

BEUC'S COMMENTS (FIRST PART) FOR THE COMMISSION'S EXPERT GROUP ON EUROPEAN CONTRACT LAW

BEUC's preliminary comments on the "contents and effects" paper

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Preliminary remarks

Below are some comments related to the chapter on Content and Effects of contracts (other than unfair contract terms) submitted to the Sounding Board. Since this document contains only “isolated” articles, it is not possible to give a final opinion on their content. It would be necessary to have the full legal context and the scope of their application. Moreover, as expressed in the letter sent to DG Ms. François Le Bail on 20th of September, there are still many questions that need to be answered before BEUC can express its opinion and make detailed comments on an initiative in contract law.

Specific comments

7:101 (DCFR II.–9:101): Terms of a contract

- (1) The terms of a contract may be derived from the express or tacit agreement of the parties, from rules of law or from practices established between the parties or usages.**
- (2) Where it is necessary to provide for a matter which the parties have not foreseen or provided for, a court may imply an additional term, having regard in particular to:
 - (a) the nature and purpose of the contract;**
 - (b) the circumstances in which the contract was concluded; and**
 - (c) the requirements of good faith and fair dealing.****
- (3) Any term implied under paragraph (2) should, where possible, be such as to give effect to what the parties, had they provided for the matter, would probably have agreed.**
- (4) Paragraph (2) does not apply if the parties have deliberately left a matter unprovided for, accepting the consequences of so doing.**

BEUC's comments:

- Paragraph 1 related to the sources of contract terms can not be applied to B2C contracts as such without referring to mandatory rules. It is necessary to make clear that the main source in consumer contracts is mandatory dispositions which protect the weaker party (consumer). In this sense, the rule should establish a hierarchy between the sources clarifying that mandatory protective rules take precedence in case they are more beneficial in B2C contracts.
- Paragraph 2 is about the integration of the contract by a judge/court. As an additional criteria (or added to point b) it should include also the “position of the parties”
- Paragraph 4 – should principally not be applicable for b to c contracts; parties should only be able to rely on this where there is written correspondence proving the intention and the consumer is not deprived of any mandatory protection.

7:102 (DCFR II.–9:102): Certain pre-contractual statements regarded as contract terms

- (1) *If one of the parties to a contract is a business and before the contract is concluded makes a statement, either to the other party or publicly, about the characteristics of what is to be supplied by that business under the contract, the statement is regarded as a term of the contract unless:***
- (a) the other party was aware when the contract was concluded, or could reasonably be expected to have been so aware, that the statement was incorrect or could not otherwise be relied on as such a term; or***
- (b) the other party's decision to conclude the contract could not have been influenced by the statement.***
- (2) *For the purposes of paragraph (1), a statement made by a person engaged in advertising or marketing for the business is treated as being made by the business.***
- (3) *Where the other party is a consumer then, for the purposes of paragraph (1), a public statement made by or on behalf of a producer or other person in earlier links of the business chain is treated as being made by the business unless the business, at the time of conclusion of the contract, did not know and could not reasonably be expected to have known of it.***
- (4) *In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.***

BEUC's comments:

- This article needs to be examined firstly in relation to the 1999 Consumer Sales Directive. According to the text proposed, private (direct communication to the consumer) and public statements would be included in the contract whereas in the Consumer Sales Directive only public statements are covered. Regarding the exceptions of the inclusion of the statement into the contract, the text seems to cover the same circumstances as in the 1999 Sales Directive.
- The question here is what are the other circumstances – except from the lack of conformity – to which the inclusion of statements into the contract could apply; probably especially for the application of the *culpa in contrahendo principle*, this could be important. Is this covered by the CFR?

Regarding the answers to the questions contained in page 2/3:

1. Should the article be retained or should the question be dealt with only in the later rules on conformity of goods with the contract of sale or lease?

Before answering to this question is it necessary to define where this provision would apply apart from the lack of conformity?

2. Should paragraph (3), which at present applies only where the other party is a consumer, apply also where the other party is not a consumer?

We do not respond to this question

3. In paragraph (1)(b) should the wording be

- *the other party's decision to conclude the contract COULD NOT HAVE BEEN influenced by the statement OR*
- *the other party's decision to conclude the contract WAS NOT influenced by the statement?*

We prefer to keep the wording "WAS NOT" instead "COULD HAVE BEEN influenced" because it demonstrates a casual connection between the incorrect statement and the knowledge of the consumer and the second case is ambiguous and easier to prove by the trader.

