the consumer to perform obligations under the contract, without the consumer's agreement;

   (o) permitting a business to keep money paid by a 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;

   (p) requiring a consumer who fails to perform his or her obligations to pay a disproportionately large amount of damages;

   (q) entitling a business to withdraw from or terminate the contractual relationship on a discretionary basis without giving the same right to the consumer, or entitles a business to keep money paid for services not yet supplied in the case where the business withdraws from or terminates the contractual relationship;

   (r) making binding on a consumer an obligation which is subject to a condition the fulfilment of which depends solely on the intention of the business;

   (s) automatically extending a contract of fixed duration unless the consumer indicates otherwise, in cases where such terms provide for an unreasonably early deadline;

   (t) enabling 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 supplier of financial services reserves the right to change the rate of interest to be paid by, or to, the consumer, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the consumer at the earliest opportunity and that the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the consumer at the earliest opportunity and that

**CFR**

II. – 9:410: Terms which are presumed to be unfair in contracts between a business and a consumer

(1) A term in a contract between a business and a consumer is presumed to be unfair for the purposes of this Section if it is supplied by the business and if it:

   (a) excludes or limits the liability of a business for death or personal injury caused to a consumer through an act or omission of that business;

   (b) inappropriately excludes or limits the remedies, including any right to set-off, available to the consumer against the business or a third party for non-performance by the business of obligations under the contract;

   (c) makes binding on a consumer an obligation which is subject to a condition the fulfilment of which depends solely on the intention of the business;

   (d) permits a business to keep money paid by a 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) requires a consumer who fails to perform his or her obligations to pay a disproportionately high amount of damages;

   (f) entitles a business to withdraw from or terminate the contractual relationship on a discretionary basis without giving the same right to the consumer, or entitles a business to keep money paid for services not yet supplied in the case where the business withdraws from or terminates the contractual relationship;

   (g) enables a business to terminate a contractual relationship of indeterminate duration without reasonable notice, except where there are serious grounds for doing so; this does not affect terms in financial services contracts where there is a valid reason, provided that the supplier is required to inform the other contracting party thereof immediately;

   (h) automatically extends a contract of fixed duration unless the consumer indicates otherwise, in cases where such terms provide for an unreasonably early deadline;

   (i) enables 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 supplier of financial services reserves the right to change the rate of interest to be paid by, or to, the consumer, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the consumer at the earliest opportunity and that
of the product or service;
(l) unilaterally amending contract terms communicated to the consumer in a durable medium through on-line contract terms which have not been agreed by the consumer.
2. Point 1(e) shall not apply to terms by which a supplier of financial service reserves the right to terminate unilaterally an open-ended contract without notice, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
3. Point 1(g) shall not apply to
(a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;
(b) contracts for the purchase or sale of foreign currency, traveller’s cheques or international money orders denominated in foreign currency;
(c) price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.
4. Point 1(k) shall not apply to
(a) terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately;
(b) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;
(c) contracts for the purchase or sale of foreign currency, traveller’s cheques or international money orders denominated in foreign currency;
(d) terms under which the trader reserves the right to alter unilaterally the conditions of an open-ended contract, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to terminate the contract.
the consumer is free to terminate the contractual relationship with immediate effect; neither does it affect terms under which a business reserves the right to alter unilaterally the conditions 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 contractual relationship;
(j) enables a business to alter unilaterally without a valid reason any characteristics of the goods, other assets or services to be provided;
(k) provides that the price of goods or other assets is to be determined at the time of delivery or supply, or allows 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) gives a business the right to determine whether the goods, other assets or services supplied are in conformity with the contract, or gives the business the exclusive right to interpret any term of the contract;
(m) limits the obligation of a business to respect commitments undertaken by its agents, or makes its commitments subject to compliance with a particular formality;
(n) obliges a consumer to fulfil all his or her obligations where the business fails to fulfil its own;
(o) allows a business to transfer its rights and obligations under the contract without the consumer’s consent, if this could reduce the guarantees available to the consumer;
(p) excludes or restricts a consumer’s right to take legal action or to exercise any other remedy, in particular by referring the consumer to arbitration proceedings which are not covered by legal provisions, by unduly restricting the evidence available to the consumer, or by shifting a burden of proof on to the consumer;
(q) allows 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 withdraw.
2. Subparagraphs (g), (i) and (k) do not apply to:
(a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate beyond the control of the business;
(b) contracts for the purchase or sale of foreign currency, traveller’s cheques or international money orders denominated in foreign currency.
Comparison

