

# Principles of the Existing EC Contract Law<sup>\*</sup>

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<sup>\*</sup> Source: Research Group on the Existing EC Private Law (Acquis Group), Principles of the Existing EC Contract Law (Acquis Principles) – Contract II, Munich 2009, pp. 1-48; on the purposes and the underlying methods see the contributions of *Hans Schulte-Nölke/Fryderyk Zoll* (pp. xxiii-xxxv) and *Gerhard Dannemann* (pp. xxxvi-xlix) in this volume.

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## **Text of the Acquis Principles**

### **Chapter 1:**

#### **Introductory Provisions**

##### **Section 1:**

##### **Scope**

###### **Article 1:101: Scope and purpose of these Principles**

- (1) The following principles and rules are formulated on the basis of the existing law of the European Community in the field of contract law.
- (2) These principles and rules serve as a source for the drafting, the transposition and the interpretation of European Community law.
- (3) They are not formulated to apply in the areas of labour law, company law, family law or inheritance law.

##### **Section 2:**

##### **Consumer and business**

###### **Article 1:201: Consumer**

Consumer means any natural person who is mainly acting for purposes which are outside this person's business activity.

###### **Article 1:202: Business**

Business means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to this person's self-employed trade, work or profession, even if this person does not intend to make profit in the course of this activity.

###### **Article 1:203: Mandatory nature of consumer rules**

- (1) Unless provided otherwise, contract terms which are prejudicial to the consumer and which deviate from rules applicable specifically to relations between businesses and consumers are not binding on the consumer. This does not apply to contracts which settle an existing dispute.
- (2) Paragraph (1) applies accordingly to unilateral promises.

##### **Section 3:**

##### **Notice and form**

###### **Article 1:301: Means of notice<sup>1</sup>**

Notice may be given by any means appropriate to the circumstances.

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<sup>1</sup> Grey rule from Art. II. -1:109(2) DCFR.

Article 1:302: Effectiveness of notice<sup>2</sup>

(1) The notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.

(2) The notice reaches the addressee:

- (a) when it is delivered to the addressee;
- (b) when it is delivered to the addressee's place of business, or, where there is no such place of business or the notice does not relate to a business matter, to the addressee's habitual residence;
- (c) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could reasonably be expected to obtain access to it without undue delay.

### **Article 1:303: Electronic notice**

A notice transmitted by electronic means reaches the addressee when it can be accessed by this person. This rule is mandatory in the sense of Article 1:203 (Mandatory nature of consumer rules) in relations between businesses and consumers.

### **Article 1:304: Freedom of form**

Unless provided otherwise, no form needs to be observed in legal dealings.

### **Article 1:305: Textual form**

'Textual form' means a text which is expressed in alphabetical or other intelligible characters by means of any support that permits reading, recording of the information contained therein and its reproduction in tangible form.

### **Article 1:306: Durable medium**

'Durable medium' means any support which stores information so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information.

### **Article 1:307: In writing**

A statement is 'in writing' if it is in textual form and in characters which are directly legible from paper or another durable medium on which the statement is stored.

### **Article 1:308: Signatures**

- (1) 'Handwritten signature' means the name of, or sign representing, a person written by that person's own hand for the purpose of authentication;
- (2) 'Electronic signature' means data in electronic form which are attached to or logically associated with other electronic data, and which serve as a method of authentication;
- (3) 'Electronic' means relating to technology with electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities;

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<sup>2</sup> Grey rule from Art. I. -1:109(3) and (4) DCFR.

- (4) 'Advanced electronic signature' means an electronic signature which meets the following requirements:
- (a) it is uniquely linked to the signatory;
  - (b) it is capable of identifying the signatory;
  - (c) it is created using means which can be maintained under the signatory's sole control; and
  - (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.

## Chapter 2:

### **Pre-contractual Duties**

#### General Provisions

##### Section 1:

#### **General duties**

##### **Article 2:101: Good faith**

In pre-contractual dealings, parties must act in accordance with good faith.

##### **Article 2:102: Legitimate expectations**

In pre-contractual dealings, a business must act with the special skill and care that may reasonably be expected to be used with regard, in particular, to the legitimate expectations of consumers.

##### **Article 2:103: Negotiations contrary to good faith**

- (1) A party is free to negotiate and is not liable for failing to reach an agreement.
- (2) However, a party who has conducted or discontinued negotiations contrary to good faith is liable for loss caused to the other party.
- (3) In particular, a party acts contrary to good faith if it enters into or continues negotiations with no real intention of reaching an agreement.

##### Section 2:

#### **Pre-contractual information duties**

##### **Article 2:201: Duty to inform about goods or services**

Before the conclusion of a contract, a party has a duty to give to the other party such information concerning the goods or services to be provided as the other party can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.

##### **Article 2:202: Information duties in marketing towards consumers**

- (1) Where a business is marketing goods or services to a consumer, the business must, with due regard to the limitations of the communication medium employed, provide such material information as the average consumer can reasonably expect in the given context for a decision on any steps to take towards concluding a contract for those goods or services.
- (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, it must in fact contain all the relevant information. All the relevant information must be provided in the same language. 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 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;
  - (c) the language used for communications between parties after the conclusion of the contract, if this differs from the language of the commercial communication.

**Article 2:203: Information duties towards disadvantaged consumers**

- (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 must, as appropriate in the circumstances, provide clear information about the main characteristics of the goods or services, the price including delivery charges, taxes and other costs, the address and identity of the business with whom the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures. This information must be provided at the latest at the time of conclusion of the contract.
- (2) Where more specific information duties are provided for specific situations, these take precedence over general information duties under paragraph (1).

**Article 2:204: Clarity and form of information**

- (1) A duty to provide information imposed on a business is not fulfilled unless the information is clear and precise, and expressed in plain and intelligible language.
- (2) In the case of contracts between a business and a consumer concluded at a distance, information about the main characteristics of the goods or services, the price, the address and identity of the business with whom the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures, as may be appropriate in the particular case, needs to be confirmed in writing at the time of conclusion of the contract.
- (3) Where more specific formal requirements for the provision of information are provided for specific situations, these take precedence over general requirements under paragraphs (1) and (2). Unless stated otherwise, writing may be replaced by another textual form on a durable medium, provided this is reasonably accessible to the recipient.

- (4) Failure to observe a particular form will have the same consequences as breach of information duties.

**Article 2:205: Information about address and identity**

- (1) For the purposes of this chapter, the address and identity of the business include:
- (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 name of that register;
  - (d) its geographical address;
  - (e) contact details;
  - (f) where the business has a representative in the consumer's country of residence and this is a Member state, 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 identification number.
- (2) For the purpose of Article 2:202 (Information duties in marketing towards consumers) paragraph 2, the address and identity of the business include only the information indicated in paragraph (1) subparagraphs (a), (c), (d) and (e).

**Article 2:206: Information about price**

- (1) For the purposes of this chapter, the 'price' includes:
- (a) the remuneration for the goods or services;
  - (b) any deposits payable;
  - (c) any additional taxes and duties where these may be indicated separately; and
  - (d) any additional charges, including those made for
    - (i) delivery; or
    - (ii) the use of distance communication where this exceeds the basic rate.
- (2) When an exact price cannot be indicated, the consumer must be given such information on the basis for the calculation which enables the consumer to verify the price.
- (3) Where the price is not payable in one sum, the consumer must be informed of the payment schedule.

**Article 2:207: Burden of proof**

The business bears the burden of proof that it has provided information as required by Article 2:203 (Information duties towards disadvantaged consumers) and by the Specific Provisions of this Chapter.

**Article 2:208: Remedies for breach of information duties**

- (1) If a business is required under Articles 2:203 (Information duties towards disadvantaged consumers) and 2:204 (Clarity and form of information) above to provide information to a consumer before the conclusion of a contract from which the consumer has the right to withdraw, the withdrawal period commences when all this information has been provided. However, this rule does not postpone the end of

the withdrawal period beyond one year counted from the time of the conclusion of the contract.

- (2) If a party has failed to comply with its duties under Articles 2:201 (Duty to inform about goods or services) to 2:204 (Clarity and form of information), and a contract has been concluded, this contract contains the obligations which the other party could reasonably expect as a consequence of the absence or incorrectness of the information.
- (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 to the other party for reliance damages. The rules on damages for non-performance of a contractual obligation apply accordingly.

## **Specific Provisions**

### **Part A: Contracts Negotiated Away from Business Premises**

#### **Article 2:A-01: Specific pre-contractual information duties for distance selling of financial services**<sup>Placeholder</sup>

### **Part B: Contracts for the Delivery of Goods**

#### **Article 2:B-01: Pre-contractual information on consumer guarantees**<sup>Placeholder</sup>

### **Part C: Timeshare Contracts**

#### **Article 2:C-01: Specific pre-contractual Information duties for timeshare contracts**<sup>Placeholder</sup>

### **Part D: Service Contracts**

#### **Article 2:D-01: Specific pre-contractual Information duties for service contracts**<sup>Placeholder</sup>

### **Part E: Package Travel Contracts**

#### **Article 2:E-01: Specific pre-contractual duties for package travel contracts**

- (1) In the case of a package travel contract, as defined in Article 7:E-02 (Definition of package travel contract) paragraph (1), a business is presumed to have complied with the information duties imposed by Articles 2:202 (Information duties in marketing towards consumers) and 2:203 (Information duties towards disadvantaged



- consumers) if it makes a brochure available to the customer with the information specified in paragraph (2).
- (2) Where the business makes available a brochure to a customer, this brochure must specify:
- (a) the main characteristics of the goods or services:
    - (i) the destination(s) and the means, characteristics and categories of transport used;
    - (ii) the type of accommodation, its location, category or degree of comfort and its main features; its approval and tourist classification;
    - (iii) the meal plan;
    - (iv) the itinerary; and
    - (v) whether the package is offered only if a minimum number of bookings is reached, and the deadline for informing the consumer in the event of termination;
  - (b) the address and identity of the organiser;
  - (c) the price and
  - (d) other relevant information about:
    - (i) passport and visa requirements; and
    - (ii) health formalities required for the journey and stay.
- (3) At a reasonable time before conclusion of the package travel contract, the customer must be given information about:
- (a) passport and visa requirements; and
  - (b) health formalities required for the journey and stay.
- (4) The contract must specify at least:
- (a) the main characteristics of the goods or services, including:
    - (i) the destination(s), including the dates of the periods of stay where multiple stays are involved;
    - (ii) the means, characteristics and categories of transport used;
    - (iii) dates, times and points of departure and return;
    - (iv) the itinerary (times and places of any intermediate stops and transport connections);
    - (v) visits, excursions or other services which are included in the total price agreed for the package; and
    - (vi) the type of accommodation, its location, category or degree of comfort and its main features; its approval and tourist classification;
  - (b) the price, including any possibility of price revision as provided in Article 7:E-03;
  - (c) the address and identity of the organiser and, where applicable, the retailer;
  - (d) the terms of the contract, including any agreed special requirements of the customer;
  - (e) the rights and obligations of both contracting parties, including
    - (i) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the customer in the event of termination; and
    - (ii) the duty to communicate any failure in the performance which the traveller perceives on the spot to the supplier of the services concerned and to the

- business in writing or any other appropriate form at the earliest opportunity;  
and
- (f) any available redress procedures, including periods during which the customer must make any complaint concerning the performance of the contract.