7:103 [DCFR II.-4:104]: Merger clauses

- (1) *If a contract document contains an individually negotiated clause stating that the document embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the document do not form part of the contract.*
- (2) *If the merger clause is not individually negotiated it establishes only a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.*
- (3) *The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.*
- (4) *A party may by statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on such statements or conduct.*
- (5) *This Article is subject to paragraph (4) of the preceding Article. [7:102(4)].*

BEUC's comments:

- This article can not be applied to B2C contracts: consumer can be confused by public statements of traders that might be excluded from the contract (or might create a presumption of their exclusion) if the terms contain a merger clause.
- Moreover, this disposition is inconsistent with unfair terms directive and not coherent with the article related to pre-contractual statements.

7:104 [DCFR II.–4:210]: Formal confirmation of contract between businesses

If businesses have concluded a contract but have not embodied it in a final document, and one without undue delay sends the other a notice in textual form on a durable medium which purports to be a confirmation of the contract but which contains additional or different terms, such terms become part of the contract unless:

- (a) the terms materially alter the terms of the contract; or*
- (b) the addressee objects to them without undue delay.*

- No comments

7:105 (DCFR II.–9:103): Terms not individually negotiated

(1) Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.

(2) If a contract is to be concluded by electronic means, the party supplying any terms which have not been individually negotiated may invoke them against the other party only if they are made available to the other party in textual form.

(3) For the purposes of this Article

- (a) "not individually negotiated" has the meaning given by II.–1:110 (Terms "not individually negotiated"); and*
- (b) terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document.*

BEUC's comments:

- In relation to B2C contracts this should not be seen isolated from the whole Chapter. It cannot serve as a B2C rule.
- The first paragraph is not clear enough as a transparency rule. The term "reasonable steps to draw the other party's attention" is too vague and difficult to prove. The terms must have been provided to the other party prior to the conclusion of the contract if they are to be relied on. Moreover the last sentence of this paragraph suggests that the contract terms not negotiated can be provided at the moment of the conclusion of the contract when it should take place always before.
- How is this rule will be linked to the unfair contract terms directive?

7:106 [DCFR II.–9:104]: Determination of price

Where the amount of the price payable under a contract cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, the price payable is the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.

BEUC's comments:

- This article needs to be expressively excluded from its application to B2C contract. The price in these kinds of contracts needs to be determined (or must be determinable) before hand. Under the current text the trader would be able to mislead the consumer in the price clause by leaving unclear situations to fix it (such us "uses or practices", "comparable circumstances")
- It should be clear that this cannot override a trader's obligations under the unfair terms directive or unfair commercial practices directive.

7:107 [DCFR II.–9:105]: Unilateral determination by a party

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

BEUC's comments:

- The article is not clear enough. What does grossly unreasonable mean and how will be determined? This cannot be discussed for B2C contracts without putting in context. Also, it is not consistent with the unfair terms directive.

7:108 [DCFR II.–9:106]: Determination by a third person

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

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

- No comments except second paragraph which is applicable the previous observation.

7:109 [DCFR II.–9:107]: Reference to a non-existent factor

Where the price or any other contractual term is to be determined by reference to a factor which does not exist or has ceased to exist or to be accessible, the nearest equivalent factor is substituted unless this would be unreasonable in the circumstances in which case a reasonable price or other term is substituted.

BEUC's comments:

- This article can not be applicable to B2C contracts. The terms of a consumer contract can not depend on external factors. All the terms and the price have to be determined before hand in the contract however this rule must be applied together with unfair contract terms directive and the unfair commercial practices directive.

7:110 [DCFR II.–9:108]: Quality

Where the quality of anything to be supplied or provided under the contract cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, the quality required is the quality which is reasonable in the circumstances.

- No comments

7:111 [DCFR II.–9:109]: Language

Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be determined from the terms agreed by the parties, from any other applicable rule of law or from usages or practices, the language to be used is that used for the conclusion of the contract.

BEUC's comments:

- In B2C contracts any communication related to contract terms should always be provided in the language used in the conclusion of the contract.

Second part: Effects of contracts on third parties

- No comment on this section for the time being

END