The proposed CRD and the CFR each include a ‘grey list’ of contract terms that are presumed to be unfair. While a consumer normally has to prove that a contract term is unfair, in cases concerning these clauses the burden of proof lies on the trader/business. The clauses in principle are presumed to be unfair, but the trader/business may provide proof that they are not (and may thus be upheld). Apart from Para. 1(j) and (l), all terms grey listed by the CRD can be found in II.-9:410 CFR (see (1)(b), (d), (e), (f), (g), (h), (I), (j), (n) and (o) of this provision). Most of the exclusions mentioned in Para. 2, 3 and 4 of the proposed CRD correspond to similar provisions in the CFR (II.-9:410(2)). Interestingly, however, Para. 4(d) CRD does not have a counterpart in the CFR, which means that the CFR offers more protection regarding the unilateral adaptation of the terms of open-ended contracts than the proposed CRD.

Suggestion for amendment based on the CFR

- Delete Annex III, Para 4(d): ‘terms under which the trader reserves the right to alter unilaterally the conditions of an open-ended contract, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to terminate the contract.’

7.7. Interpretation of terms (contra proferentem rule)

**CRD**

**Article 36**

**Interpretation of terms**

1. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.
2. This Article shall not apply in the context of the procedures laid down in Article 38(2).

**CFR**

II. – 8:103: Interpretation against supplier of term or dominant party

(1) Where there is doubt about the meaning of a term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.

(2) Where there is doubt about the meaning of any other term, and that term has been established under the dominant influence of one party, an interpretation of the term against that party is to be preferred.

Comparison

Both the CRD and the CFR have adopted the *contra proferentem* rule for the interpretation of standard terms. Only their wording differs: where the CRD says that in case of doubt about the meaning of a term, ‘the interpretation most favourable to the consumer shall prevail’, the CFR chooses the negative formulation that ‘an interpretation of the term against the party who supplied it is to be preferred’. The results of application of the provisions may be expected to greatly overlap, although the CRD formula maybe slightly more consumer friendly because it requires the *most* favourable of all possible interpretations.
7.8. Effects of unfair contract terms

**CRD**

*Article 37*

*Effects of unfair contract terms*

Contract terms which are unfair shall not be binding on the consumer. The contract shall continue to bind the parties if it can remain in force without the unfair terms.

**CFR**

*II. – 9:408: Effects of unfair terms*

1. A term which is unfair under this Section is not binding on the party who did not supply it.
2. If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties.

**Comparison**

The proposed CRD and the CFR completely agree on the effects of unfairness of contract terms. The term shall not be binding on the party who did not supply it, i.e. the consumer, in case of consumer contracts. If the contract can be maintained without this term, the rest of the contract will remain binding on the parties.
8. MISCELLANEOUS PROVISIONS

KEY FINDINGS

- It is not clear exactly which rules in the CRD are mandatory.

8.1. Mandatory nature of the provisions

**CRD**

**Article 43**

*Imperative nature of the Directive*

If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive.

**CFR**

Right of Withdrawal

II. – 5:101: *Scope and mandatory nature*

(2) The parties may not, to the detriment of the entitled party, exclude the application of the rules in this Chapter or derogate from or vary their effects.

Consumer Sales of Goods

IV. A. – 2:309: *Limits on derogation from conformity rights in a consumer contract for sale*

In a consumer contract for sale, any contractual term or agreement concluded with the seller before a lack of conformity is brought to the seller’s attention which directly or indirectly waives or restricts the rights resulting from the seller’s obligation to ensure that the goods conform to the contract is not binding on the consumer.

IV. A. – 4:101: *Limits on derogation from remedies for non-conformity in a consumer contract for sale*

In a consumer contract for sale, any contractual term or agreement concluded with the seller before a lack of conformity is brought to the seller’s attention which directly or indirectly waives or restricts the remedies of the buyer provided in Book III, Chapter 3 (Remedies for Non-performance), as modified in this Chapter, in respect of the lack of conformity is not binding on the consumer.