## Part F: Consumer Credit Contracts

### **Article 2:F-01: Specific pre-contractual Information duties for consumer credit contracts**<sup>Placeholder</sup>

## Part G: Payment Services

### **Article 2:G-01: Specific pre-contractual information duties for single payment transactions**<sup>Rules only</sup>

- (1) In the case of single payment transactions as defined in Article 7:G-02 (Definitions) subparagraph (c), a business which provides the following items of information is presumed to have complied with the information duties imposed by Articles 2:201 (Duty to inform about goods or services) to 2:203 (Information duties towards disadvantaged consumers):
- (a) a specification of the unique identifier or other information which the service user must provide in order for a payment order to be properly executed; (b) the time within which the payment service is to be provided;
  - (c) the price, including a breakdown of any separate charges;
  - (d) where applicable, the actual or reference exchange rate to be applied to the payment transaction.
- (2) Unless agreed otherwise by the parties, the information to be provided under paragraph (1) must be given in a language which is an official language at the place where the payment service is offered.
- (3) On request of the payment service user, the payment service provider must provide the information in textual form on a durable medium.

### **Article 2:G-02: Specific pre-contractual information duties in framework contracts for payment transactions**<sup>Rules only</sup>

- (1) In the case of a framework contract for payment transactions, as defined in Article 7:G-02 (Definitions), a business which provides the following items of information is presumed to have complied with the information duties imposed by Articles 2:201 (Duty to inform about goods or services) to 2:203 (Information duties towards disadvantaged consumers):
- (a) the main characteristics of the payment service, including
    - (i) a specification of the unique identifier or other information which the service user must provide in order for a payment order to be properly executed;

- (ii) the form of and procedure for authorising a payment transaction and revoking authorisation in accordance with Articles 7:G-06 (Authorisation of payment transactions) and 7:G-09 (Irrevocability of a payment order);
- (iii) a reference to the time of receipt of a payment order as defined in Article 7:G-10 (Receipt of a payment order) and the cut-off time, if any, established by the payment service provider;
- (iv) the maximum execution time for the payment services to be provided; and
- (v) any spending limits which the service provider requires or is willing to accept for the use of the payment instrument in accordance with Article 7:G-06 (Authorisation of payment transactions);
- (b) the price, including, if agreed, the immediate application of changes in reference interest or exchange rate and information requirements related to the changes in accordance with Article 7:G-04 (Changes to the framework contract);
- (c) where applicable, the reference exchange rate to be applied to payment transactions;
- (d) address and identity of the business;
- (e) the terms of the contract, including
  - (i) where applicable, the means of communication, including the technical requirements for the service user's equipment, agreed between the parties for the transmission of information or notifications;
  - (ii) the manner in and frequency with which information under Article 7:G-21 (Information due to payee on individual payment transactions within framework contract) is to be provided;
  - (iii) the language or languages in which the framework contract will be concluded and communication during this contractual relationship undertaken; and
  - (iv) the service user's right to receive a copy of the framework contract and information and conditions in accordance with Article 7:G-03 (Copy of framework contract);
  - (v) if agreed, information that the service user will be bound by changes in the conditions in accordance with Article 7:G-04 (Changes to the framework contract), and how the service user can avoid this binding effect;
  - (vi) the duration of the contract; and
  - (vii) the right of the service user to terminate the framework contract and any agreements relating to termination in accordance with Article 7:G-05 (Termination);
- (f) the rights and obligations of both contracting parties:
- (i) where applicable, a description of steps which the service user must take in order to keep safe a payment instrument and how to notify the service provider of any loss, theft or misappropriation of the payment instrument or of its unauthorised use in accordance with Article 7:G-08 (Notification of loss, theft or misappropriation of the payment instrument or of its unauthorised use);

- (ii) if agreed, the conditions under which the service provider reserves the right to block a payment instrument in accordance with Article 7:G-07 (Service provider's right to block the payment instrument);
  - (iii) the liability of the payer in accordance with Article 8:G-05 (Payer's liability for unauthorised payment transactions), including information on the relevant amount;
  - (iv) how and within which time the service user may claim rectification by notifying the payment service provider of any unauthorised or incorrectly executed payment transaction in accordance with Article 8:G-02 (Rectification), as well as the service provider's liability for unauthorised payment transactions in accordance with Article 8:G-04 (Payment service provider's liability for unauthorised payment transactions);
  - (v) the liability of the service provider for the execution of payment transactions in accordance with Articles 8:G-08 (Liability for non-performance of a payment order) and 8:G-09 (Liability for transmission of the payment order); and
  - (vi) the conditions for refund in accordance with Articles 8:G-04 (Payment service provider's liability for unauthorised payment transactions), 8:G-06 (Refunds for payment transactions initiated by or through a payee) and 8:G-07 (Requests for refunds for payment transactions initiated by or through a payee);
  - (g) any clause on jurisdiction or on the law applicable to the framework contract; and
  - (h) the out-of-court complaint and redress procedures available to the payment service user in accordance with Article 8:G-07 (Requests for refunds for payment transactions initiated by or through a payee).
- (2) Unless agreed otherwise by the parties, the information to be provided under paragraph (1) must be given in a language which is an official language at the place where the payment service is offered.
- (3) The payment service provider must provide the information in textual form on a durable medium.

Article 2:G-03: Specific pre-contractual information duties in payment contracts concluded by distance communication framework contracts for payment transactions<sup>Rules only</sup>

- (1) Where a single payment service contract or framework contract has been concluded using means of distance communication, a business which provides the following items of information is presumed to have complied with the information duties imposed by Articles 2:201 (Duty to inform about goods or services) to 2:203 (Information duties towards disadvantaged consumers):
- (a) the main characteristics of the services;
  - (b) the price, including a breakdown of any additional charges in case of single payment service contracts;

- (c) the rights and obligations of both contracting parties, including the existence or absence of a right of withdrawal in accordance with Chapter 5;
  - (d) the existence of guarantee funds or other compensation arrangements not covered by legislation on investor compensation schemes; and
  - (e) on the basis of the laws of which country the business establishes pre-contractual relations with the consumer.
- (2) If a single payment service contract or framework contract has been concluded at the request of the service user using a means of distance communication which does not enable the service provider to comply with the requirements set out in this Article, the service provider must fulfil these duties immediately after the conclusion of the contract.

## Chapter 3:

### **Non-Discrimination**

#### Section 1:

#### **General Rules/Definitions**

##### **Article 3:101: Principle of non-discrimination in contract law**

Any discrimination based on sex, racial or ethnic origin is prohibited.

##### **Article 3:102: Discrimination**

(1) "Discrimination" means:

- (a) a situation where one person is treated less favourably than another person is, has been or would be treated in a comparable situation;
- (b) a situation where an apparently neutral provision, criterion or practice would place persons with a particular feature at a particular disadvantage when compared with other persons;

(2) Discrimination also includes

- (a) unwanted conduct which violates the dignity of a person and which creates an intimidating, hostile, degrading, humiliating or offensive environment, or which aims to do so (harassment); or
- (b) any form of unwanted physical, verbal, non-verbal, or psychical conduct of a sexual nature that violates the dignity of a person, or which aims to do so, in particular when such conduct creates an intimidating, hostile, degrading, humiliating or offensive environment (sexual harassment).

(3) Any instruction to discriminate also amounts to discrimination.

##### **Article 3:103: Exception**

Unequal treatment which is justified by a legitimate aim does not amount to discrimination if the means used to achieve that aim are appropriate and necessary.

#### Section 2:

#### **Remedies**

### **Article 3:201: Remedies**

- (1) A person who is discriminated against on the grounds of sex, ethnic or racial origin in relation to contracts that provide access to, or supply goods or services which are available to the public, including housing, is entitled to compensation.
- (2) Where appropriate, the discriminated person is entitled to other remedies which are suitable to undo the consequences of the discriminating act, or to prevent further discrimination.

### **Article 3:202: Content of the remedies**

- (1) Compensation under Article 3:201 (Remedies) paragraph (1) may include damages for pecuniary and non-pecuniary losses.
- (2) The amount of any damages for non-pecuniary losses, and remedies granted under Article 3:201 (Remedies) paragraph (2), must be proportionate to the injury; the deterrent effect of remedies may be taken into account.

### **Article 3:203: Burden of proof**

- (1) If a person who considers himself or herself discriminated against on one of the grounds mentioned in Article 3:201 (Remedies) paragraph (1) establishes, before a court or another competent authority, facts from which it may be presumed that there has been such discrimination, it falls on the other party to prove that there has been no breach of the principle of non-discrimination.
- (2) Paragraph (1) does not apply to proceedings in which it is for the court or another competent authority to investigate the facts of the case.

## **Chapter 4: Formation**

### **General Provisions**

#### **Article 4:101: Agreement between the parties**

A contract is concluded if the parties intend to be legally bound, and they reach a sufficient agreement.

#### **Article 4:102: Conclusion of contract**

- (1) A contract can be concluded by the acceptance of an offer in accordance with the following provisions.
- (2) The rules in this chapter apply accordingly when the process of conclusion of a contract cannot be analysed into offer and acceptance.

Article 4:103: Offer; public statements<sup>3</sup>

(1) A proposal amounts to an offer if:

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<sup>3</sup> Grey rule from Art. II. – 4:201 DCFR.

- (a) it is intended to result in a contract if the other party accepts it, and
- (b) it contains sufficiently definite terms to form a contract.
- (2) An offer may be made to one or more specific persons or to the public.
- (3) A proposal to supply goods or services at stated prices made by a business in a public advertisement or a catalogue, or by a display of goods, is treated, unless the circumstances indicate otherwise, as an offer to sell or supply at that price until the stock of goods, or the business's capacity to supply the service, is exhausted.

#### **Article 4:104: Information duties in real time communication**

- (1) When initiating real time distance communication with a consumer, a business must provide at the outset explicit information on its name and the commercial purpose of the contact.
- (2) Real time distance communication includes telephone and electronic means such as voice over internet protocol and internet related chat.
- (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), the other party has the right to withdraw from the contract. The right of withdrawal must be exercised no later than one year after the conclusion of the contract, and not after the contract has been fully performed by both parties. The other party may also claim damages caused by the failure to comply.

#### **Article 4:105: Formation by electronic means**

- (1) If a contract is to be concluded by electronic means, a business, before the other party makes or accepts an offer, must provide reference to any contract terms used, which must be available in textual form. This rule is mandatory in the sense of Article 1:203 (Mandatory nature of consumer rules) in relations between businesses and consumers.
- (2) A business which offers the facility to conclude contracts by electronic means and without individual communication must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer. This rule is mandatory in the sense of Article 1:203 (Mandatory nature of consumer rules) in relations between businesses and consumers.
- (3) If a contract is to be concluded by electronic means and without individual communication, a business must provide the following information before the other party makes or accepts an offer:
  - (a) which technical steps must be followed in order to conclude the contract;
  - (b) the languages offered for the conclusion of the contract
  - (c) the technical means for identifying and correcting input errors;
  - (d) whether or not the concluded contract will be filed by the business and whether it will be accessible.

