

From the Task Force on Consumers and Professionals

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THE NOTIONS OF CONSUMER AND PROFESSIONAL AND SOME RELATED QUESTIONS

Policy issues

1. Is the word professional as a description of the party acting in the course of his trade, business or profession acceptable?
2. Is the standard definition of the professional in B.5 acceptable?
3. Is the standard definition of the consumer in B.5 acceptable?
4. Is the description of the consumer transaction in B.5 acceptable? Which alternative should be chosen?
5. If there is a need of a more restricted definition, would the definition of the transaction in C.1 be acceptable?
6. In C.2 several alternatives with broader scopes of application are presented. Are the alternatives as such acceptable?
7. If a choice between C.2.1 and C.2.2 has to be made, which definition is more acceptable?

A. Introduction

1. A draft paper regarding the notions of consumer and its counter-party the professional was presented in Oxford in December 2001. During this meeting it was decided that a standard definition of the consumer and its counter-party was needed. It was also decided that the consumer should be defined vis-à-vis its counter-party, hereinafter referred to as the professional, and that a definition therefore should be developed of a consumer transaction. Additionally, it was decided that variations on the theme, with different scopes as to what persons or groups of persons should be included.
2. For the purposes of the Draft European Civil Code, there is a need of defining the consumer, the professional, and what should constitute a consumer transaction and also of developing deviations from this standard definition. A definition of the consumer may also be necessary where there is no transaction (e.g. product liability). Much of the harmonisation of private law within the EU is the result of consumer protection directives of the EU. Therefore, much work has already been done in the field of defining these notions.
3. One of the obstacles of trade within Europe is that the rules protecting consumers are different in different countries. This is true also for the areas of consumer law where Directives exist. One reason is of course that the Directives include minimum clauses giving the Member states the right to adopt or keep

stricter or more consumer friendly rules.¹ Although such a problem does exist also in other areas of law, the problems are greater for the parties involved in business as the consumer protection rules are to a great extent mandatory. Therefore, it is desirable that the rules protecting consumers in general are the same or at least almost the same. This is true also for the definitions of consumers, professionals and consumer transactions, as these definitions define the scope of applicability.

4. The main purpose of the rules protecting consumers is to protect a party which may be regarded as weaker party in the transaction involved.² Developing mandatory rules is just one of many ways to protect this weaker party. One important addition or alternative is to regulate situations where one party takes advantage of the weaker party's lack of bargaining skill or inexperience. An example of such rules is Art. 4:109 in PECL, where the weaker party is given the right to avoid the contract or to have the contract adapted where the other party has taken such advantage. Such rules provides important protection in cases where the mandatory rules are not applicable, e.g. because the weaker party is not a natural person.
5. The content of this paper is as follows:
 - B. The standard definitions of consumers, professionals and the consumer transaction.
 - B.1. The notion of "Consumer"
 - B.2 The notion of "Professional"
 - B.3 Commercial agents etc.
 - B.4 Protection of small business etc.
 - B.5 The standard definitions
 - C. Alternative texts that could be used in different parts of the Draft Code due to specific circumstances
 - C.1 A more restricted scope of application
 - C.2 A broader scope of application

B. The standard definitions of consumer, professional and the consumer transaction

B.1 The notion of "Consumer"

B.1.1 The notion of "Consumer" in EC-Directives, CISG and the 1980 Rome Convention

6. There are several EC-Directives that define the term "Consumer". The wording differs somewhat in the different directives. The starting point has been the

¹ This problem is mentioned in the Green Paper on European Union Consumer Protection (COM(2001)531 final).

² See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Consumer Policy Strategy 2002-2006, COM(2002) 208.

definition in the door-to-door selling directive, where the consumer is defined as "a natural person who, ..., is acting for purposes which can be regarded as outside his trade or profession" (Art. 2).³ An identical definition can be found in Art. 1(2) in the consumer credit directive.⁴ In the unfair contract terms directive,⁵ the consumer is defined as "a natural person who, ..., is acting for purposes which are outside his trade, business or profession" (art. 2(b)). The same definition is given in Art. 2(2) in the distance contracts directive⁶ and in Art. 1(2)(a) in the consumer sales directive.⁷ The only difference between this definition and the one in the door-to-door selling directive and the consumer credit directive is that the unfair contract terms directive and the distance contracts directive are also applicable when the person is acting outside his "business".