Unfair Terms

II. – 9:401: *Mandatory nature of following provisions*

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

Comparison

The CFR explicitly indicates the mandatory nature of its provisions. The proposed CRD, in Art. 43, only provides that consumers ‘may not waive the rights conferred on them by the Directive’. This does not exclude that parties may agree otherwise on subject matters that do not directly concern rights given to the consumer. In some other provisions, e.g. Art. 19(3), 22(1) and 28(3), the CRD stipulates that the parties may deviate from the given
rules. However, it is not clear whether this means that all rules of the CRD are mandatory unless it is indicated that parties may deviate from them.

**Suggestion for amendment based on the CFR**

- Clarify the mandatory nature of CRD provisions and its exact implications.

## 8.2. Inertia selling

**CRD**

**Article 45**  
Inertia selling

The consumer shall be exempted from the provision of any consideration in cases of unsolicited supply of a product as prohibited by Article 5(5) and point 29 of Annex I of Directive 2005/29/EC. The absence of a response from the consumer following such an unsolicited supply shall not constitute consent.

**CFR**

II. – 3:401: No obligation arising from failure to respond  
(1) If a business delivers unsolicited goods to, or performs unsolicited services for, a consumer:  
(a) 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 and services; and  
(b) no non-contractual obligation arises from the consumer’s acquisition, retention, rejection or use of the goods or receipt of benefit from the services.  
(2) Sub-paragraph (b) of the preceding paragraph does not apply if the goods or services were supplied:  
(a) by way of benevolent intervention in another’s affairs; or  
(b) in error or in such other circumstances that there is a right to reversal of an unjustified enrichment.  
(3) This Article is subject to the rules on delivery of excess quantity under a contract for the sale of goods.  
(4) For the purposes of paragraph (1) delivery occurs when the consumer obtains physical control over the goods.

VIII. – 2:304: Passing of ownership of unsolicited goods  
(1) If a business delivers unsolicited goods to a consumer, the consumer acquires ownership subject to the business’s right or authority to transfer ownership. The consumer may reject the acquisition of ownership; for these purposes, II. – 4:303 (Right or benefit may be rejected) applies by way of analogy.  
(2) The exceptions provided for in II. – 3:401 (No obligation arising from failure to respond) paragraphs (2) and (3) apply accordingly.  
(3) For the purposes of this Article delivery occurs when the consumer obtains physical control over the goods.

**Comparison**

Art. 45 CRD corresponds to the rules laid down in II.-3:401 CFR. The CFR’s scope here again is somewhat broader than that of the proposed CRD, including for instance non-contractual obligations. Moreover, the CFR explicitly states that in the case of inertia selling
delivery takes place ‘when the consumer obtains physical control over the goods’ (II.-3:401(4)). Read in conjunction with IV.A.-2:201 CFR, this adds up to a result similar to that reached when applying Art. 22 CRD. On this topic, the two instruments thus seem to be in agreement with one another. However, VIII. – 2:304 CFR adds that if an unsolicited good is sent to a consumer by a business (trader), the consumer acquires ownership of that good, unless he rejects it. In doing so, it is clarified that the consumer may not only retain the unsolicited goods, but – as its new owner – may use the goods (or dispose of them) as he sees fit.

**Suggestion for amendment based on the CFR**

- To indicate that the consumer obtains ownership of the unsolicited goods.
9. TERMINOLOGY, DRAFTING AND BETTER LAW MAKING

**KEY FINDINGS**

- CFR terminology is more in line with aim of better law making

A final general point of difference between the CRD and the CFR is the use of terminology and the style of drafting. Generally speaking, the use of terminology in the CFR is both more precise and more consistent. For example, 'business' (CFR) seems better than 'trader' (CRD) as the latter might suggest only buying and selling. Gender neutral drafting (CFR) seems better than suggesting that contracting parties are always men (CRD). The avoidance of the drafter’s ‘shall’ (CFR) seems better than its frequent use (CRD), which contravenes the policy of using ordinary language so far as possible. Consistency in the use of terms like ‘contract’ (CFR) seems better than inconsistency (CRD). This is not the place for a detailed terminological comparison between the CFR and the CRD. Nor will the European Parliament be too interested in this stage of the law making process in technical details. But the general point is worth making. After all, the main aim of the revision of the acquis and one of the principal purposes of the CFR is better European law-making.8

8 *Action Plan* (note 5) p. 15-16.
## ANNEX

### I. Correlation Table CRD / CFR

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**Notes**

1. See section 5.1.
Role
Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas
- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents