

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

BEUC's preliminary comments on the "non-performance" paper

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Ref.: X/2011/015 - 16/02/2011

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GENERAL REMARKS:

BEUC considers that the structure proposed by the Expert Group (based on the DCFR) is too complex and makes it difficult to identify the rules applicable to consumer contracts. The interplay between the general rules on non-performance, the general rules on non-conformity and those applicable exclusively to consumer contracts is not clear. Obviously a more user-friendly structure is desirable.

SPECIFIC REMARKS:

Section 1: General

Art. 10.101 [III.–1:102] Non-performance

Non-performance of an obligation is any failure to perform the obligation, whether or not excused, and includes delayed performance, defective performance and any other performance which is not in accordance with the terms regulating the obligation.

BEUC's comments:

- BEUC agrees with the proposed text. The concept of non-performance should not be limited to total failure to perform. As indicated in the comments of the DCFR, It might consist also in a delayed or defective performance since the performance does not conform to the terms accepted by the consumer.
- However, in the last part is not clear if a performance not complying with legal obligations is included;

Art. 10.102 [III.–3:101] Remedies available

- (1) If an obligation is not performed by the debtor and the non-performance is not excused, the creditor may resort to any of the remedies set out in this Chapter.
- (2) If the debtor's non-performance is excused, the creditor may resort to any of those remedies except enforcing performance and damages.
- (3) The creditor may not resort to any of those remedies to the extent that the creditor caused the debtor's non-performance

BEUC's comments:

- BEUC agrees that the creditor should have the choice of remedies as indicated in paragraph 2 however regrets the solution adopted for B2C contracts in article 10.902 [IV. A. – 4:201] (Modification of remedies for lack of conformity in a consumer contract for sale) - see comments below

Art. 10.103 [III.–3:102] Cumulation of remedies

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

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BEUC's comments:

- This article is related to article 27 of the Consumer Rights Directive and needs to be re-considered once the consumer rights directive is adopted.
- Nevertheless, does the right to damages mentioned in the article include also any non-pecuniary loss caused by the non conformity?

Art. 10.104 [III.–3:104] Excuse due to an impediment

(1) A debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have taken the impediment into account at the time when the obligation was incurred, or to have avoided or overcome the impediment or its consequences.

(2) Where the excusing impediment is only temporary the excuse has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.

(3) Where the excusing impediment is permanent the obligation is terminated automatically, and so is the creditor's reciprocal obligation. The rules on restitution after termination (Art. 10.XXX) apply.

(4) The debtor has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the creditor within a reasonable time after the debtor knew or could reasonably be expected to have known of these circumstances. The creditor is entitled to damages for any loss resulting from the non-receipt of such notice.

BEUC's comments:

- Paragraph 1 should be interpreted restrictively in consumer contracts and consequently the formula to be adopted should be "nor" instead of "or"
- BEUC wonders whether the situation described in the first part of paragraph 2 could lead to an abuse if the impediment is later overcome, for example through late delivery. The pending consumer rights directive will probably include rules on delivery, which will not incorporate the concept of excuse nor the concept of fundamental non-performance. This provision therefore needs to be adapted in the light of the forthcoming rules for b to c contracts.
- The 1999/44 directive on sales and consumer guarantees does not consider the concept of "excuse" in case of a lack of conformity. The consumer's remedies are fully applicable regardless of an excuse. This should be taken into account as well.
- In paragraph 4 a specific period of time to communicate the impediment, at least for B2C contracts should be mandatory

Art. 10.105 [III.–3:105] Term excluding or restricting remedies

A term of a contract which purports to exclude or restrict liability to pay damages for personal injury (including fatal injury) caused intentionally or by gross negligence is void.

BEUC's comments:

- This provision should be placed in the section dedicated to unfair contract terms.
- The proposed text is not in line with the unfair contract terms directive, which refers to ANY liability for personal injury. The text proposed introduces a

subjective factor (“caused intentionally or by gross negligence”) that does not exist in the 1993 Unfair Contract Terms Directive nor in the pCRD and that would be detrimental to consumers since damages caused by other situations – for example simple negligence - be exempted contractually by the trader.

As a general principle, we would ask the expert group to clearly identify those provisions which are covered by the consumer acquis as to ensure that the standards of the acquis are taken into account.