7. The timeshare directive⁸ defines the "purchaser" as a person who is "acting in transactions ..., for purposes which may be regarded as being outside his professional capacity" (Art. 2), whereas the price indication directive⁹ defines the consumer as a "natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional capacity" (Art. 2(e)).
8. Two common features in the consumer definitions are that the consumer is a natural person and that the purpose should be outside some kind of business, commercial or trade activity.
9. Some of the rules in the 1980 Rome Convention on the Law Applicable to Contractual Obligations are only applicable to consumer contracts. According to Art. 5, the rules providing a consumer protection are applicable to a contract "the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession" or a contract "for the provision of credit for that object". This definition is similar to the definitions in the consumer directives. However, it is quite different from the definition in CISG. Art. 2(a) CISG states that the convention is not applicable to sales of goods "bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use".

³ Council Directive 85/577/EEC.

⁴ Council Directive 87/02/EEC, amended in Council Directive 90/88/EEC.

⁵ Council Directive 93/13/EEC.

⁶ Directive 97/7/EC.

⁷ Directive 99/44/EC. See also Art. 2(e) Directive on Electronic Commerce 2000/31/EC, where the consumer is defined as "any natural person who is acting for purposes which are outside his or her trade, business or profession".

⁸ Directive 94/47/EC.

⁹ Directive 98/6/EC.

B.1.2 The Consumer definition

10. It is, from the definitions given in the directives and the conventions, evident that at least four features are decisive for the content of a consumer definition. It has to be decided:
- whether the consumer has to be a natural person or if the notion “consumer” should also cover legal persons being in similar situations as a natural person,
 - if the transaction or act should be defined positively as being made for personal use or negatively as being made outside the person’s trade, business or profession,
 - whether a transaction with mixed purposes should fall within the consumer protection sphere or not, and
 - if the purpose must be known or ought to have been known to the other party.

B.1.2.1 Natural/legal persons

11. According to the EC Directives the consumer should be a natural person. As the Member States usually may implement the directives in such a way as giving a higher degree of protection, the protection can be given also to others than natural persons. Most consumer protection statutes within the EU limit the protection to natural persons. Since the beginning of the trend with rules giving consumers protection there has been arguments made in favour of protecting also others than consumers. The possibility to broaden the scope when implementing directives has been used in some Member States, e.g. Denmark.¹⁰ However, the approach chosen here – being in line with the general opinion of the Coordinating Committee at the meeting in Oxford - is to restrict the definition of the consumer to natural persons in the standard definition (for a discussion about protecting also small business or other non-natural persons, where other ways of solving the problem are suggested, see below).

B.1.2.2 The purpose of the act or transaction

12. There are, in principle, two ways of describing the purpose of a natural person’s act. The purpose could either be that the natural person acts for personal, family or household use (i.e. a positive description) or that he acts for purposes which are outside his trade, business or profession (i.e. a negative description). Both models have been used in national legislation and international conventions. In most cases both ways of describing the purpose will lead to the same result. However, in some cases the different descriptions will lead to different results. An example is when the natural person concludes a contract of sale in his own name and where the purpose is that the good should be used by a non-profit

¹⁰ See Lynge Andersen, Lennart, *Lov om Kreditaftaler med kommentarer*, 3 ed. 2001, p. 45 et seq.

organization of which the person is a member. In this case the purpose is outside the buyer's trade, business or profession, but the transaction has not been made for personal, family or household use. The person would therefore be protected when applying the negative description, but not when applying the positive description.

13. All EC Directives have chosen the negative description of the purpose. This is one reason behind the choice made here. Another reason is that the natural person is worthy of protection also in borderline cases. The decisive factor should be whether or not the natural person is acting outside the professional sphere, in which case he has – within the limits of good faith and fair dealing etc. - to take the risk himself on how he regulates his rights and obligations.
14. The definition chosen covers cases when the purpose of the transaction is to give the natural person a profit, e.g. where the purchase of goods is made with a purpose of making a profit.¹¹ However, if the purpose is to immediately resell the goods, the transaction could be regarded to have been made within the person's trade or business if he carries out several such transactions during a relatively short period of time.¹²

B.1.2.3 Mixed purposes

15. In many national legislations, the consumer definition includes transactions or acts being made *mainly* for a purpose within the private sphere or *mainly* outside the person's trade, business or profession.¹³ However, no such wording is included in the consumer definitions in the EC Directives, in the 1980 Rome Convention or in the CISG.
16. According to statements made by the Commission and the EU Council when the door-to-door selling directive and the unfair contract terms directive were to be implemented, the directives were applicable even if the natural person acted partly for business purposes, as long as the main purpose of the act was outside the trade, business or profession. Even if statements such as these are of minor value for the interpretation, there seems to be the prevailing view among European scholars that the consumer definition covers also such mixed transactions or acts.
17. The prevailing view regarding Art. 2(a) CISG is that the exception is not applicable when the buyer has bought the goods for mixed purposes, at least when the business, trade or professional purpose is more than insignificant.