This paragraph is mandatory in the sense of Article 1:203 (Mandatory nature of consumer rules) in relations between businesses and consumers.

- (4) If a business has failed to comply with the duties under paragraphs (2) and (3), the other party has the right to withdraw from the contract. The right of withdrawal must be exercised no later than one year after the conclusion of the contract, and not after the contract has been fully performed by both parties. The other party may also claim damages caused by the failure to comply.

#### **Article 4:106: Unsolicited goods or services**

If a business delivers unsolicited goods or services to a consumer, no obligation arises from the consumer's failure to respond.

#### **Article 4:107: Pre-contractual statements by a contract party**

- (1) Any public statement which a business, prior to the conclusion of the contract, makes about the specific characteristics of the goods or services which it supplies is binding under the contract unless:
- (a) when the contract was concluded, the other party was aware, or should have reasonably been aware that the statement was incorrect, or
  - (b) the other party's decision to conclude the contract could not have been influenced by the statement, or
  - (c) the statement had been corrected by the time of the conclusion of the contract.
- (2) Paragraph (1) is mandatory in the sense of Article 1:203 (Mandatory nature of consumer rules) in relations between businesses and consumers.

#### **Article 4:108: Pre-contractual statements by third parties**

- (1) Article 4:107 (Pre-contractual statements by a contract party) also applies to public statements made by the producer, another person within the business chain between producer and ultimate customer, or any person advertising or marketing services or goods for the business, unless the business was not, and could not reasonably have been, aware of the statement.
- (2) Paragraph (1) is mandatory in the sense of Article 1:203 (Mandatory nature of consumer rules) in relations between businesses and consumers.

#### **Article 4:109: Binding force of unilateral promises<sup>4</sup>**

- (1) A valid unilateral promise or undertaking is binding on the person giving it, if it is intended to be legally binding without acceptance.
- (2) If a unilateral promise is binding, provisions of contract law which protect one particular party apply in its favour.

#### **Article 4:110: Acknowledgment of receipt**

- (1) A business which offers the facility to conclude a contract by electronic means and without individual communication must acknowledge by electronic means the receipt of an offer or an acceptance by the other party. Article 1:303 (Electronic notice) applies.

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<sup>4</sup> Partial grey rule from Art. II. –1:103 DCFR.



- (2) If the other party does not receive such an acknowledgment or an acceptance without undue delay, that other party may withdraw its offer or acceptance and may also claim damages.
- (3) Paragraphs (1) and (2) are mandatory in the sense of Article 1:203 (Mandatory nature of consumer rules) in relations between businesses and consumers.

## Specific Provisions

### Part C: Timeshare Contracts

#### Article 4:C-01: Timeshare contracts

- (1) Timeshare contracts with consumers must be made in writing and must include all information required under Article 2:C-01 (Specific pre-contractual Information duties for timeshare contracts). The consumer must be given a copy of the contract.
- (2) They must be formulated at least in an official language of the European Union which is either an official language at the place of residence of the consumer, or of the state of which the consumer is a national, at the consumer's choice. This rule applies only to consumers who are nationals or residents of a Member State.
- (3) The consumer is entitled to a certified translation of the contract into an official language of the European Union which is the official language or one of the official languages of the Member State in which the immovable property is situated.
- (4) Articles 2:204 (Clarity and form of information) paragraph (4) and 2:207 (Burden of proof) apply.

### Part E: Package Travel Contracts

#### Article 4:E-01: Package travel contracts

- (1) Package travel contracts must be made in writing and include all information required under Article 2:E-01 (Specific pre-contractual duties for package travel contracts) paragraph (4).  
Writing may be replaced by another textual form on a durable medium, provided this is reasonably accessible to the customer. The customer must be given a copy of the contract.
- (2) Articles 2:204 (Clarity and form of information) paragraph (4) and 2:207 (Burden of proof) apply.

### Part F: Consumer Credit Contracts

#### Article 4:F-01: Consumer credit contracts<sup>Placeholder</sup>

### Chapter 5:

## **Withdrawal**

### **General Provisions**

#### **Article 5:101: Mandatory nature**

Where a party has a statutory right of withdrawal from a contract, the provisions in this section apply as mandatory rules.

#### **Article 5:102: Exercise of a right of withdrawal**

A right of withdrawal is exercised by notice to the other party. No reasons need to be given. Returning the subject matter of the contract is considered a notice of withdrawal unless the circumstances indicate otherwise.

#### **Article 5:103: Withdrawal period**

- (1) Unless provided otherwise, the right of withdrawal must be exercised within fourteen days after both the contract has been concluded and notice of the right pursuant to Article 5:104 (Information on the right of withdrawal) has been given, and no later than one year after the conclusion of the contract. If the subject matter of the contract is the delivery of goods, the period lapses not earlier than fourteen days after the goods have been received.
- (2) The notice of withdrawal is timely if dispatched within this period.

#### **Article 5:104: Information on the right of withdrawal**

The entitled party must receive adequate information of the right of withdrawal from the other party. Such information must be brought appropriately to the entitled party's attention, and provide in textual form on a durable medium and in plain and intelligible language information about the right of withdrawal, the withdrawal period, and the name and address of the person to whom the withdrawal must be communicated.

#### **Article 5:105: Effects of withdrawal**

- (1) Withdrawal from a contract terminates the obligations to perform the contract. Each party has to return at its own expense to the other what it received under the contract, unless the contract provides otherwise in favour of the entitled party. The withdrawing party is not liable to pay any other costs and does not incur any other liability through the exercise of its rights of withdrawal. The other party must return any payment received from the party that has withdrawn free of charge and as soon as possible, and in any case not later than thirty days after the withdrawal becomes effective.
- (2) The party withdrawing from the contract is not liable for damage to the received goods, provided that it exercised reasonable care. The same party is not liable for diminished value of the received goods caused by inspecting and testing. It is liable for the diminished value that results from their normal use, unless the party had not received adequate information of its right of withdrawal.

#### **Article 5:106: Linked contracts**

- (1) If a consumer exercises a right of withdrawal from a contract for the supply of goods or services by a business, the effects of withdrawal extend to any linked contract.
- (2) Contracts are linked if they objectively form an economic unit.
- (3) If a contract is partially or exclusively financed by a credit contract, they form an economic unit in particular:
  - (a) if the business supplying goods or services finances the consumer's performance or
  - (b) if the supplier of credit uses the supplier of goods or services for the formation of the credit contract or
  - (c) if the credit contract refers to specific goods or services to be financed with this credit, and if this link between both contracts was suggested by the supplier of goods or services, or by the supplier of credit, unless other circumstances indicate that these two contracts do not form an economic unit.
- (4) Article 5:105 (Effects of withdrawal) applies accordingly to the linked contract.
- (5) Paragraph (1) does not extend the effect of withdrawal from a credit contract to a contract for goods or services whose price depends on fluctuations in the financial market outside the control of the business, and which may occur during the withdrawal period.

## Specific Provisions

### Part A: Contracts Negotiated Away from Business Premises

#### **Article 5:A-01: Right to withdraw from contracts negotiated away from business premises**

- (1) A consumer has the right to withdraw from the contract under which a business supplies goods or services, including financial services, if the consumer's offer or acceptance was expressed away from the business premises.
- (2) Unless the business has exclusively used means of distance communication for concluding the contract, paragraph (1) applies only to contracts under which a consumer has to pay at least a statutory minimum amount.
- (3) Paragraph (1) does not apply to
  - (a) contracts concluded by means of automatic vending machines or automated commercial premises,
  - (b) contracts concluded with telecommunications operators through the use of public payphones,
  - (c) contracts concluded for the construction and sale of immovable property or relating to other immovable property rights, excluding tenancy contracts,
  - (d) contracts for foods, beverages or other goods intended for everyday consumption supplied by regular roundsmen to the home, residence or workplace of the consumer,
  - (e) contracts concluded by means of distance communication, but outside of an organized distance sales or service-provision scheme run by the business,

- (f) contracts for goods or services whose price depends on fluctuations in the financial market which may occur during the withdrawal period and which are outside the control of the business,
  - (g) contracts concluded at an auction,
  - (h) travel and baggage or similar short-term insurance policies of less than one month's duration.
- (4) If the business has exclusively used means of distance communication for concluding the contract, paragraph (1) does also not apply to contracts
- (a) for accommodation, transport, catering or leisure services, where the business undertakes at the time of conclusion of the contract to supply these services on a specific date or within a specific period,
  - (b) for 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 Article 5:103 (Withdrawal period) paragraph (1),
  - (c) for goods made to the consumer's specifications or which are clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly,
  - (d) for 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) for newspapers, periodicals and magazines, (f) for gaming and lottery services.
- (5) With regard to financial services, paragraph (1) does also not apply to contracts that have been fully performed by both parties, at the consumer's express and informed request, before the consumer purports to exercise a right of withdrawal.

#### **Article 5:A-02: Effects of withdrawal in case of supply of equivalent goods or services**

If a consumer exercises a right of withdrawal from a contract after a business has made use of a contractual right to supply goods or services of equivalent quality and price (Article 7:A-01 (Goods or services of equivalent quality)), Article 5:105 (Effects of withdrawal) applies with the modification that the business must bear the cost of returning what the consumer has received under the contract.

#### **Article 5:A-03: Effects of withdrawal from financial services contracts**<sup>Placeholder</sup>

### **Part C: Timeshare Contracts**

#### **Article 5:C-01: Right to withdraw from timeshare contracts**

- (1) A consumer who acquires a right which allows him or her to use immovable property under a timeshare contract with a business has the right to withdraw from this contract.
- (2) The business must not demand or accept any advance payment by the consumer during the period in which the latter may exercise the right of withdrawal.

### **Article 5:C-02: Effects of withdrawal from timeshare contracts**

Where a consumer exercises the right of withdrawal under Article 5:C-01 (Right to withdraw from timeshare contracts), Article 5:105 (Effects of withdrawal) applies with the modification that the contract may require the consumer to reimburse those expenses which:

- (a) have been incurred as a result of the conclusion of and withdrawal from the contract, and
- (b) correspond to legal formalities which must be completed before the end of the period referred to in Article 5:103 (Withdrawal period) paragraph (1), and
- (c) are reasonable and appropriate, and
- (d) are expressly mentioned in the contract, and
- (e) are in conformity with any applicable rules on such expenses.

The consumer is not obliged to reimburse any expenses when exercising the right of withdrawal under Article 2:208 (Remedies for breach of information duties) paragraph (1).

## **Chapter 6:**

### **Non-Negotiated Terms**

#### **Section 1:**

##### **Scope of application**

#### **Article 6:101: Subject matter**

- (1) The following provisions apply to contract terms which have not been individually negotiated, including standard terms.
- (2) A term supplied by one party (the user) is not individually negotiated if the other party has not been able to influence its content because it has been drafted in advance, in particular as part of a pre-formulated standard contract. In contracts between a business and a consumer, if terms have been drafted by a third person, the business is considered to be the user, unless the consumer introduced those terms to the contract.
- (3) A “standard term” is a term which has been formulated in advance for several transactions involving different parties and which has not been individually negotiated by the parties.
- (4) If it is disputed whether a term supplied as part of standard terms has been individually negotiated, the user bears the burden of proving that it has been individually negotiated.

#### **Section 2:**

##### **Inclusion and interpretation of terms**

#### **Article 6:201: Acquaintance with terms not individually negotiated**

- (1) Contract terms which have not been individually negotiated bind a party who was unaware of them only if the user took reasonable steps to draw the other party's attention to them before or when the contract was concluded.
- (2) Terms are not brought appropriately to the other party's attention by a mere reference to them in a contract document, even if that party signs the document.
- (3) If a contract is to be concluded by electronic means, contract terms are not binding on the other party unless the user makes them available to the other party in textual form.
- (4) Consumers are not bound to terms to which they had no real opportunity to become acquainted before the conclusion of the contract.

#### **Article 6:202: Preference to negotiated terms**

Terms which have been individually negotiated take preference over those which have not.

#### **Article 6:203: Interpretation of terms**

- (1) Where the meaning of a term is unclear, that term is to be interpreted against the party who supplied it.
- (2) Paragraph (1) does not apply to collective proceedings for injunctions against the use of particular terms.

#### **Article 6:204: Conflicting standard terms<sup>5</sup>**

- (1) If the parties have reached agreement except that the offer and acceptance refer to conflicting standard terms, a contract is nonetheless formed. The standard terms form part of the contract to the extent that they are common in substance.
- (2) However, no contract is formed if one party:
  - (a) has indicated in advance, explicitly, and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or
  - (b) without undue delay, informs the other party of such an intention.

### **Section 3:**

#### **Validity of terms**

#### **Article 6:301: Unfairness of terms**

- (1) A contract term which has not been individually negotiated is considered unfair if it disadvantages the other party, contrary to the requirement of good faith, by creating a significant imbalance in the rights and obligations of the parties under the contract. Without prejudice to provisions on collective proceedings, when assessing the unfairness of a contractual term, regard is to be given to the nature of the goods or services to be provided under the contract, to all circumstances prevailing during the

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<sup>5</sup> Grey rule from Art. II. – 4:209 DCFR.

conclusion of the contract, to all other terms of the contract, and to all terms of any other contract on which the contract depends.

- (2) A term in a contract between businesses which has not been individually negotiated is considered unfair only if using that term would grossly deviate from good commercial practice.

#### **Article 6:302: Transparency of terms**

Not individually negotiated terms must be drafted and communicated in plain, intelligible language.

#### **Article 6:303: Scope of the unfairness test**

- (1) Contract terms which are based on statutory provisions or on international conventions to which the Member States are parties, or to which the European Union is a party, particularly in the transport area, are not subject to an unfairness test.
- (2) For contract terms which are drafted in plain 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.

#### **Article 6:304: List of unfair terms**

The following is a non-exhaustive list of terms which are unfair in contracts between a business and a consumer if they have not been individually negotiated:

- terms conferring exclusive jurisdiction for all disputes arising under the contract on the court for the place where the business is domiciled.

#### **Article 6:305: Indicative list of unfair terms**

- (1) The following is an indicative and non-exhaustive list of terms which may be regarded as unfair in contracts between a business and a consumer if they have not been individually negotiated. This list comprises terms which would:
  - (a) exclude or limit the liability of a business for death or personal injury caused to a consumer through an act or omission of that business;
  - (b) inappropriately exclude or limit 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;
  - (c) make a contract binding on a consumer which is subject to a condition whose realization depends solely on the intention of the business;
  - (d) permit a business to keep money paid by a consumer if the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the business in the reverse situation;
  - (e) require a consumer who fails to fulfil his or her obligations to pay a disproportionately high amount of damages;
  - (f) entitle a business to withdraw from, or terminate the contract on a discretionary basis without giving the same right to the consumer, or terms which entitle a business to keep money paid for services not yet supplied in the case that the business withdraws from, or terminates the contract;

- (g) enable a business to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so; 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 or parties thereof immediately;
  - (h) automatically extend a contract of fixed duration unless the consumer indicates otherwise, in cases where such terms provide for an unreasonably early deadline;
  - (i) enable a business to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; this does not affect terms under which a supplier of financial services reserves the right to change without notice the rate of interest to be paid by, or to, the consumer, or the amount of other charges for financial services where there is a valid reason, provided that the supplier is required to inform the consumer at the earliest opportunity and that the consumer is free to terminate the contract 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 contract;
  - (j) enable a business to alter unilaterally without a valid reason any characteristics of the goods or services to be provided;
  - (k) provide that the price of goods is to be determined at the time of delivery, or which allow a business to increase the price without giving the consumer the right to withdraw from the contract 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) give a business the right to determine whether the goods or services supplied are in conformity with the contract, or which give the business the exclusive right to interpret any term of the contract;
  - (m) limit the obligation of a business to respect commitments undertaken by its agents, or which make its commitments subject to compliance with a particular formality;
  - (n) oblige a consumer to fulfil all his or her obligations where the business fails to fulfil its own;
  - (o) allow 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) exclude or impede 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 onto the consumer.
- (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 sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

**Article 6:306: Effects of unfair terms**

- (1) Unfair terms are not binding on a party who did not supply them.
- (2) If the contract can be maintained without the unfair terms, it remains otherwise binding on the parties.

Chapter 7:

**Content and Performance of Obligations**

General Provisions

Section 1:

**General duties**

**Article 7:101: Duty to perform**

- (1) The debtor must perform its obligations in accordance with good faith.
- (2) A business must perform its obligations with the special skill and care that may reasonably be expected to be used with regard, in particular, to the legitimate expectations of consumers.

**Article 7:102: Good faith in the exercise of rights**

The creditor must exercise its rights to performance and remedies for non-performance in accordance with good faith.

**Article 7:103: Duty of loyalty**

If an obligation by its nature requires the debtor to manage the creditor's affairs, the debtor must give due regard to the creditor's interests related to those affairs.

**Article 7:104: Duty to co-operate**

The debtor and the creditor must co-operate with each other to the extent that this can reasonably be expected for the performance of an obligation.

**Article 7:105: Language of communications**

Unless provided otherwise, parties can expect to communicate with each other in the language used for conclusion of the contract.

Section 2:

## Modalities of Performance

### Article 7:201: Time of performance<sup>6</sup>

- (1) If the contract does not fix the time of performance, the debtor must perform without undue delay.
- (2) Unless the parties have agreed otherwise, a business must execute the obligations incurred under contracts concluded at a distance no later than 30 days after the contract was concluded.
- (3) If a business must reimburse money received from a consumer, such reimbursement must be carried out as soon as possible and in any case no later than 30 days after the reimbursement obligation arose.
- (4) If the order of performance of reciprocal obligations cannot be otherwise determined from the terms regulating the obligations then, to the extent that the obligations can be performed simultaneously, the parties are bound to perform simultaneously unless the circumstances indicate otherwise.

### Article 7:202: Place of performance<sup>7</sup>

- (1) If the place of performance of an obligation cannot be otherwise determined from the terms regulating the obligation it is:
  - (a) in the case of a monetary obligation, the creditor's place of business;
  - (b) in the case of any other obligation, the debtor's place of business.
- (2) For the purposes of the preceding paragraph
  - (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the obligation; and
  - (b) if a party does not have a place of business, or the obligation does not relate to a business matter, the habitual residence is substituted.
- (3) If, in a case to which paragraph (1) applies, a party causes any increase in the expenses incidental to performance by a change in place of business or habitual residence subsequent to the time when the obligation was incurred, that party must bear the increase.

## Specific Provisions

### Part A: Contracts Negotiated Away from Business Premises

#### Article 7:A-01: Goods or services of equivalent quality

A contract term whereby the business may supply goods or services of equivalent quality and price is invalid if the consumer has not been informed, in accordance with Article 2:204 (Clarity and form of information), of this possibility and of the fact that the business must bear the expense of returning what the consumer has received under

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<sup>6</sup> Partially grey rule from Art. III. – 2:104 DCFR.

<sup>7</sup> Grey rule from Art. III. – 2:101 DCFR.

the contract if the consumer exercises a right of withdrawal under Article 5:A-01 (Right to withdraw from contracts negotiated away from business premises).

## Part B: Contracts for the Delivery of Goods

### **Article 7:B-01: Conformity of goods to the contract**

- (1) When determining whether goods conform to the contract, regard is to be given in particular to whether the goods:
  - (a) comply with the description given by the debtor and possess the qualities of the goods which the debtor has held out to the other party as a sample or model;
  - (b) are fit for any particular purpose for which the creditor requires them, which the creditor made known to the debtor at the time of conclusion of the contract and which the debtor has accepted; and
  - (c) are fit for the purposes for which goods of the same type are normally used.
- (2) Where the goods are to be installed by the debtor, the goods conform to the contract only if they are installed correctly.
- (3) Where the installation of goods is left to the creditor, the goods conform to the contract only if the installation instructions are sufficient.

### **Article 7:B-02: Mandatory nature for consumer contracts**

In a contract under which a business sells goods, including goods to be manufactured or produced, to a consumer, Articles 7:101 (Duty to perform) and 7:B-01 (Conformity of goods to the contract) are mandatory in the sense of Article 1:203 (Mandatory nature of consumer rules).

## Part E: Package Travel Contracts

### **Article 7:E-01: Mandatory nature**

Contract terms which are prejudicial to the customer and which deviate from the provisions of this Part are not binding on the customer.

### **Article 7:E-02: Definition of package travel contract**

- (1) "Package travel contract" means a contract under which a business is to provide a pre-arranged combination of travel services such as transport or accommodation or other related services.
- (2) A contract term according to which the business acts only as an intermediary for contracts concluded between the customer and other suppliers is not binding on the customer if the customer can reasonably expect, having regard to the circumstances of the conclusion of the contract, that the business itself is obliged to provide the travel services.

### **Article 7:E-03: Revision of price**

- (1) Revision of price in a package travel contract requires an express contractual term which must also state precisely how the revised price is to be calculated. The reasons for revision must be limited to variations in:
  - (a) transportation costs, including the cost of fuel;
  - (b) dues, taxes or fees chargeable for certain services, such as landing taxes or embarkation or disembarkation fees at ports and airports; or (c) the exchange rates applied to this package.
- (2) The price may be increased only until the twenty-first day before departure.
- (3) The customer may (a) terminate the contract; or (b) accept the revised price.
- (4) If the customer does not notify the business of its decision without undue delay, an appropriate price revision is considered as accepted.

