

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

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I. BEUC's comments on the operational conclusions (OC)

In relation to the operational conclusions, BEUC would like to highlight some points that have not been taken into account in the conclusions of the European Commission.

OC 30 September :

BEUC's comments on interpretation are missing – see below;

OC of 28 October:

BEUC's remarks referring to the letter sent to Mrs. Le Bail last 27th of October on the work of the SB are not mentioned.

In addition, in relation to the paper on "Change of circumstances" it is not indicated that BEUC did not agree on the inclusion of the re-negotiation duty in the clause of Change of Circumstances.

OC of 17 November:

In relation to the part on the impact assessment in the OC: It is not mentioned that BEUC supported the suggestion made by one of the participants, that it is essential that the Commission undertakes a consultation on the final and complete proposal of the expert group on the text of an optional instrument. It should also be clarified in the last sentence of the OC that BEUC's comments made in the sounding board cannot be considered as contributions to an impact assessment as long as the key parameters of an optional instrument are not defined and hence a meaningful position on the impact of such an instrument on consumers cannot be taken.

In relation to the 9th bullet point of the OC related to Art . 9.110 but also in a more general context, BEUC asks the Commission not to infer "general agreement" in case BEUC announces that it will submit written comments. Indeed we did never agree to this Article and in particular to its paragraph 2, which however could be deduced from the Commission's wording.

II. BEUC's comments on the feedback of the EG on the articles related to "contents and effects"

We would like to thank the expert group and Prof Clive in particular for the detailed response to our comments as well as for the explanations about why certain comments have not been taken on board.

- BEUC regrets that the EG agreed not to include the position of the parties as a criterion of interpretation. Although this aspect can theoretically be covered by the nature and circumstances of the contract, if it is not *expressly* indicated in the article the judge might think that he/she is not enabled to take into account the specific positions of the parties especially when it is not clear whether or not it is a B2C contract.

- BEUC regrets that the EG decided to keep the wording "could not have been influenced" instead of "was not influenced" in the article of pre-contractual statements and contract terms. BEUC considers that the adopted text by the EG is ambiguous and could be used abusively by traders because it gives more chances to exclude the statement from the contract terms.

- BEUC does not agree with the new draft of article 7:103 on merger clauses. It is not good enough for consumers because prior statements can be excluded from the contract terms if the merger clause was individually negotiated (see para. 4):

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

(1) If a contract document contains a 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) The parties' prior statements may be used to interpret the contract unless it otherwise provides.

(3) 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.

(4) In a contract between a business and a consumer, the consumer is not bound by a merger clause in terms supplied by the business.]

This situation deviates from the one described in article 24 pCRD where it is established that public statements have to be used as a criterion to determine the lack of conformity. Under the text proposed by the EG consumers would not be able to plead lack of conformity based on prior statement such as those included in advertisements if the merger clause has been individually negotiated. Furthermore, the article does not consider that it is very difficult to prove when a clause has been negotiated. The wording in para 4: "***in terms supplied by the business***" should be deleted.

- BEUC regrets that the EG did not amend the text of article 7:105 (Terms not individually negotiated). BEUC considers that the EG has not responded to BEUC's question how this rule relates to the unfair contract terms directive. We underscore therefore in particular, its paragraph 1 is conflicting with the proposed consumer rights directive Art 31, which states that contract terms shall be made available to the

consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract.

The EG indicated that in many ordinary situations concerning everyday contracts of small values it was unrealistic to expect that actual terms would be supplied to a consumer prior to the conclusion of a contract. BEUC does not agree with this approach. Although the situation described by the EG can be applied to some contracts, the rule in B2C relations should be that the consumer has to be always provided with the terms of the contract before the conclusion as proposed by the pCRD.

Furthermore, how does this rule relate to the distance selling directive and to the door step selling directive?

- BEUC regrets that the EG agreed to keep the article on determination of the price. The EG pointed out that this provision could be good for consumers because if the price is not fixed, they would not be obliged to pay more than the normal or reasonable price. However, BEUC considers that under the proposed text there could be abuses from the trader's side. For example, if the trader offers a lower price to catch the attention of consumers and then does not include any price in the contract terms. If we read the EG's provision together with the one on merger clauses, the price announced as a public statement could be excluded from the contract terms and the consumer obliged to pay the normal price which would be higher than the one announced by the trader.

It would moreover be useful if the EG clarifies the relationship to the unfair contract terms directive.

III. BEUC's comments on the proposed papers

1. Paper on Good Faith and Fair Dealing

I. – 1:101: Good faith and fair dealing

(1) During the pre-contractual, contractual and post-contractual stage, each party has a duty to act in accordance with good faith and fair dealing.

(2) The duty may not be excluded or limited by contract.

(3) Breach of the duty may make the party in breach liable for any loss thereby caused to the other party, or may preclude that party from exercising or relying on a right, remedy or defence which that party would otherwise have.

BEUC's comments:

- Although the good faith must govern every contract, in the case of consumer contract the application of the proposed article could lead to a broad interpretation of a term that a priori can be considered unfair;

2. Paper on Interpretation

Art. 1 [II. – 8:101:] General rules on interpretation of contracts

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the normal meaning of the expressions used in it.

(2) If one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of this intention, the expression is to be interpreted in the way intended by the first party.

(3) Unless otherwise provided in the preceding paragraphs, the contract is to be interpreted according to the meaning which a reasonable person would give to it in the circumstances.

- The definition of a “reasonable person” in Art. 1 (3) should be based on different criteria depending on whether it is a consumer or a trader.

Art. 2 [II. – 8:102:] Relevant matters

In interpreting the contract, regard may be had, in particular, to:

(a) the circumstances in which it was concluded, including the preliminary negotiations;

(b) the conduct of the parties, even subsequent to the conclusion of the contract;

(c) the interpretation which has already been given by the parties to expressions which are similar to those used in the contract and the practices they have established between themselves;

(d) the meaning commonly given to such expressions in the branch of activity concerned and the interpretation such expressions may already have received;

(e) the nature and purpose of the contract;

(f) usages; and

(g) good faith and fair dealing.

BEUC’s comments:

- BEUC considers that the position of the parties should be included expressly as a criterion of interpretation.

Art. 3 [II. – 8:105:] Reference to contract as a whole

Expressions used in a contract are to be interpreted in the light of the whole contract in which they appear.

No comments

Art. 4 [II. – 8:107:] Linguistic discrepancies

Where a contract document is in two or more language versions none of which is stated to be authoritative, there is, in case of discrepancy between the versions, a preference for the interpretation according to the version in which the contract was originally drawn up.

BEUC’s comments:

- According to this article the contract is to be interpreted on the basis of the language version in which the contract was originally drawn up. This is not acceptable for B2C contracts. As it will normally be the trader offering a translation to a foreign customer, it must be this version on which the consumer will build up his mind and not the original version. Consequently, at least when the second version is offered by the trader himself, the translation must be the determining version! The same should apply when the consumer is making a translation if the trader has “approved” it or has confirmed that the translation is correct.

- At this question Prof. Schulte-Nölke referred to Art. 8 saying that the later would solve all the problems by always applying an interpretation in favour of the consumer. But when the question was raised about the hierarchy of the chapter's article, he said that there was none, but Art. 8 had to be understood in the way that if there were doubts remaining about the interpretation of a contract after having applied Art. 1 to 7, these remaining doubts would be solved by the application of Art. 8. In our understanding, this would have the effect that the application of Art. 4 would lead to the trader's language version as the “la seule version faisant foi” and if there remained doubts in this version they would be interpreted according Art. 8 in favor of the consumer. But it would not be the version written in the consumer's language.

Art. 5 [II. – 8:104:] Preference for negotiated terms

Terms which have been individually negotiated prevail over those which have not.

- Did the EG consider what is the rule in relation to the burden of proof in b to c contracts for terms being “individually negotiated”? A rule for b to c contracts should be inserted, putting the burden on business, as proposed in the pCRD.

Art. 6 [II. – 8:106:] Preference for interpretation which gives terms effect

An interpretation which renders the terms of the contract effective is to be preferred to one which would not.

- No comments

Art. 7 [II. – 8:103:] Interpretation against supplier of term

Where in a contract which does not fall under the following article there remains doubt about the meaning of a term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.

- No comments

Art. 8 [II. – 8:103a:] Interpretation in favour of consumers

(1) Where in a contract between a business and a consumer there remains doubt about the meaning of a term, the interpretation most favourable to the consumer is to be preferred.

(2) Paragraph (1) does not apply to terms supplied by the consumer [or to terms which have been individually negotiated between the parties].

(3) 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:

- BEUC is opposed to the second paragraph. It should be deleted since the *quid* of the interpretation should not be who provide the terms but the position of the parties and the imbalance in bargaining power. This is the rule that governs other unbalanced relationships as expressed through the principles of *indubio pro-operatio* (labour contracts) and *favour debitoris* (relationship between creditor and debtor).

- If we always interpret a contract in favour of the consumer, this could lead to the effect that a contract would be valid whereas it would be void if it was interpreted in the way the less favourable for the consumer. Summa summarum, it could be more favourable to the consumer if the interpretation the less favourable to the consumer was applied as this would have the effect that at least the clause was void and the legal rule (from which the trader normally tries to derogate in his favour) would apply in the consumer's favour.

Art. 9 [II. – 8:201:] Unilateral statements or conduct

(1) Unilateral statements or conduct indicating intention are to be interpreted in the way in which they could reasonably be expected to be understood by the person to whom they are addressed.

(2) Articles II. – 8:102 to II. – 8:107 apply with appropriate adaptations.

- Article 9 (1) is problematic if we imagine that it is the trader asking/forcing the consumer to make a certain statement. The consumer might not be aware of the content, but the trader. (Or could this case be solved elsewhere/otherwise?)

3. Paper on Formation

NB: The subject of this paper depends in big parts on the results of the proposed consumer rights directive. Our comments are therefore not detailed and do not anticipate comments on this issue once the consumer rights directive is adopted.