11 See Bourgoignie, *Éléments pour une théorie du droit de la consommation*, Bruxelles 1988, p. 51.

¹² Cf. the Danish Supreme Court Cases U 1995.432 H and U 1998.47 H.

¹³ E.g. most of the consumer definitions in the Nordic countries.

18. The approach chosen here is that a transaction should be regarded as a consumer transaction if the natural person has acted *primarily* outside his trade, business or profession.¹⁴ The main reason for this choice is that the natural person, as long as he is not acting to a greater extent within his professional sphere, should be protected as a consumer as the reasons for protecting consumers as such are equally valid in this case.

B.1.2.4 Objective versus subjective approach

19. A complicated question is whether the consumer definition contains or should contain a requirement that the purpose of the consumer with the transaction or act – either personal or outside business etc. - should be apparent for the professional as a requirement for the consumer protection rules to apply or if it is enough that the consumer had such a purpose with the transaction regardless of the knowledge of the professional. In other words, is there a consumer transaction when the professional did not know nor should have known that he contracted with a consumer and therefore that the protective rules were applicable.

Example: Arthur wishes to buy a birthday present for Laura, his girlfriend. He goes to a shop for professionals without indicating to the sales attendant that neither Laura nor he is a professional. Do the rules on consumer sales apply?

20. Within the EU, national legislations differ considerable in the answer to this question. Even within most legal systems the answers are different depending upon what the regulations deal with. The same is true with regard to different EC-Directives. At present, no EC-Directive explicitly deals with this problem. However, according to statements made in protocols by the Commission and the EU Council in answering questions from Member States being in the process of implementing the door-to-door selling directive and the consumer credit directive, a transaction where the professional did not nor should have known that the transaction was made mainly outside the natural persons trade, business or profession should not be regarded as a consumer transaction. These statements were in some countries interpreted as allowing a requirement for applicability that the professional at least ought to have known that the natural person acted for purposes outside business etc. and this despite the fact that the wordings of the consumer definitions did not explicitly deal with the problem. When implementing the unfair contract terms directive, some countries noted that no statement with a similar content was made, which was interpreted as not allowing such an approach due to the wording of the consumer definition.
21. According to Art. 2(a) CISG, the Convention is not applicable when the natural person has bought the goods for personal, family or household use “unless the seller, at any time before or at the conclusion of the contract, neither knew nor

¹⁴ Cf. Howells & Wilhelmson, 1997, p. 3.

ought to have known that the goods were bought for any such use”. Accordingly, CISG has chosen the objective approach.

22. A choice has to be made between the two approaches. The approach making the applicability dependent upon the knowledge of the professional has the advantage of giving the professional a chance to make a risk analysis before deciding upon the price and before the conclusion of the contract. On the other hand, the other approach has the advantage of protecting the consumer – presumably not knowing about the rules – as soon as his or her purpose with the transaction or act is outside his or hers business, trade or profession. The latter approach has been chosen here as being a part of the standard definition, i.e. the rules protecting consumers should be applicable regardless of whether the professional had knowledge of the consumer’s purposes with the transaction.

B.2 The notion of “Professional”