**Article 7:E-04: Duty to notify of proposed modifications**

- (1) If, before departure, it becomes impossible or excessively burdensome for the business to perform the contract without significant modifications, the business must immediately notify this to the customer, indicating proposed modifications.
- (2) The customer may
  - (a) terminate the contract and claim damages for non-performance under Chapter 8; or (b) accept the proposed modifications.
- (3) If the customer does not notify the business of its decision without undue delay, proposed appropriate modifications are considered as accepted.

**Article 7:E-05: Business's right of termination**

- (1) The business may terminate the package travel contract without incurring liability if the number of persons enrolled is less than the required minimum number set out in the contract in accordance with Article 2:E-01 (Specific pre-contractual duties for package travel contracts) paragraph (4)(e). The notice of termination must be made in writing and communicated to the customer within the period specified in the contract. Writing may be replaced by another textual form on a durable medium, provided this is reasonably accessible to the customer.
- (2) Article 8:303 (Effects of termination) applies accordingly.

**Article 7:E-06: Information before departure**

Before departure, the business must inform the customer about:

- (a) times and places of intermediate stops and transport connections and travel accommodation details, e. g., cabin or berth on ship, or sleeper compartment on train;
- (b) the address and identity of the organiser and of the organiser's and/or retailer's local representative; or the address of local agencies on whose assistance a traveller in difficulty could call;
- (c) where the representatives or local agencies referred to in (b) above do not exist, the customer must be provided with an emergency telephone number or other contact information that enables the traveller to contact the business;
- (d) if minors are travelling on their own, the address or contact details to reach them or the person responsible for them; and
- (e) the optional conclusion of a travel insurance policy.

## Part G: Payment Services<sup>Rules only</sup>

### **Article 7:G-01: Mandatory nature of the provisions of this Part**

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The provisions of this sub-section are mandatory.

### **Article 7:G-02: Definitions**

For the purposes of this Part, the following definitions apply:

- (a) "payment order" means any instruction by a payer or payee to its payment service provider requesting the execution of a payment transaction;
- (b) "payment transaction" means an act, initiated by the payer or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee;
- (c) "single payment transaction" means a payment transaction not covered by a framework contract;
- (d) "individual payment transaction" means a payment transaction covered by a framework contract;
- (d) "framework contract" means a payment service contract which governs the future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account.
- (e) "payer" means a person who holds a payment account and allows a payment order from that payment account, or, where there is no payment account, a person who gives a payment order;
- (f) "payee" means a person who is the intended recipient of funds which have been the subject of a payment transaction;
- (g) "payment service user" means a person making use of a payment service in the capacity of either payer or payee, or both;
- (h) "payment service provider" means credit institutions, electronic money institutions, post office giro institutions or other persons that are entitled under EC law or national law to provide payment services.
- (i) "payment instrument" means any personalised devices such as banking cards or set of procedures, e. g. for online banking, agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment order;
- (j) "value date" means a reference time used by a payment service provider for the calculation of interest on the funds debited or credited to a payment account.

### **Article 7:G-03: Copy of framework contract**

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<sup>8</sup> The mandatory character set out by this rule will be revisited on an article by article approach.

The payment service user is entitled to receive on request a copy of the framework contract in textual form on a durable medium.

#### **Article 7:G-04: Changes to the framework contract**

- (1) A term in the framework contract whereby the payment service provider may change particular terms of the framework contract is effective only if it allows the payment service user to object to such changes by notice to the payment provider before the date of their proposed entry into force.
- (2) Changes proposed by the payment service provider under paragraph (1) become effective only if
  - (a) the payment service user does not object as specified in paragraph (1), and;
  - (b) the changes are proposed to the payment service user in textual form on a durable medium and no later than two months before their proposed date of application, together with the information that
    - (i) the changes become effective unless the payment service user objects in accordance with paragraph (1);
    - (ii) the payment service user may terminate the framework contract before the date of the proposed application of the changes without notice and free of any charge.
- (3) A term in the framework contract whereby the payment service provider may change the interest or exchange rates to the disadvantage of the payment service user immediately and without notice is effective only if such changes are to be based on a reference interest or exchange rate specified in the framework contract.
- (4) Changes made under paragraph (3) are effective only if they are implemented and calculated consistently for all payment service users who have the same type of framework contract with the payment service provider.
- (5) The payment service provider must inform the payment service user of any change made under paragraph (3) in textual form on a durable medium and at the earliest opportunity, unless the parties have agreed on a specific frequency or manner in which the payment service user is to be informed.

#### **Article 7:G-05: Termination**

- (1) The payment service user may terminate the framework contract at any time, unless the parties have agreed on a period of notice not exceeding one month.
- (2) If a framework contract concluded for a fixed period exceeding 12 months or for an indefinite period is terminated by the payment service user after the expiry of 12 months, the payment service user is not required to bear any charges. In all other cases, any charges for the termination must be appropriate and may not exceed the costs typically associated with such a termination.
- (3) If the framework contract allows the payment service provider to terminate a framework contract concluded for an indefinite period, notice must be given at least two months in advance in textual form on a durable medium. Articles 7:G-25 (language of information) and 2:204 (Clarity and form of information) apply accordingly.

- (4) If the payment service provider proposes changes to the framework contract, the payment service user is entitled to terminate the framework contract immediately and without charge.
- (5) Charges for payment services levied on a regular basis are payable by the payment service user proportionally up to the time when termination becomes effective. Article 8:303 (Effects of termination) paragraph (2), sentence 2 applies to charges made in advance.

#### **Article 7:G-06: Authorisation of payment transactions**

- (1) A payment transaction may be executed only if the payer has authorised the transaction in advance. The payer and its service provider can also agree that authorisation may be given after the execution of the transaction.
- (2) Unless agreed otherwise for an individual payment transaction, the framework contract between a payer and its service provider regulates the requirements for giving authorisation, including those relating to form and to the potential limits of the transactions if a specific payment instrument is used for the purposes of giving authorisation to execute a payment transaction.
- (3) Failure to observe the agreed form renders the authorisation ineffective.

#### **Article 7:G-07: Service provider's right to block the payment instrument**

- (1) The framework contract may give the service provider the right to block the payment instrument only for objectively justified reasons related to the security of the payment instrument, the suspicion of its unauthorised or fraudulent use or, in the case of a payment instrument with a credit line, a significantly increased risk that the payer may be unable to fulfil its liability to pay.
- (2) The service provider must inform the payer of any blocking of a payment instrument and of the reasons for doing so. Information must be provided before the block is applied or, if this is not possible, immediately afterwards, unless this information would compromise the security reasons which justify the block, or such information is prohibited by statute.
- (3) The service provider must unblock the payment instrument or replace it with a new instrument once the reasons for blocking it no longer exist.

#### **Article 7:G-08: Notification of loss, theft or misappropriation of the payment instrument or of its unauthorised use**

- (1) The service user must notify the service provider, or the entity specified by the latter, without undue delay on becoming aware of loss, theft or misappropriation of the payment instrument or of its unauthorised use.
- (2) A service provider who issues a payment instrument must make appropriate means available at all times which enable the service user to make a notification under paragraph (1) or request unblocking under Article 7:G-07 (Service provider's right to block the payment instrument) paragraph (2). On request, the service provider must make appropriate means available to the service user to prove, for 18 months after notification, that the payer made such a notification. The service provider must

prevent all use of the payment instrument once notification under paragraph (1) has been made.

#### **Article 7:G-09: Irrevocability of a payment order**

- (1) The payer may revoke a payment order only before it has been received by the payer's service provider.
- (2) Where the payment transaction is initiated by or through the payee, the payer may not revoke the payment order after transmission of the order providing authorisation to execute the payment transaction to the payee.
- (3) However, in the case of a direct debit and without prejudice to refund rights, the payer may revoke the payment order at the latest by the end of the business day preceding the day agreed for debiting the funds.
- (4) In the case referred to in Article 7:G-10 (Receipt of a payment order) paragraph (2), the service user may revoke a payment order at the latest by the end of the business day preceding the agreed day.
- (5) After the time limits specified in paragraphs (2) to (4) have elapsed, the payment order may be revoked only if agreed between the service user and this party's service provider. In cases covered by paragraphs (2) and (3), the payee's agreement is also required. If agreed in the framework contract, the service provider may charge for the revocation.

#### **Article 7:G-10: Receipt of a payment order**

- (1) Receipt of a payment order occurs when the order reaches the payer's service provider if this is a business day for this party, and otherwise on the following business day. The service provider may establish a cut-off time near the end of a business day beyond which any payment order received is to be considered as received on the following business day.
- (2) If the service user initiating a payment order and its service provider agree that execution of the payment order starts on a specific day or at the end of a certain period or on the day on which the payer has set funds at the service provider's disposal, the payment order is received on the agreed day if this is a business day for the service provider, and otherwise the following business day.

#### **Article 7:G-11: Refusal of payment orders**

- (1) If all requirements set out in the payer's framework contract are met, the payer's service provider may not refuse to execute an authorised payment order irrespective of whether the payment order is initiated by the payer or by or through a payee.
- (2) A service provider who refuses to execute a payment order must notify the refusal to the service user immediately and at any rate no later than within the time specified in Article 7:G-12 (Time of execution of a payment order). If possible, the service provider must also state the reasons for the refusal and the procedure for correcting any factual mistakes that led to the refusal.
- (3) The framework contract may entitle the service provider to charge for a notification only if the refusal is objectively justified.



**Article 7:G-12: Time of execution of a payment order**

- (1) The payer's service provider must credit the amount of the payment transaction to the payee's service provider's account at the latest by the end of the business day which follows the date of receipt under Article 7:G-10 (Receipt of a payment order). The framework contract may provide for an extension by one additional business day for paper-initiated payment transactions.
- (2) The service provider of the payee must make available the amount of the payment transaction to the payee's payment account after this service provider has received the funds.
- (3) If the payee does not have a payment account with the service provider, the funds must be made available to the payee by the service provider who receives the funds for the payee within the period specified in paragraph (1).

**Article 7:G-13: Value date and availability of funds**

- (1) The credit value date for the payee's payment account is no later than the business day on which the amount of the payment transaction is credited to the account of the payee's service provider. The amount of the payment must be at the payee's disposal immediately after it is credited to the payee's service provider's account.
- (2) The debit value date for the payer's payment account is no earlier than the time at which the payment transaction is debited to that payment account.

**Article 7:G-14: Cash placed on a payment account**

Where a consumer places cash on a payment account with that service provider in the currency of that payment account, the amount must be made available and value dated immediately after receipt of the funds. If the service user is not a consumer, the amount must be made available and value dated at the latest on the next business day after the receipt of the funds.

**Article 7:G-15: Prohibition of deducting charges from the amount transferred**

- (1) Service providers and their intermediaries may not deduct charges from the amount transferred.
- (2) The payee and its service provider may agree that the service provider is allowed to deduct its charges from the amount transferred before crediting it to the payee. In this case, the service provider must inform the payee of both the full amount of the payment transaction and of the charges.
- (3) If any charges other than those referred to in paragraph (2) are deducted from the amount transferred, the service provider of the payer must ensure that the payee receives the full amount of the payment transaction initiated by the payer. For transactions initiated by or through the payee, the payee's service provider owes the same duty.