[Art. 10.106 [III.-3:107] Failure to notify non-conformity¹

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

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

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

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

BEUC's comments:

- Although in the last paragraph it is indicated that the articles does not apply to B2C contracts; the sounding board was asked whether a general obligation to notify the non conformity should be imposed also to consumer contracts and if such a notice has to be given in “reasonable time” or if another solution could be preferable.

BEUC welcomes paragraph 4. We consider that a duty to notify the defect which is appropriate for b to b contracts, but must not be imposed to consumer contracts. This would lead to a lowering of consumer protection standards in many MS and is not justified.

Art. 10.107 [III.-3:108] Business unable to fulfil consumer’s order by distance communication²

(1) Where a business is unable to perform its obligations under a contract concluded with a consumer by means of distance communication, it is obliged to inform the consumer immediately and to offer refund of any sums paid by the consumer without undue delay and in any case within 30 days. The business is obliged to inform the consumer about the right to terminate the contract and consumer’s remedies for non-performance remain unaffected.

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

¹ If the scope of the instrument is restricted to Sales, this provision will need to be deleted here and merged with the sales specific provisions in Section 10. It should, however, be retained if other contracts are covered as well.

² The admissibility of this provision depends on a closer examination of the effects of the CRD’s maximum harmonization and omission of such a provision in the CRD, as well as of the impact of the CRD on the Consumer Sales Directive.

BEUC's comments:

We do not comment at this stage on this Article as it was said in the last SB meeting of 26 January that this provision would be changed and integrated elsewhere. As said previously, the pending consumer Rights directive will stipulate specific rules on delivery.

Section 2: Cure by debtor

Art. 10.201 Right to cure

- (1) The debtor may, at its own expense, cure non-performance, provided that
 - (a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;
 - (b) cure is appropriate in the circumstances;
 - (c) the creditor has no legitimate interest in refusing cure;
 - (d) the non-performance doesn't amount to a fundamental non-performance; and
 - (e) cure is effected promptly and without significant inconvenience to the creditor.
- (2) The right to cure is not precluded by notice of termination.
- (3) Upon effective notice of cure, rights of the creditor that are inconsistent with the debtor's performances are suspended until the time for cure has expired.
- (4) The creditor may withhold performance pending cure.
- (5) Notwithstanding cure, the creditor retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

BEUC's comments:

It is not clear what cure means.

- This concept does not exist in the current consumer acquis. Does it cover only repair or also other remedies for lack of conformity or other non-performance reasons? This concept is currently not applicable in the field of lack of conformity for b to c contracts in all MS. Remedies should be available to the consumer on his/her choice, depending on certain criteria, which must be further specified, such as for example in the field of lack of conformity, the non-applicability of rescission of the contract in case of a minor defect. BEUC is opposed to the introduction of the general principle of a debtors right to cure.

Art. 10.202[III.–3:205] Return of replaced item

- (1) Where the debtor has, whether voluntarily or in compliance with an order under 10.302 (Enforcement of non-monetary obligations), remedied a non-conformity by replacement, the debtor has a right and an obligation to take back the replaced item at the debtor's expense.
- (2) The creditor is not liable to pay for any use made of the replaced item in the period prior to the replacement.
 - - BEUC welcomes this rule.

Section 3: Right to enforce performance

Art. 10.301 [III.–3:301] Enforcement of monetary obligations

- (1) The creditor is entitled to recover money payment of which is due.
- (2) Where the creditor has not yet performed the 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.

BEUC's comments:

- - No comments

Art. 10.302 [III.–3:302] Enforcement of non-monetary obligations

- (1) The creditor is entitled to enforce performance of an obligation other than one to pay money.
- (2) Performance includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation.
- (3) Performance cannot, however, be enforced where:
 - (a) performance would be unlawful or impossible;
 - (b) the burden or expense of performance would be disproportionate to the benefit the creditor would obtain; or
 - (c) performance would be of such a personal character that it would be unreasonable to enforce it.
- (4) The creditor loses the right to enforce performance if performance is not requested within a reasonable time after the creditor has become, or could reasonably be expected to have become, aware of the non-performance.

BEUC's comments:

- - What is the relationship between the last paragraph and Art. 10.902 [IV. A. – 4:201] Modification of remedies for lack of conformity in a consumer contract for sale? From this last provision the right to enforce performance is excluded as a remedy in consumer contracts.

Art. 10.303 [III.–3:303] Damages not precluded

The fact that a right to enforce performance is excluded under the preceding Article does not preclude a claim for damages.

- - No comments

Section 4: Withholding performance

Art. 10.401 [III.–3:401] Right to withhold performance of reciprocal obligation

- (1) A creditor who is to perform at the same time as, or after, the debtor performs has a right to withhold performance until the debtor has tendered performance or has performed.
- (2) The performance which may be withheld under this Article is the whole or part of the performance as may be reasonable in the circumstances.

- - No comments

Section 5: Termination

Art. 10.501 [III.–3:501] Definition and effects of termination

In this Section “termination” means the termination of the contractual relationship in whole or in part and “terminate” has a corresponding meaning.

- - No comments

Art. 10.502 [III.–3:502] Termination for fundamental non-performance

(1) A creditor may terminate if the debtor’s non-performance one or more obligations under the contract is fundamental.

(2) Non-performance is fundamental if:

- (a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or
- (b) it is intentional or reckless and gives the creditor reason to believe that the debtor’s future performance cannot be relied on.

BEUC’s comments:

- - BEUC has doubts in relation to the requirements to assess if the non-performance is fundamental: what the creditor was “entitled to expect” under the contract and from which he/she has to be “substantially deprived”. This is very difficult to prove and in addition what moved the consumer to conclude the contract (for example buy a present for an anniversary) it is not generally expressed in the contract terms.
- - In addition, it is not clear whether the non-performance substantially deprives the creditor of what he or she was entitled to expect. As indicated in the comments of the DCFR this has to be assessed on a case by case basis which is not a good solution for consumer contracts where the trader will decide this situation and the consumer will not be able to withhold the payment due to the exclusion of article Art. 10.902 last paragraph.
- In the current consumer acquis, we do not have a definition of what fundamental non-performance is. Existing concepts such as a minor/major defect, should be brought into context. Does a fundamental non-performance in all circumstances require a major (as contrary to minor) defect?

Art. 10.503 [III.–3:503] Termination after notice fixing additional time for performance

(1) A creditor may terminate in a case of delay in performance which is not in itself fundamental if the creditor gives a notice fixing an additional period of time of reasonable length for performance and the debtor does not perform within that period.

(2) If the period fixed is unreasonably short, the creditor may terminate only after a reasonable period from the time of the notice.

BEUC’s comments:

- As says the future consumer rights directive needs to be taken into account here. The concept of reasonable time needs clarification. Moreover for consumer contracts we favour a rule which gives the consumer the choice in all circumstances to choose between immediate termination and additional time

period for delivery. Moreover, an automatic termination of the contract once the additional time has expired exists currently in many MS and is the better concept for b to c contracts.

Art. 10.504 [III.–3:504] Termination for anticipated non-performance

A creditor may terminate before performance is due if the debtor has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental.

- No comments

Art. 10.505 [III.–3:505] Termination for inadequate assurance of performance

A creditor who reasonably believes that there will be a fundamental non-performance by the debtor may terminate if the creditor demands an adequate assurance of due performance and no such assurance is provided within a reasonable time.

- No comments

Art. 10.506 [III.–3:506] Scope of right to terminate

(1) Where the debtor's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part to which a counter-performance can be apportioned, the creditor may terminate only in relation to that part, unless the creditor cannot reasonably be expected to accept performance of the other parts or the non-performance is fundamental in relation to the contract as a whole.

(2) Where the debtor's obligations under the contract are not divisible or the counter-performance cannot be apportioned, the creditor may terminate only if the non-performance is fundamental in relation to the contract as a whole.

BEUC's comments:

- No comments

Art. 10.507 [III.–3:507] Notice of termination

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

(2) Where a notice under 10.503 (Termination after notice fixing additional time for performance) provides for automatic termination if the debtor does not perform within the period fixed by the notice, termination takes effect after that period or a reasonable length of time from the giving of notice (whichever is longer) without further notice.

BEUC's comments:

- As previously indicated, in consumer contract giving notice after additional time, is not the preferred concept in many MS. The consumer rights directive needs to be awaited. As a general point, notice should not be subject to any kind of formality.