B.2.1 The notion of “professional” in the EC-Directives

23. The counter-party of the consumer in a transaction is called different things in different directives dependent upon the purpose of the directive. In the relevant directives one will therefore find terms as “trader” (the door-to-door selling directive & the price indication directive), “vendor” (the timeshare directive), “creditor” (the consumer credit directive), “seller” (the unfair contract terms directive & the consumer sales directive) and “supplier” (the unfair contract terms directive & the distance contracts directive). However, in this text the term “professional” will be used.
24. The definition of the term professional differs between different directives. The starting point has been the definition in the door-to-door selling directive, where a professional is defined as “a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of” a professional (Art. 2). Similar definitions could be found in the distance contracts directive, where the professional is defined as a person who is “acting in his commercial or professional capacity” (Art. 2(3)).¹⁵ In the price indication directive, we find a definition stating that the professional is a person who sells or offers for sale products “which fall within his commercial or professional activity” (Art. 2(d)). The definitions in the consumer credit directive, the unfair contract terms directive and the consumer sales directive are very similar. Thus, in the consumer credit directive, the professional is a person who grants credit “in the course of his trade, business or profession” and in the consumer sales directive he is a person who sells consumer goods “in the course of his trade, business or profession”. In the unfair contract terms directive, the professional is instead a person who is “acting for

¹⁵ Cf. Art. 2 the timeshare directive, where the professional is defined as a person “who, acting ... in his professional capacity”.

purposes relating to his trade, business or profession” with the addition “whether publicly owned or privately owned” (Art. 2(c)).

B.2.2. The policy issues regarding the definition of the “professional”

25. It is evident from the definitions given in the directives that the professional could be a natural or legal person and that the consumer protection rules should be applied in the same way regardless of whether he is a natural or legal person. It is appropriate to include also natural persons in the definition as long as they are acting as professionals. One reason is that the way a person has chosen to organize the business should not be decisive when deciding whether or not the rules protecting the other party, i.e. the consumer, should be applicable. The important factor should therefore be if the party is doing something that he does on a more regular basis and for some purpose of earning money. Thus, a definition should include both natural and legal persons. However, when defining the term “professional” there are at least four policy issues to be decided upon:

- if the transaction or act should be defined positively as being made in the course of or for purposes within his profession or negatively as being made outside the personal sphere,
- if the act should be defined objectively as being made in the course of the persons profession or more subjectively as being made for purposes relating to the profession,
- how the professional sphere should be defined, and
- whether or not a transaction in the course of both the profession and outside the profession should fall within the definition and, if so, how this should be stated.

B.2.2.1 A positive or negative definition

26. The transaction or act in which the natural or legal person participates could either be described positively, i.e. as being within his profession, or negatively, e.g. as outside his personal, family or household use. All EC-Directives have chosen the positive approach. Where the professional is at all defined in national legislation, the positive approach has been chosen almost without exception. In the present text the positive approach has been chosen as it is of some importance that the specific rules protecting the other party are applicable only when the person in fact is acting as a professional and therefore knows or ought to have known that there are specific risks involved as the transaction is regulated by mandatory rules protecting the other party. Therefore, the rules should not apply in the borderline cases where the person is acting outside his personal, family or household use but not within the profession.

B.2.2.2 An objective or more subjective approach

27. In the unfair contract terms directive, the rules are applicable where the person is “acting for purposes relating to his” profession, a wording that could be interpreted to imply that some sort of subjective test has to be made of the person’s actual subjective purpose with the action involved. Words with a similar content do not exist in the other directives. Instead, these directives either stipulate that the person “acts” or is “acting” in his professional capacity or stipulate that the person is acting “in the course of” his profession. Most likely, the different wordings have been intended to have the same legal meaning. However, the latter wording seem to be preferable, as it in a clearer way shows that the act or transaction in question should be part of the profession of the natural or legal person.

B.2.2.3 The definition of the professional sphere

28. In some directives, e.g. the door-to-door selling directive and the distance contracts directive, the act or transaction should be related to the persons “commercial or professional capacity”. In other directives, e.g. the CDC, unfair contract terms directive and the consumer sales directive, the act should be within the persons “trade, business or profession”. It is very hard to discern whether or not the two approaches have the same legal meaning. However, the latter wording has the advantage of using the same words as the consumer definition, which is the reason for the choice.

B.2.2.4 Mixed acts

29. In some cases, the natural or legal person could be acting both within and outside his trade, business and profession, i.e. the act or transaction could comprise elements or connecting factors from both spheres. The directives does not regulate if such a transaction or act should be regarded as being covered by the definition of the professional or to what extent the act has to be within the professional sphere in order to be regarded as a professional act. As the definitions in the member states usually have been influenced by the definitions in the directives, the acts in the member states do not usually include any rules dealing with this problem. This has caused some problems in practice.