**Article 7:G-16: Currency of payment**

A payment order must be made in the currency agreed between the service user and the service provider.

**Article 7:G-17: Unique identifier**

- (1) Unless agreed otherwise, if a payment order is executed in accordance with the unique identifier provided by the service user, the payment order is considered to have been executed to the right payee.
- (2) If the payment has been executed in accordance with paragraph (1), but not to the intended payee, the payer's service provider must make reasonable efforts to recover the funds involved in the payment transaction. The framework contract may entitle the service provider to charge for the recovery.

**Article 7:G-18: Information due to payer in single payment transaction**

- (1) In a single payment transaction, immediately after receipt of the payment order, the payer's service provider must inform the payer about:
  - (a) the reference which enables the payer to identify the payment transaction and, where appropriate, details relating to the payee;
  - (b) the amount of the payment transaction in the currency used in the payment order;
  - (c) the amount of any charges for the payment transaction payable by the payer and, where applicable, a breakdown of those amounts;
  - (d) where applicable, the exchange rate used in the payment transaction by the payer's service provider and the amount of the payment transaction after that currency conversion; and (e) the date of receipt of the payment order.
- (2) At the payer's request, this information must be provided in textual form on a durable medium.

**Article 7:G-19: Information due to payee in single payment transaction**

- (1) In a single payment transaction, immediately after the execution of the payment order, the payee's service provider must inform the payee about:
  - (a) the reference which enables the payee to identify the payment transaction and, where appropriate, the payer and any information transferred with the payment transaction;
  - (b) the amount of the payment transaction in the currency in which the funds are at the payee's disposal;
  - (c) the amount of any charges for the payment transaction payable by the payee and, where applicable, a breakdown of those amounts;
  - (d) where applicable, the exchange rate used in the payment transaction by the payee's payment service provider, and the amount of the payment transaction before that currency conversion; and
  - (e) the credit value date.
- (2) At the payee's request, this information must be provided in textual form on a durable medium.

**Article 7:G-20: Information due to payer on individual payment transactions within framework contract**

When under a framework contract an individual payment transaction is debited from the payer's account or, where the payer does not use a payment account, when the payment

order has been received, the payer's service provider must inform the payer without undue delay in textual form on a durable medium about:

- (a) the reference which enables the payer to identify each payment transaction and, where appropriate, the payee;
- (b) the amount of the payment transaction in the currency in which the payer's payment account is debited or in the currency used for the payment order;
- (c) the amount of any charges for the payment transaction and, where applicable, a breakdown of those amounts, or the interest payable by the payer;
- (d) where applicable, the exchange rate used in the payment transaction by the payer's service provider, and the amount of the payment transaction after that currency conversion; and (e) the debit value date or the date of receipt of the payment order.

**Article 7:G-21: Information due to payee on individual payment transactions within framework contract**

When an individual payment transaction is executed within a framework contract, the payee's service provider must inform the payee without undue delay in textual form on a durable medium about:

- (a) the reference which enables the payee to identify the payment transaction and, where appropriate, the payer, and any information transferred with the payment transaction;
- (b) the amount of the payment transaction in the currency in which the payee's payment account is credited;
- (c) the amount of any charges for the payment transaction and, where applicable, a breakdown of those amounts, or the interest payable by the payee;
- (d) where applicable, the exchange rate used in the payment transaction by the payee's service provider, and the amount of the payment transaction before that currency conversion; and (e) the credit value date.

**Article 7:G-22: Modification of information duty in framework contract**

The parties may agree that the information referred to in Articles 7:G-20 (Information due to payer on individual payment transactions within framework contract) and 7:G-21 (Information due to payee on individual payment transactions within framework contract) is to be provided periodically, at least once a month, in textual form on a durable medium.

**Article 7:G-23: Limitation of information duties for low value payment instruments and electronic money**

For payment instruments which, according to the framework contract, concern only individual payment transactions that do not exceed J30 or that either have a spending limit of J150 or store funds that do not exceed J150 at any time, parties may agree that after the execution of a payment transaction:

- (a) the payment service provider must provide only a reference which enables the service user to identify the payment transaction, its amount and any charges. If several payment transactions of the same kind are made to the same payee, the

reference must enable to identify the total amount and charges for those payment transactions;

- (b) the payment service provider cannot be required to provide information referred to in subparagraph (a) if the payment instrument is used anonymously or if this is technically impossible for another reason. The service provider must nevertheless enable the payer to verify the amount of funds stored.

#### **Article 7:G-24: Derogations for low value payment instruments and electronic money**

For payment instruments which, according to the framework contract, concern only individual payment transactions not exceeding J30 or which either have a spending limit of J150 or store funds which do not exceed J150 at any time, service providers may agree with their service users that:

- (a) the service provider is not required to notify the service user of the refusal of a payment order, if the non-execution is apparent from the context;
- (b) the payer cannot revoke the payment order after it is transmitted or after giving his consent to execute the payment transaction to the payee; (c) other execution periods apply.

#### **Article 7:G-25: Language of communications**

Unless agreed otherwise by the parties, information to be provided under this part must be given in an official language of the country where the payment service is offered.

### **Part H: Commercial Agency Contracts**<sup>Rules only</sup>

#### **Article 7:H-01: Definition of commercial agency contract**

- (1) Commercial agency is a contract under which one party, the commercial agent, is to act on a continuing basis as a self-employed intermediary to negotiate or conclude contracts on behalf of another party, the principal, and the principal is to remunerate the agent for those activities.
- (2) Commercial agency does not include:
  - (a) a commercial agent who operates on a commodity exchange,
  - or (b) a partner who has authority to bind the other partners.

#### **Article 7:H-02: Mandatory nature**

- (1) Contract terms which are prejudicial to the commercial agent and which deviate from the rules in this part are not binding on the commercial agent.
- (2) The parties may derogate from Articles 7:H-15 (Additional remuneration) and 7:H-16 after the commercial agency contract has ended.

#### **Article 7:H-03: Agent's obligations**

- (1) A commercial agent is in particular obliged to:
  - (a) make appropriate efforts to negotiate or conclude the contracts on behalf of the principal which the agent was instructed to conclude;

- (b) communicate to the principal all the necessary information available to the agent and(c) follow the principal's reasonable instructions.
- (2) Paragraph (1) is mandatory.

#### **Article 7:H-04: Principal's obligations**

- (1) A principal is in particular obliged to:
  - (a) pay the commercial agent's remuneration as laid down in Articles 7:H-05 (Commercialagent's remuneration) to 7:H-11 (Information on commission);
  - (b) provide the commercial agent with the necessary documentation relating to the goodsand services concerned; and
  - (c) warn the commercial agent within a reasonable time when the principal foresees that thevolume of contracts will be significantly lower than the commercial agent could have expected.
- (2) A principal must, in addition, inform the commercial agent within a reasonable time of:
  - (a) the principal's acceptance or rejection of a contract which the commercial agent has negotiated on the principal's behalf; or
  - (b) any non-performance of obligations under a contract which the commercial agent hasnegotiated or concluded on the principal's behalf.

#### **Article 7:H-05: Commercial agent's remuneration**

- (1) If the remuneration of the commercial agent is not specified in the commercial agency contract, the commercial agent is entitled to the remuneration that commercial agents appointed for the goods or services forming the subject of the commercial agency contract are customarily allowed at the place where the commercial agent performs the contract. If there is no such custom, a commercial agent is entitled to reasonable remuneration, taking into account all circumstances.
- (2) Any remuneration which wholly or partially depends upon the number or value of contracts is commission within the meaning of this Part.
- (3) Articles 7:H-06 (Commission during the commercial agency contract) to 7:H-11 (Information on commission) do not apply if the commercial agent is not remunerated wholly or partially by commission.

#### **Article 7:H-06: Commission during the commercial agency contract**

- (1) A commercial agent is entitled to commission on any contract concluded with a client of the principal during the period covered by the commercial agency contract if the contract has been concluded:
  - (a) as a result of commercial agent's efforts; or
  - (b) with a third party whom the commercial agent has previously acquired as a client forcontracts of the same kind.
- (2) A commercial agent is also entitled to commission on contracts concluded with a client of the principal during the period covered by the agency contract if the commercial agent is entrusted with a specific geographical area or group of clients and the contract has been concluded with a client belonging to that area or group.

- (3) The principal and the commercial agent may agree that commission under paragraph (2) is due only to the extent that the commercial agent has an exclusive right to a specific geographical area or group of clients.

**Article 7:H-07: Commission after the commercial agency contract has ended**

A commercial agent is entitled to commission on any contract concluded [with a client] after the commercial agency contract has ended if:

- (a) in accordance with the requirements of Article 7:H-06 (Commission during the commercial agency contract), the order of the client reached the principal or the commercial agent before the commercial agency contract ended; or
- (b) the contract is mainly the result of the commercial agent's efforts during the period covered by the commercial agency contract. When deciding whether the contract is mainly the result of the commercial agent's efforts, regard may be given to the period which has elapsed between the ending of the commercial agency contract and the time of the conclusion of the contract with the client.

**Article 7:H-08: Conflicting entitlements to the commission**

- (1) A commercial agent is not entitled to the commission referred to in Article 7:H-06 (Commission during the commercial agency contract) if a previous commercial agent is entitled to that commission under Article 7:H-07 (Commission after the commercial agency contract has ended), unless it is reasonable that the commission is shared between the two commercial agents.
- (2) Paragraph (1) is mandatory.

**Article 7:H-09: Due time for commission payment**

- (1) The commission becomes due as soon as and to the extent that:
  - (a) the principal has or should have performed the contract concluded with the client; or
  - (b) the client has performed the contract.
- (2) The commission becomes due at the latest when the client has performed the contract, or when the client should have performed the contract if the principal had duly performed the contract.
- (3) If the contract with the client is concluded by the commercial agent on behalf but not in the name of the principal, commission becomes due when the principal acquires the economic benefit of this contract.
- (4) The commission is to be paid not later than on the last day of the month following the quarter in which the commercial agent became entitled to the commission.

**Article 7:H-10: Extinguishing of entitlement to commission**

- (1) A contract term whereby the commercial agent's entitlement to commission on a contract concluded with a client is extinguished is valid only if and to the extent that it provides for extinction on the basis that the client's contractual obligations are not performed for a reason for which the principal is not accountable.
- (2) Upon the extinguishing of the commercial agent's entitlement to commission, the commercial agent must refund any commission already received.

**Article 7:H-11: Information on commission**

- (1) The principal is obliged to supply the commercial agent with a statement of the commercial agent's commission not later than the last day of the month following the quarter in which the commercial agent became entitled to commission. This statement must set out how the commission has been calculated.
- (2) The principal must provide the commercial agent upon request with all the information available, in particular an extract from the books, which is necessary for verifying the amount of commission due.

**Article 7:H-12: Statement of commercial agency contract**

- (1) Both parties are obliged to provide to the other, on request, a signed statement of the terms of the commercial agency contract including any terms which were subsequently agreed.
- (2) Paragraph (1) is mandatory.