1. Requirements for the conclusion of a contract [Articles II.-4:101 and II.-1:106]

(1) A contract is concluded if the parties reach a sufficient agreement which they intend will have legal effect.

(2) There are no further general requirements for the conclusion of a contract.

(3) In particular, a contract need not be concluded, made or evidenced in writing nor is it subject to any other requirement as to form [except as specifically required by these rules] [or by rules of the otherwise applicable national law].

BEUC comments:

- Paragraph 3 is not in line with the distance selling and the door-step selling directive, nor with the proposed CRD and it would conflict with many rules in national law, depending on the sectors looked at.
- Moreover the reference to “otherwise applicable national law” raises many questions – as we understand the OI should be self standing – how does this fit?

2. How intention is determined [Article II.-4:102]

The intention of the parties that their agreement will have legal effect is to be determined from their statements and conduct interpreted in accordance with the rules on interpretation.

3. Agreement [Article 4:211 Contracts not concluded through offer and acceptance & Article II.-4:103 Sufficient Agreement]

(1) Agreement may be reached by acceptance of an offer or by conduct of the parties which indicates their consent [to be bound by the same terms]. Where agreement is reached other than by offer and acceptance, the rules in this Chapter apply with appropriate adaptations.

(2) Agreement is sufficient if:

(a) the terms of the contract have been sufficiently defined by the parties for the contract to be given effect; or

(b) the terms of the contract, or the rights and obligations of the parties under it, can be otherwise sufficiently determined for the contract to be given effect.

(3) If one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached.

BEUC’s comments:

- What is the relationship of para 2 with the unfair contract terms directive.
- It is necessary to clarify when the terms of the contract have been “sufficiently defined”. The article does not contain any parameter to establish this aspect of the term.

4. Offer [II. – 4:201]

(1) A proposal amounts to an offer if:

(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 from stock, or a service, at a stated price 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 supply at that price until the stock of goods, or the business’s capacity to supply the service, is exhausted.

BEUC's comments:

- The third paragraph should be improved by specifying that when the offer depends on the quantity of goods, the stock available in the catalogue or medium used for the public advertisement has to be indicated.

5. Revocation of offer [II. – 4:202]

(1) An offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance or, in cases of acceptance by conduct, before the contract has been concluded [under article [II.-4:205(2) or (3)].

(2) An offer made to the public can be revoked by the same means as were used to make the offer.

(3) However, a revocation of an offer is ineffective if:

(a) the offer indicates that it is irrevocable;

(b) the offer states a fixed time for its acceptance; or

(c) it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

(4) Nevertheless, an offeror who would have a right of withdrawal from the contract were it concluded remains able to revoke the offer even in the circumstances set out in paragraph (3). The parties may not, to the detriment of the offeror, exclude the application of this rule or derogate from or vary its effects

- No comments

6. Rejection of offer [II. – 4:203]

When a rejection of an offer reaches the offeror, the offer lapses.

- No comments

7. Acceptance [II. – 4:204]

(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.

(2) Silence or inactivity does not in itself amount to acceptance.

BEUC's comments:

- When the article refers to acceptance by a conduct, it should be specified that such conduct should not leave any doubt that about the offeree's assent.

8. Time of conclusion of the contract II. – 4:205:

(1) If an acceptance has been sent by the offeree the contract is concluded when the acceptance reaches the offeror.

(2) In the case of acceptance by conduct, the contract is concluded when notice of the conduct reaches the offeror.

(3) If by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by doing an act without notice to the offeror, the contract is concluded when the offeree begins to do the act.

BEUC's comments

- If this article is intended to be applied to online contracts, it might be important to count on specific rule for these kinds of contractual modality where the acceptance reaches the offeror almost simultaneously with its emission. In this sense, BEUC suggests to include an article with the technical steps that the parties have to comply to conclude a contract online.

9. Time limit for acceptance [II. – 4:206]

(1) An acceptance of an offer is effective only if it reaches the offeror within the time fixed by the offeror.

(2) If no time has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time.

(3) Where an offer may be accepted by doing an act without notice to the offeror, the acceptance is effective only if the act is done within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

- No comments

10. Late acceptance [II. – 4:207]

(1) A late acceptance is nonetheless effective as an acceptance if without undue delay the offeror informs the offeree that it is treated as an effective acceptance.

(2) If a letter or other communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer is considered to have lapsed.

- No comments

11. Modified acceptance [II. – 4:208]

(1) A reply by the offeree which states or implies additional or different terms which materially alter the terms of the offer is a rejection and a new offer.

(2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.

(3) However, such a reply is treated as a rejection of the offer if:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) the offeror objects to the additional or different terms without undue delay; or

(c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

- No comments

12. Conflicting standard terms [II. – 4:209]

(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.

BEUC's comments:

- In the case of consumer contracts, agreement must be considered reached only if the consumer accepts *all* contract terms otherwise consumers can be misled by terms that at the end do not form part of the contract.

13. Formal confirmation of contract between businesses [II. – 4:210]

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

END