30. Therefore, a rule in the Code should deal with the problem. As there is a risk that the consumer might believe that he is protected by the consumer protection rules when he is dealing with a person who at least to some extent is acting professionally in the field involved, the threshold should be rather low. Another reason is that the consumer also in these transactions typically is less informed than the other party. The main alternative here therefore is that the rules should be applicable as soon as the professional element is not negligible. As an alternative, the rules should at least be applicable when the professional element is the main part of the act or transaction.

B.3 Commercial agents etc.

31. A case which will sometimes arise in practise is that both parties are private persons, but one of them is represented by a professional as commercial agent, broker, commissioner, etc. In such a case, the involvement of the professional could lead to a situation where the other private person is in the same need of protection as when one of the parties is a professional. One reason for this need of protection could be that the consumer in dealing with the professional as acting on behalf of the private person on the other side would not understand that this might put him in a situation less beneficial than if the professional was the contracting party. Another idea behind the need of protection is that the professional should not be able to bring himself in a better situation by putting a private person, e.g. an employee, as contracting party instead of the professional himself.
32. Ideas along these lines have in some member states led to legislative acts where the transaction or act is regarded as a consumer transaction or act and in some cases also to the solution that the professional is responsible together with the private person who contracted the professional. Two examples of such legislative acts are Art. 1(2) of the Swedish Consumer Sales Act¹⁶ and Art. 7-5(2) of the Dutch Civil Code.¹⁷ This novelty has led to greater protection for the consumer. At the same time, the legislation has caused several new problems. One example is that it is hard to make a distribution of responsibility between the private person and the professional contracted by him. Another example is that a private person gets the same responsibility as a professional, which could be something that private person did not know or ought to have known when contracting the professional as an intermediary. The result in these cases is that one of two private persons gets a better protection and one is put in a worse situation than he would have been in, if the professional was not involved. For these reasons, no rule dealing with this situation is suggested.

B.4 Protection of small business etc.

33. A major concern might in some cases be what to do with small business, non-profit organisations and other legal persons. In many regards they are in the same position as consumers as they usually do not have expertise on many issues. The difficulty is where to draw the borderline between legal persons worthy of protection and other legal persons. Time and again, legislators have

¹⁶ According to Art. 1(2), the Act is applicable also where the seller is not a professional, but a professional has acted as an intermediary on behalf of the seller. In these cases, the professional has a joint and several liability together with the seller, even if the seller in most cases is the party ultimately responsible for the transaction.

¹⁷ According to 7-5(2), where the thing is sold by a procurator in the course of a profession or business, the sale is considered to be a consumer sale, unless, at the time of entering into the contract, the buyer knows that the principal does not act in the course of a profession or business.

tried - and failed - to draw a precise line between these two categories. Should it be the number of employees that is decisive? The assets of the company? The turn-over? The non-profit status of the legal entity? One or several of the mentioned criteria together with a description of the entity as a weaker party in the transaction in question? The problems seem to be insurmountable.¹⁸ At least, one could not find a formula applicable to all types of transactions or acts. Each possible solution will seem more or less arbitrary, where it is very hard to give convincing reasons for the substantive rules chosen. Therefore, one should refrain from trying to include small business etc. in the standard definition..

34. Two observations should, however, be made. First, consumer protection regulations have often served as a catalyst, in reforming (contract) law in general. An example is the package travel directive¹⁹, which is aimed at protecting consumers, but which has been drafted in such a way so as to equally protect professional passengers. The same is true for the Overbooking Regulation, which in contrast to the package travel directive even speaks of “passenger” rather than “consumer”. Second, consumer protection is sometimes accompanied by more general norms, which equally extend to business persons. The consumer protection rules in this code could influence the courts in disputes involving small business, i.e. a “Reflexwirkung” where the court finds that a contractual stipulation or behaviour by one party is unfair to the other and where this decision is influenced by a comparison with the rules protecting consumers.
35. A further possibility to extend the protection of consumers to small business in at least some cases is to do so when the transaction involved is alien to the trade, business or profession, e.g. where a financial advisor sells his computer to a natural person. This possibility was advocated by the Advocate-General in the Pinto case, but the European Court rejected the approach.²⁰ On the other hand, it has been accepted in some jurisdictions, e.g. in France²¹ and Italy.²²
36. Based upon what has been mentioned above, our recommendation is that the standard definition should not include small business etc.

B.5 The standard definitions

37. Based upon what has been stated in B.1-B.4 above, one could apply the following definitions as the standard for the Draft Civil Code.