**Article 7:H-13: Conversion of definite period contract**

Where both parties continue the performance of a commercial agency contract after a definite contract period has expired, parties are presumed to have entered into a contract for an indefinite period.

**Article 7:H-14: Termination by notice**

- (1) Either party to a commercial agency contract for an indefinite period may terminate the contract by giving notice to the other.
- (2) The minimum period of notice is one month for the first year of the commercial agency contract, two months for the second year commenced, and three months for the third year commenced and subsequent years.
- (3) The period of notice for subsequent years is one month for each year during which the contract has lasted, with a maximum period of six months.
- (4) If the parties agree on longer periods than those laid down in paragraphs 2 and 3, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent.
- (5) Unless otherwise agreed in the contract, the period of notice is extended to the next end of a calendar month.
- (6) Paragraphs (1) to (5) apply to a commercial agency contract which has become a contract for an indefinite period in accordance with Article 7:H-13 (Conversion of definite period contract). The earlier definite period is to be taken into account for the calculation of the period of notice.
- (7) Paragraphs (1) to (4) and (6) are mandatory.

**Article 7:H-15: Additional remuneration**

- (1) Further to the remuneration due under Arts. 7:H-05 (Commercial agent's remuneration) to 7:H-08 (Conflicting entitlements to the commission), the commercial agent is entitled to an additional remuneration on termination of the contract if and to the extent that

- (a) the commercial agent has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and the commercial agent would without termination have obtained commission on such contracts; or
  - (b) termination prevents the commercial agent from amortizing the costs and expenses which the commercial agent has incurred for the performance of the agency contract on the principal's advice.
- (2) Unless the parties have agreed a higher figure, the amount of the remuneration under paragraph (1)(a) does not exceed one year's remuneration calculated from the commercial agent's average annual remuneration over the preceding five years, or if the commercial agency contract has lasted less than five years, from the average during the period in question.
- (3) Remedies under Chapter 8 remain unaffected.

**Article 7:H-16: Additional remuneration in case of commercial agent's death**

- (1) An entitlement to an additional remuneration under Article 7:H-15 (Additional remuneration) also arises where the commercial agency contract is terminated as a result of the commercial agent's death. In this case, the limitations of Article 7:H-15 (Additional remuneration) paragraph (2) apply to all entitlements under Article 7:H-15 (Additional remuneration) paragraph (1).
- (2) The entitlement lapses if the commercial agents' heir or heirs fail to notify the principal within one year following the termination of the commercial agency contract of their intention to rely on the entitlement.
- (3) Paragraphs (1) and (2) are mandatory.

**Chapter 8:**

**Remedies**

**General Provisions**

**Section 1:**

**General rules**

**Article 8:101: Definition of non-performance**

Non-performance is any failure to perform an obligation, including delayed performance, defective performance and failure to co-operate in order to give full effect to the obligation.

**Article 8:102: Exclusion or restriction of remedies**

The creditor is precluded from exercising remedies against the debtor to the extent that non-performance is attributable to the creditor.



## Section 2:

### **Performance and cure of non-performance**

#### Article 8:201: Monetary obligations<sup>9</sup>

- (1) The creditor is entitled to recover money payment of which is due.
- (2) Where the creditor has not yet performed the reciprocal obligation for which payment will be due and it is clear that the debtor in the monetary obligation will be unwilling to receive performance, the creditor may nonetheless proceed with performance and may recover payment unless:
  - (a) the creditor could have made a reasonable substitute transaction without significant effort or expense; or
  - (b) performance would be unreasonable in the circumstances.

#### Article 8:202: Non-monetary obligations<sup>10</sup>

- (1) The creditor is entitled to enforce specific performance of an obligation other than one to pay money.
- (2) Specific performance includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation.
- (3) Specific performance cannot, however, be enforced where:
  - (a) performance would be unlawful or impossible;
  - (b) performance would be unreasonably burdensome or expensive; or
  - (c) performance would be of such a personal character that it would be unreasonable to enforce it.
- (4) The creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense.

## Section 3:

### **Termination and reduction of performance**

#### **Article 8:301: Grounds for termination and reduction**

- (1) The creditor may reduce its own performance appropriately, or terminate the contract: (a) if the creditor has no right to performance or cure under Section 2 above or

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<sup>9</sup> Grey rule from Art. III. – 3:301 DCFR.

<sup>10</sup> Grey rule from Art. III. – 3:302 DCFR. Paragraph (4) of that provision was not adopted as grey rule for the reasons indicated below; paragraph (5) of that provision has become Art. 8:202(4) ACQP.

(b) if the debtor has not provided the remedy under Section 2 above within a reasonable time.

The creditor is not entitled to terminate the contract if the debtor's failure to perform amounts to a minor non-performance.

- (2) Regardless of paragraph (1), the creditor is entitled to terminate the contract for non-performance if the creditor cannot be reasonably expected to be bound by the contract, in particular because of the kind of non-performance or because of the nature of the obligation.
- (3) The creditor can terminate the contract under paragraph (1) only with respect to that part which is affected by non-performance, unless partial performance is of no utility to the creditor. Paragraph (2) applies correspondingly.
- (4) The creditor is entitled to reduce its own performance if the cure under Section 2 above has not restored the original value of performance.
- (5) The remedies provided for in the preceding paragraphs do not prejudice the creditor's right to damages.

#### Article 8:302: Notice of termination<sup>11</sup>

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

#### **Article 8:303: Effects of termination**

- (1) Termination of the entire contract releases both parties from their obligations to perform as from the time when termination becomes effective. In case of partial termination, both parties are released from their obligations which relate to the terminated part.
- (2) On termination, each party is obliged to return to the other what has been performed under the contract. In case of partial termination, both parties are obliged to return to the other what has been performed under the terminated part of the contract.

#### Article 8:304: Right to withhold performance of reciprocal obligation<sup>12</sup>

- (1) A creditor who is to perform a reciprocal obligation at the same time as, or after, the debtor performs has a right to withhold performance of the reciprocal obligation until the debtor has tendered performance or has performed.
- (2) A creditor who is to perform a reciprocal obligation before the debtor performs and who reasonably believes that there will be non-performance by the debtor when the debtor's performance becomes due may withhold performance of the reciprocal obligation for as long as the reasonable belief continues. However, the right to withhold performance is lost if the debtor gives an adequate assurance of due performance.
- (3) A creditor who withholds performance in the situation mentioned in paragraph (2) has a duty to give notice of that fact to the debtor as soon as is reasonably practicable and is liable for any loss caused to the debtor by a breach of that duty.

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<sup>11</sup> Grey rule from Art. III. – 3:507(1) DCFR.

<sup>12</sup> Grey rule from Art. III. – 3:401 DCFR.

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

## Section 4:

### Damages

#### **Article 8:401: Right to damages**

- (1) The creditor is entitled to damages for loss caused by non-performance of an obligation, unless such non-performance is excused.
- (2) Non-performance is excused if it is due to circumstances beyond the control of the debtor and of any persons engaged by the debtor for performing this obligation, provided that the consequences of those circumstances could not have been avoided even if all due care had been exercised.

#### **Article 8:402: Measure of damages**

- (1) Damages are a money payment of the amount necessary to put the creditor into the position in which it would have been if the obligation had been duly performed.
- (2) Damages cover the loss suffered by the creditor, including the loss of profits.
- (3) Without prejudice to rules on recovery of costs in judicial proceedings, damages include reasonable costs for the enforcement of an obligation.
- (4) Damages cover non-pecuniary losses only to the extent that the purpose of the obligation includes the protection or satisfaction of non-pecuniary interests.

#### **Article 8:403: Contributory negligence and mitigation**

Damages are reduced or excluded to the extent that the creditor wilfully or negligently contributed to the effects of the non-performance or could have reduced the loss by taking reasonable steps.

#### **Article 8:404: Interest on delayed payment<sup>13</sup>**

- (1) If payment of a sum of money is delayed, whether or not the non-performance is excused, the creditor is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due.
- (2) The creditor may in addition recover damages for any further loss.

#### **Article 8:405: Interest in case of creditor's non-performance**

The creditor is not entitled to interest to the extent that there has been non-performance of the creditor's reciprocal obligation.

#### **Article 8:406: Interest in commercial contracts**

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<sup>13</sup> Grey rule from Art. III. – 3:708 DCFR.

- (1) If a business delays the payment of a price for goods or services owed to a business without being excused under Article 8:401 (Right to damages), interest is due at the rate specified in paragraph (4), unless a higher interest rate is applicable.
- (2) Interest at the rate specified in paragraph (4) starts to run
  - (a) on the day which follows the date or the end of the period for payment provided in the contract, and otherwise
  - (b) 30 days after the date when the debtor receives the invoice or an equivalent request for payment; or
  - (c) 30 days after the date of receipt of the goods or services, if the date under (b) is earlier or uncertain, or if it is uncertain whether the debtor has received an invoice or equivalent request for payment.
- (3) If conformity of goods or services to the contract is to be ascertained by way of acceptance or verification, the 30 day period under paragraph (2)(c) starts to run on the date of acceptance or verification.
- (4) The interest rate for delayed payment (“the statutory rate”) is the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question (“the reference rate”), plus seven percentage points (“the margin”), unless otherwise specified in the contract. For the currency of a Member State which is not participating in the third stage of economic and monetary union, the reference rate is the equivalent rate set by its national central bank.
- (5) The creditor may in addition recover damages for any further loss.

#### **Article 8:407: Unfair terms relating to interest**

- (1) A term whereby a business pays to another business interest on a price for goods or services from a date later than that specified in the preceding Article paragraph (2)(b) and (c) and paragraph (3), or at a rate lower than that specified in paragraph (4), is not binding to the extent that the term is unfair.
- (2) A term whereby a business is allowed to pay to another business the price for goods or services later than the time when interest starts to run under the preceding Article paragraph (2)(b) and (c) and paragraph (3) does not deprive the creditor of interest to the extent that the term is unfair.
- (3) A term is unfair for the purposes of this Article if it grossly deviates from good commercial practice.

## **Specific Provisions**

### **Part A: Contracts Negotiated Away from Business Premises**

#### **Article 8:A-01: Goods or services ordered are unavailable**

- (1) Where a business is unable to perform its obligations under a contract concluded by means of distance communication because the goods or services ordered are unavailable, it must inform the consumer immediately and refund any sums paid by

the consumer without undue delay and in any case within 30 days. The consumer's remedies for non-performance remain unaffected.

- (2) Paragraph (1) is mandatory in the sense of Article 1:203 (Mandatory nature of consumer rules).

## Part B: Contracts for the Delivery of Goods

### **Article 8:B-01: Mandatory nature for consumer contracts**

In a contract under which a business sells goods, including goods to be manufactured or produced, to a consumer, Articles 8:101 (Definition of non-performance), 8:301 (Grounds for termination and reduction) to 8:303 (Effects of termination), 8:B-02 (Time of conformity) to 8:B-05 (Return of replaced goods) are mandatory in the sense of Article 1:203 (Mandatory nature of consumer rules).