Art. 10.508 [III.–3:508] Loss of right to terminate

(1) If performance has been tendered late or a tendered performance otherwise does not conform to the contract the creditor loses the right to terminate under this Section unless notice of termination is given within a reasonable time.

(2) Where the creditor has given the debtor a period of time to cure the non-performance under 10.201 (Cure by debtor: general rules) the time mentioned in paragraph (1) begins to run from the expiry of that period. In other cases that time begins to run from the time when the creditor has become, or could reasonably be expected to have become, aware of the tender or the non-conformity.

(3) A creditor loses a right to terminate by notice under 10.503 (Termination after notice fixing additional time for performance), 10.504 (Termination for anticipated non-performance) or 10.505 (Termination for inadequate assurance of performance) unless the creditor gives notice of termination within a reasonable time after the right has arisen.

BEUC's comments:

- This rule should not apply to b to c contracts. At the very least it should be considered that if notice is given late, whether this has had a detrimental effect on the trader or not. See also our comments on the Articles referred to.

Art. 10.509 [III.–3:509] Effect on obligations under the contract

(1) On termination under this Section, the outstanding obligations or relevant part of the outstanding obligations of the parties under the contract come to an end.

(2) Termination does not, however, affect any provision of the contract for the settlement of disputes or other provision which is to operate even after termination.

(3) A creditor who terminates under this Section retains existing rights to damages or a stipulated payment for non-performance and in addition has the same right to damages or a stipulated payment for non-performance as the creditor would have had if there had been non-performance of the now extinguished obligations of the debtor. In relation to such extinguished obligations the creditor is not regarded as having caused or contributed to the loss merely by exercising the right to terminate.

BEUC's comments:

- No comments

Section 6: Restitution

[...]

Section 7 Price reduction**Art. 10.701 [III.–3:601] Right to reduce price**

(1) A creditor who accepts a performance not conforming to the contract may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received in performance at the time it was made compared to the value of what would have been received by a conforming performance.

(2) A creditor who is entitled to reduce the price under the preceding paragraph and who has already paid a sum exceeding the reduced price may recover the excess from the debtor.

(3) A creditor who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.

(4) This Article applies with appropriate adaptations to a reciprocal obligation of the creditor other than an obligation to pay a price.

BEUC's comments:

- We would like to ask for clarification of some aspects:

First, it is not specified how the reduction of price will be effectuated.

Second, there is no reference to the exercise of the right to claim the price reduction.

Third, it is not clear if there is a time limit to exercise this right. If the OI would incorporate the rules on prescription of the DCFR (art. III-7:101), they apply in principle only to the rights to perform an obligation.

Fourth, the provision on how to assess the reduced value could function for the cases of defective performance but not for the other situations previewed in article Art. 10.101 (DCFR III.-1:102) like delayed performance or any performance not in conformity with the contract.

**Section 8: Damages and interest
[...]**

Section 9: Buyer's remedies for lack of-conformity

Art. 10.901 [new] Overview of buyer's remedies for lack of conformity

If the goods are not in conformity with the contract, the buyer may

- (a) demand the remedying of the lack of conformity by repair or replacement under Section 3 of this Chapter;
- (b) withhold the payment of the price under Section 4 of this Chapter;
- (c) terminate under Section 5 of this Chapter;;
- (d) reduce the price under Section 7 of this Chapter; and
- (e) claim damages under Section 8 of this Chapter;

if the requirements for these remedies are satisfied and if the remedies chosen are not incompatible [with one another].

- - See comments to next article

Art. 10.902 [IV. A. – 4:201] Modification of remedies for lack of conformity in a consumer contract for sale

(1) In a consumer contract for sale,

- (a) the business has no right to cure under Article 10.201, [except for the case where the business has delivered goods before the time for delivery and the exercise of the right to cure does not cause the buyer unreasonable inconvenience];
- (b) the consumer may choose between repair and replacement where the business must remedy a lack of conformity, unless repair or replacement would be unlawful, impossible or disproportionate to the benefit the consumer would obtain;³
- (c) the consumer may terminate for non-performance under Section 5 in the case of any lack of conformity, unless the lack of conformity is minor; and
- (d) Article 10.508 (Loss of right to terminate) does not apply.