¹⁸ Cf. Ot.prp. nr. 44 (2001-2002) Om lov om forbrukerkjøp, p. 35 et seq. and 54, where a thorough analysis of this problem is made and where the conclusion is, inter alia, that such a broadened scope would cause major demarcation problems and considerable interference in the freedom of contract of the parties.

¹⁹ Council Directive 90/314/EEC.

²⁰ Case C-361/89, 1991 ECR I, 1189.

²¹ Cour de cassation 6 janvier 1993, JCP 27 janvier 1993 (Actualités).

²² Tribunale da Roma 20 October 1999, Foro Italiano 2/2000.

Professional

- *Professional* shall mean any natural or legal person who is acting to a not negligible extent in the course of his trade, business or profession

Consumer

- *Consumer* shall mean any natural person who is acting primarily for purposes which are not related to his trade, business or profession

Consumer transaction

Alt. 1. For the purpose of this Draft Civil Code, a consumer [transaction] is a [transaction] in which a professional [transacts with] a consumer

or

Alt. 2. For the purpose of this Draft Civil Code, a consumer [transaction] is a [transaction] in which a natural or legal person who is acting to a not negligible extent in the course of his trade, business or profession (the professional) [transacts with] a natural person who is acting primarily for purposes which are not related to his trade, business or profession (the consumer)

The standard definition applied to sales transactions (example)

For the purpose of this Chapter, a consumer sale is a sale in which a professional sells goods to a consumer

or

For the purpose of this Chapter, a consumer sale is a sale in which a natural or legal person who is acting to a not negligible extent in the course of his trade, business or profession (the professional) sells goods to a natural person who is acting primarily for purposes which are not related to his trade, business or profession (the consumer)

The standard definition applied to guarantees (example)

For the purpose of this Chapter, a consumer guarantee is a guarantee in which a consumer as a guarantor assumes a guarantee from a professional

C. Alternative texts that could be used in different parts of the Draft Code due to specific circumstances

38. The process of developing black-letter rules with elaborate comments and comparative notes for different parts of the Draft Civil Code is in most cases not finished. There might in some cases be a need of a different scope of application of the mandatory rules protecting one of the parties. Such deviations from the general scope of application could be done in several different ways. In some cases there might be a need of a more narrow definition. In other cases there might be a need of a broader definition, including also other groups than natural persons acting outside trade, business or profession. Below, such alternative definitions of the scope of application are given.

C.1 A more restricted scope of application

39. As has been stated above, one of the major problems with the consumer notion found in EC-Directives and national legislations is the question whether or not the professional at least ought to have known the consumer's purposes with the transaction. In the standard definition no such knowledge requirement has been included. If there is a need of a more restricted definition, an inclusion of such a requirement seems to be the only appropriate restriction. One possible alternative restriction would be to exclude cases where the transaction is made for mixed purposes and thus only offer protection when the natural person has acted solely for purposes outside his trade, business or profession. However, such a restriction would cause several problems in practice and should therefore not be adopted. A definition of the consumer transaction with a knowledge requirement could be phrased as follows:

Consumer transaction

For the purpose of [this part of the Draft Civil Code, this Chapter, this Sub-Chapter, this Book], a consumer transaction is a transaction in which a professional transacts with a consumer and the professional, at any time before or at the conclusion of the contract, knew or ought to have known this.

The restricted definition applied to sales transactions (example)

For the purpose of this Chapter, a consumer sale is a sale in which a professional sells goods to a consumer and the professional, at any time before or at the conclusion of the contract, knew or ought to have known this.

C.2 A broader scope of application

40. The methodology suggested in this paper on how to broaden the scope of application of the mandatory rules is to use a standard or general definition of a consumer transaction with a specific definition of the "consumer". If it is deemed suitable to enlarge the group covered by the mandatory rules, such a change should be accomplished by including a wording where it is stated that the mandatory rules, i.e. the rules protecting the consumer, apply also to other transactions made by other persons. As foreseeability and predictability are interests that ought to be weighed against the need of protection, it is suggested, as a general requirement, that others than consumers, defined by the standard definition, should only be protected if the professional at least ought to have known that the transaction was made with a certain category of persons.

C.2.1 Alternative 1

41. In this alternative, the rules in a certain part of the Draft Code protecting the consumer are also applicable when the transaction is made between a professional and a legal person in situations where the purpose of the transaction could not be regarded as being part of its course of business. The only difference

between the standard definition of the consumer and the scope of application for legal persons is that there is a knowledge requirement in the latter case.