### **Article 8:B-02: Time of conformity**

- (1) For goods sold, including goods to be manufactured or produced, any lack of conformity in the sense of Article 7:B-01 (Conformity of goods to the contract) which exists at the time when the goods are delivered amounts to non-performance.
- (2) Paragraph (1) applies accordingly to other contracts under which goods are to be delivered.

### **Article 8:B-03: Presumption**

In a contract under which a business sells goods to a consumer, including goods to be manufactured or produced any lack of conformity which becomes apparent within six months of delivery of the goods is presumed to have existed at the time of delivery, unless such a presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

### **Article 8:B-04: Choice of cure**

In a contract under which a business sells goods to a consumer, including goods to be manufactured or produced, the consumer may choose between repair and replacement as cure of nonperformance in the sense of Art. 8:202 (Non-monetary obligations) paragraphs (2) and (3).

### **Article 8:B-05: Return of replaced goods**

- (1) Where the supplier has replaced non-conforming goods, the supplier has both the right and the obligation to take back the replaced goods at the supplier's expense.
- (2) If the supplier is a business and the recipient a consumer, the recipient is not liable to pay for any use made of the replaced goods prior to the replacement.

### **Article 8:B-06: Right of redress**<sup>Placeholder</sup>

### **Article 8:B-07: Time limit**<sup>Placeholder</sup>

## Part E: Package Travel Contracts

### **Article 8:E-01: Mandatory nature**

- (1) Contract terms which are prejudicial to the customer and which deviate from the provisions of Chapter 8 are not binding on the customer.
- (2) The contract can reasonably limit damages for non-performance, except for damages due for personal injuries.

### **Article 8:E-02: Alternative arrangements in case of partial non-performance**

- (1) After departure, if non-performance of a significant proportion of the obligations of the business has occurred, or if the business realises that such non-performance will occur, the business must make suitable alternative arrangements for the continuation of the package which are to be provided at no extra costs. Where appropriate, the business must compensate the customer for the difference in value between the services owed and those supplied. The customer or the traveller may reject the alternative arrangements for good reasons.
- (2) If alternative arrangements are impossible, or are rejected for good reasons, the organiser must, where appropriate, provide the traveller with an equivalent return transport to the place of departure, or to another return point agreed with the traveller, at no extra cost. This does not affect the customer's right to claim damages.

### **Article 8:E-03: Duty of assistance**

If it becomes apparent that the package travel contract will not be performed properly, the business must provide prompt assistance to a traveller in difficulty.

### **Article 8:E-04: Duty to inform about non-performance**

Any non-performance which the traveller perceives on the spot must be communicated at the earliest opportunity to the supplier of the services concerned or to the business.

## Part G: Payment Services

### **Article 8:G-01: Mandatory nature of the provisions of this Part**

Contract terms which are prejudicial to service users and which deviate from the provisions of this Part are not binding on service users regardless of whether they are consumers.

### **Article 8:G-02: Rectification**

The service user is entitled to obtain rectification from the service provider only if the service user has notified the service provider on becoming aware of any unauthorised or incorrectly executed payment transactions giving rise to an obligation, including that under Article 8:G-09 (Liability for transmission of the payment order). Notification must be made without undue delay, and no later than 13 months after the debit date, unless the service provider has failed to provide the information on that payment

transaction in accordance with Article 7:G-20 (Information due to payer on individual payment transactions within framework contract) to 7:G-21 (Information due to payee on individual payment transactions within framework contract).

#### **Article 8:G-03: Burden of proof**

- (1) Where a service user denies having authorised an executed payment transaction or claims that the payment transaction was not correctly executed, it is for this user's service provider to prove that the payment transaction was authenticated, accurately recorded, entered in the accounts and not affected by a technical breakdown or some other deficiency.
- (2) Where a service user denies having authorised an executed payment transaction, the use of a payment instrument recorded by the service provider is not necessarily sufficient proof that the payer
  - (a) authorised the transaction;
  - (b) acted fraudulently;
  - (c) failed with intent or gross negligence to fulfil its obligations to keep safe the personalised security features of the payment instrument, or
  - (d) failed to notify the service provider of the loss, theft or misappropriation of the payment instrument or of its unauthorised use.

#### **Article 8:G-04: Payment service provider's liability for unauthorised payment transactions**

- (1) In the case of an unauthorised payment transaction, the payer's service provider must immediately refund to the payer the amount of the unauthorised payment transaction and, where applicable, must restore the debited payment account to the state in which it would have been had the unauthorised payment transaction not taken place.
- (2) The remedy provided for in paragraph (1) does not prejudice the payer's right to damages.

#### **Article 8:G-05: Payer's liability for unauthorised payment transactions**

- (1) The payer is liable up to a maximum of J150 for the loss caused by an unauthorised payment transaction which results from the use of a lost or stolen payment instrument or, if the payer has failed to keep the personalised security features safe, from the misappropriation of a payment instrument.
- (2) The payer is liable for the loss caused by an unauthorised payment transaction which results from the payer acting fraudulently or failing to fulfil its obligations under the contract or under Article 7:G-08 (Notification of loss, theft or misappropriation of the payment instrument or of its unauthorised use) paragraph (1) with intent or gross negligence. In such cases, the maximum amount referred to in paragraph (1) does not apply.
- (3) The payer is not liable for any financial consequences resulting from use of the lost, stolen or misappropriated payment instrument after notification in accordance with Article 7:G-08 (Notification of loss, theft or misappropriation of the payment

instrument or of its unauthorised use) paragraph (1), except where the payer has acted fraudulently.

- (4) If the payment service provider does not provide appropriate means for the notification as required under Article 7:G-08 (Notification of loss, theft or misappropriation of the payment instrument or of its unauthorised use) paragraph (2), the payer is not liable for the loss resulting from the use of that payment instrument, except where the payer has acted fraudulently.

**Article 8:G-06: Refunds for payment transactions initiated by or through a payee**

If an authorised payment transaction initiated by or through a payee has been executed, the payer is entitled to a refund from its service provider if:

- (a) the authorisation did not specify the exact amount of the payment transaction when the authorisation was made; and
- (b) the amount of the payment transaction exceeded the amount the payer could reasonably have expected, taking into account the payer's previous spending pattern, the terms of the framework contract and other relevant circumstances.

At the service provider's request, the payer must present facts which relate to the circumstances specified in (a) and (b).

The refund consists of the full amount of the executed payment transaction.

**Article 8:G-07: Requests for refunds for payment transactions initiated by or through a payee**

- (1) A request for a refund under Article 8:G-06 (Refunds for payment transactions initiated by or through a payee) of an authorised payment transaction initiated by or through a payee must be made within eight weeks from the date on which the funds were debited.
- (2) Within ten business days from receiving a request for a refund, the service provider must either refund the full amount of the transaction or provide justification for its refusal. In the case of refusal, the service provider must indicate the out-of-court complaint and redress procedures for the settlement of disputes between service users and their service providers and the bodies to which the payer may refer the matter if it does not accept the justification provided.

**Article 8:G-08: Liability for non-performance of a payment order**

- (1) The payer's service provider is liable to the payer for any non-performance of a payment transaction initiated by the payer, unless the payee's service provider received the payment in accordance with Article 7:G-12 (Time of execution of a payment order) paragraph (1). The payer's service provider bears the burden of proof for this receipt. If the payee's service provider has received the payment, it is liable to the payee for any non-performance of the payment transaction.
- (2) Where the payer's service provider is liable under paragraph (1), it must without undue delay refund to the payer the amount of the affected payment transaction and, where applicable, restore the debited payment account to the state in which it would have been had that payment transaction not taken place.



- (3) Where the payee's service provider is liable under paragraph (1), it must immediately place the amount of the payment at the payee's disposal and, where applicable, credit the corresponding amount to the payee's payment account.
- (4) In case of non-performance of a payment transaction initiated by the payer, its service provider must, on request, make immediate efforts to trace the payment transaction and notify the payer of the outcome, even if this non-performance is not attributable to this service provider.

#### **Article 8:G-09: Liability for transmission of the payment order**

- (1) Where a payment order is initiated by or through the payee, its service provider is liable to the payee for any non-performance relating to the transmission of the payment order to the service provider of the payer and, in case of such non-performance, must immediately retransmit the payment order in question to the service provider of the payer.
- (2) In addition, the service provider of the payee is liable to the payee for any non-performance relating to the handling of the payment transaction in accordance with its obligations under Article 7:G-13 (Value date and availability of funds). The service provider must ensure that the amount of the payment transaction is at the payee's disposal immediately after it is credited to the payee's service provider's account.
- (3) The payer's service provider is liable to the payer for any non-performance of a payment transaction for which the payee's service provider is not liable under paragraphs (1) and (2). In this case, the payer's service provider must, as appropriate and without undue delay, refund to the payer the amount of that transaction and restore the debited payment account to the state in which it would have been had that payment transaction not taken place.
- (4) In the case of non-performance of a payment transaction initiated by or through the payee, its service provider must, on request, make immediate efforts to trace that payment transaction and notify the payee of the outcome, even if this non-performance is not attributable to this service provider.

#### **Article 8:G-10: Content of damages**

- (1) A payment service provider is liable under Article 8:G-08 (Liability for non-performance of a payment order) or Article 8:G-09 (Liability for transmission of the payment order) to its payment service user for any charges and any interest which the payment service user must pay and which have been caused by the non-performance of its payment service provider.
- (2) The payment service user may be entitled to further damages under Chapter 8 Section 4.

#### **Article 8:G-11: Right of recourse**

- (1) Where the liability of a service provider under Articles 8:G-08 (Liability for non-performance of a payment order) or 8:G-09 (Liability for transmission of the payment order) is attributable to another service provider or to an intermediary, that service provider or intermediary must compensate the first service provider for any

loss incurred under Articles 8:G-08 (Liability for non-performance of a payment order) or 8:G-09 (Liability for transmission of the payment order).

(2) This provision is mandatory.

#### **Article 8:G-12: Derogation for low value payment instruments and electronic money**

(1) In the case of payment instruments which, according to the framework contract, solely concern individual payment transactions not exceeding J30, or have a spending limit of J150, or store funds which do not exceed J150 at any time, service providers may agree with their service users that:

(a) Article 8:G-05 (Payer's liability for unauthorised payment transactions) paragraphs (3) and (4) do not apply if the payment instrument cannot be blocked or its further use cannot be prevented;

(b) Articles 8:G-03 (Burden of proof), 8:G-04 (Payment service provider's liability for unauthorised payment transactions) and 8:G-05 (Payer's liability for unauthorised payment transactions) paragraphs (1) and (2) do not apply if the payment instrument is used anonymously or the service provider is not in the position to prove that a payment transaction was authorised for other reasons which are intrinsic to the payment instrument.

(2) Articles 8:G-04 (Payment service provider's liability for unauthorised payment transactions) and 8:G-05 (Payer's liability for unauthorised payment transactions) do not apply to electronic money, where the payer's service provider does not have the ability to freeze the payment account or block the payment instrument.

## **Part H: Commercial Agency Contracts**

### **Article 8:H-01: Immediate termination of agency contract**<sup>Placeholder</sup>