(2) If the consumer has demanded the remedying of the lack of conformity by repair

³ The term "disproportionate to the benefit the consumer would obtain" needs to be crosschecked against the (rather cumbersome and unclear) Art. 3 (3) Consumer Sales Directive and the outcome of the pending ECJ case C-65/09 (Gebr. Weber GmbH v. Jürgen Wittmer).

or replacement and if this remedy is not unlawful, impossible or disproportionate to the benefit the consumer would obtain, the consumer may only resort to other remedies, except withholding the payment of the price, if the business has not completed repair or replacement within a reasonable time.

BEUC's comments :

- We welcome paragraph 1 a).
- It is not clear from this provision what remedies are initially available to the consumer. BEUC's suggest that it should be set out clearly, that the consumer has a freedom of choice of remedies as provided in article 10.102 [III.-3:101]
- The interplay between this Article and other provision in the general part is not clear: If paragraph 1 (c) is read together with article 10.503 the consumer apparently would not be able to terminate the contract immediately but has to give an additional period of time for the performance and if the non-performance occurs it has to be fundamental. This makes very difficult for consumers to exercise the right to terminate the contracts. Furthermore, there is a contradiction between paragraph 1 (c) and article 10.507: in the first provision the consumer may terminate the contract when the second provides for automatic termination after the first notice.
- In relation to the last paragraph, the choice of the consumer to require a price reduction in case of non-performance should not be subject to the fact that the trader has not completed the repair or replacement.

Art. 10.903 [IV. A. – 4:101] Limits on derogation from remedies for non-conformity in a consumer contract for sale

In a *consumer contract for sale*, any contractual term or agreement concluded with the seller before a lack of conformity is brought to the seller's attention which directly or indirectly waives or restricts the remedies of the buyer provided in this Chapter in respect of the lack of conformity is not binding on the consumer.

BEUC's comments:

- This provision refers to an unfair contract term so should be placed in that section.
- In addition, the rule should not allow the introduction of a clause that restricts the remedies available for the consumer after the lack of conformity. This provision in comparison to the existing rules in the 1993 Unfair Contract Terms Directive is more detrimental since in the latter such a difference does not exist and in consequence the unfair term applied before and after the lack of conformity (see annex of the directive, point b4)).

⁴ (b) *inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;*

Section 10: Examination and notification under non-consumer contracts for sale

Art. 10.1001 [IV. A. – 4:301] Examination of the goods

(1) The buyer should examine the goods, or cause them to be examined, within as short a period as is reasonable in the circumstances. Failure to do so may result in the buyer losing, under 10.106 (Failure to notify non-conformity) as supplemented by 10.1002 (Notification of lack of conformity), the right to rely on the lack of conformity.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit, or redispached by the buyer before the buyer has had a reasonable opportunity to examine them, and at the time of the conclusion of the contract the seller knew or could reasonably be expected to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

(4) This Article does not apply to a consumer contract for sale.

- - No comments

Art. 10.1002 [IV. A. – 4:302] Notification of lack of conformity

(1) In a contract between two businesses the rule in 10.106 (Failure to notify non-conformity) requiring notification of a lack of conformity within a reasonable time is supplemented by the following rules.

(2) The buyer in any event loses the right to rely on a lack of conformity if the buyer does not give the seller notice of the lack of conformity at the latest within two years from the time at which the goods were actually handed over to the buyer in accordance with the contract.

(3) If the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice under paragraph (2) does not expire before the end of the agreed period.

(4) Paragraph (2) does not apply in respect of third party claims or rights pursuant to IV. A. – 2:305 (Third party rights or claims in general) and IV. A. – 2:306 (Third party rights or claims based on industrial property or other intellectual property).

- - No comments

Art. 10.1003 [IV. A. – 4:303] Notification of partial delivery

The buyer does not have to notify the seller that not all the goods have been delivered, if the buyer has reason to believe that the remaining goods will be delivered.

- - No comments

Art. 10.1004 [IV. A. – 4:304] Seller's knowledge of lack of conformity

The seller is not entitled to rely on the provisions of 10.1001 (Examination of the goods) or 10.1002 (Notification of lack of conformity) if the lack of conformity relates to facts of which the seller knew or could reasonably be expected to have known and which the seller did not disclose to the buyer.

- - No comments

END