A broader scope of application – alternative 1

For the purpose of [this part of the Draft Civil Code, this Chapter, this Sub-Chapter, this Book], a consumer transaction is a transaction in which a professional transacts with a consumer. The same rules apply where the professional transacts with a legal person acting primarily for purposes which are not within his trade, business or profession and the professional, at any time before or at the time of the transaction, knew or ought to have known this.

The broader definition – alternative 1 - applied to sales transactions (example)

For the purpose of this Chapter, a consumer sale is a sale in which a professional sells goods to a consumer. The same rules apply where the professional sells goods to a legal person acting primarily for purposes which are not within his trade, business or profession and the professional, at any time before or at the conclusion of the contract, knew or ought to have known this.

The broader definition – alternative 1 – applied to guarantees

For the purpose of this Chapter, a consumer guarantee is a guarantee in which a consumer as a guarantor assumes a guarantee from a professional. The same rules apply where the guarantee is assumed by a legal person as guarantor acting primarily for purposes which are not within his trade, business or profession and the professional, at any time before or at the time when the guarantee was assumed, knew or ought to have known this.

C.2.2 Alternative 2

42. The difference between alternative 1 and 2 is that the latter offers protection when the transaction in question does not fall within the *regular* trade, business or profession, i.e. the core business of the party. If this definition is chosen, it has to give protection also to natural persons acting outside such purposes.

A broader scope of application – alternative 2

For the purpose of [this part of the Draft Civil Code, this Chapter, this Sub-Chapter, this Book], a consumer transaction is a transaction in which a professional transacts with a consumer. The same rules apply where the professional transacts with a natural or legal person acting for purposes not related to his regular trade, business or profession and the professional, at any time before or at the time of the transaction, knew or ought to have known this.

The broader definition – alternative 2 - applied to sales transactions (example)

For the purpose of this Chapter, a consumer sale is a sale in which a professional sells goods to a consumer. The same rules apply where the professional sells goods to a natural or legal person acting for purposes not related to his regular trade, business or profession and the professional, at any time before or at the conclusion of the contract, knew or ought to have known this.

C.2.3 Alternative 3

43. In this alternative, the scope of application is extended to cover also transactions made by legal persons if they meet one or several prerequisites. The first of these is that the legal person has a certain number of employees. Even if this prerequisite is easy to apply, it has the major drawback of being very arbitrary as the number of employees does not in any way imply that the legal person is worthy of the protection given to a consumer presumably being the weaker party. However, such a prerequisite could be combined with one of the other two prerequisites given. The second prerequisite is that the legal person is inexperienced or is lacking in bargaining skill. In these cases, there could be grounds for adaptation of the contract or avoidance of the contract (see Art. 4:109 PECL). Regardless of whether or not the professional took advantage of this in a grossly unfair way or took an excessive benefit, there might in some cases be reasonable to give such a person the same protection as that given to the consumer, but only if – as is the case also according to the rule in PECL – the other party knew or ought to have known this. The third prerequisite is that the legal person acted under circumstances similar to that of the consumer.

A broader scope of application – alternative 3

For the purpose of this Draft Civil Code a consumer transaction is a transaction in which a professional transacts with a consumer. The same rules apply where the professional transacts with a legal person [with less than five employees][being inexperienced or lacking in bargaining skill][acting under circumstances similar to that of the consumer] and the professional, at any time before or at the time of the transaction, knew or ought to have known this.

The broader definition – alternative 3 - applied to sales transactions (example)

For the purpose of this Chapter, a consumer sale is a sale in which a professional sells goods to a consumer, where the professional knew or ought to have known this. The same rules apply where the professional sells goods to a legal person [with less than five employees][being inexperienced or lacking in bargaining skill] [acting under circumstances similar to that of the consumer] and the professional, at any time before or at the conclusion of the contract, knew or ought to have known this.

The broader definition – alternative 3 – applied to guarantees (example)

For the purpose of this Chapter, a consumer guarantee is a guarantee in which a consumer as a guarantor assumes a guarantee from a professional. The same rules apply where the guarantee is assumed by a legal person as guarantor [with less than five employees][being inexperienced or lacking in bargaining skill][acting under circumstances similar to that of the consumer] and the professional, at any time before or at the time when the guarantee was assumed, knew or ought to have known this.