

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

BEUC's comments - chapter on sales

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

BEUC's comments to the chapter on sales

Chapter 1: Scope and definitions (*Placeholder for draft by Commission Services*)

Chapter 2: Obligations of the seller

Section 1: Overview

IV. A. – 2:101: Overview of obligations of the seller

The seller must:

- (a) deliver the goods which are in conformity with the contract;
- (b) transfer the ownership of the goods;
- (c) deliver such documents representing or relating to the goods as may be required by the contract.

BEUC's comments:

- It should be added that the seller shall deliver the goods including parts and accessories as established in many Member States (At, BE, FR, ES, CZ, EE, IT, LT, LV, NL, PL, SI). This would be only partially covered by point c) if such documents are considered as accessories.
- There should be also an express reference to the obligation to deliver the goods at the time and place agreed. The Expert Group has explained that these aspects are not mentioned because of a matter of legislative technique and that such obligations are included in other articles. However, we consider that it is better to have in one general article the overview of all the obligations that later are developed in the subsequent articles.

Section 2: Delivery of goods and documents

IV. A. – 2:XXX [new] Delivery in a consumer contract for sale¹

- (1) In a consumer contract for sale, the business must deliver the goods by transferring the physical possession [or control] of the goods to the consumer.
- (2) If in a consumer contract for sale the contract involves carriage of goods, the obligation to deliver includes the carriage.
- (3) The time within which the business must perform the obligation to deliver is to be determined under Art. III.-2:102 (Time of performance).²

¹ Drafted along Art. 22 (1) of the draft Consumer Rights Directive (as of Dec 2010), which reads:
"Unless the parties have agreed otherwise, the trader shall deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay after the conclusion of the contract". May need adaptation to outcome of legislative process.

² Sanctions for delay will be spelled out in the chapter on remedies.

BEUC's comments:

- In the first paragraph the formula “or control” should not be included. This term is vague and would not imply and added value to those situations where the consumer receives the good in his or her house since most legal systems consider this as physical possession. In addition, for more clarity, a definition of possession should be included.

IV. A. – 2:201: Delivery in non-consumer cases

(1) The seller fulfils the obligation to deliver by making the goods, or where it is agreed that the seller need only deliver documents representing the goods, the documents, available to the buyer.

(2) If the contract involves carriage of the goods by a carrier or series of carriers, the seller performs the obligation to deliver by handing over the goods to the first carrier for transmission to the buyer and by delivering to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods.

(3) In this Article, any reference to the buyer includes a third person to whom delivery is to be made in accordance with the contract.

(4) This article does not apply to a consumer contract of sale.

- No comments

IV. A. – 2:204: Carriage of the goods

(1) If the contract requires the seller to arrange for carriage of the goods, the seller must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(2) If the seller, in accordance with the contract, hands over the goods to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(3) If the contract does not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance.

- No comments

Section 3: Conformity of the goods

IV. A. – 2:301: Conformity with the contract

(1) The goods do not conform with the contract unless they:

- (a) are of the quantity, quality and description required by the contract;
- (b) are contained or packaged in the manner required by the contract; and
- (c) are supplied along with any accessories, installation instructions or other instructions required by the contract.

(2) Where the parties have not agreed otherwise under paragraph (1), the goods do not conform with the contract, if the requirements of Articles IV. A. – 2:302 (Criteria for conformity of the goods), IV. A. – 2:304 (Incorrect installation under a consumer contract for sale) and IV. A. – 2:305 (Third party rights or claims) are not met.

BEUC's comments:

- This article depends on the negotiations of article 24 of the Consumer Rights Directive.
- Nevertheless, it should be clarified if points (a) and (b) include pre-contractual statements as indicated in article IV. A. – 2:302.

IV. A. – 2:301a: Agreement with a consumer on conformity

(1) In a consumer contract for sale, the business is not liable under IV. A. – 2:302 (Criteria for conformity of the goods), IV. A. – 2:304 (Incorrect installation under a consumer contract for sale), IV. A. – 2:305 (Third party rights or claims) if, at the time of the conclusion of the contract, the consumer knew of the specific conditions of the goods and accepted the goods as being in conformity with the contract when concluding it.

(2) 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:

- In paragraph 2 should be specified that the consumer has to give his or her express consent (the word “expressly” should be added before “accepted”. It should be also indicated prominently in which conditions the consumer accepts the good. There could be hidden defects or defects that the consumer was not aware of and consequently be considered as accepted.
- Furthermore it is not clear whether the agreement covers all the specific conditions.
- Finally, it should be clarified who has the burden of proof of the specific conditions of the good.

IV. A. – 2:302: Criteria for conformity of the goods

The goods must:

(a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement;

(b) be fit for the purposes for which goods of the same description would ordinarily be used;

(c) possess the qualities of goods which the seller held out to the buyer as a sample or model;

(d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;

(e) be supplied along with such accessories, installation instructions or other instructions as the buyer may reasonably expect to receive;

(f) possess the qualities and performance capabilities held out in any statement which forms part of the terms of the contract by virtue of II. – 9:102 (Certain pre-contractual statements regarded as contract terms); and

(g) possess such qualities and performance capabilities as the buyer may reasonably expect.

BEUC's comments:

- This article as the previous one depends on article 24 of the Consumer Rights Directive.
- The last part of point (a) is confusing and vague. The solution of the proposed Consumer Rights Directive in line with the Sales of Good Directive looks much clearer: *"(b) they are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted"*
- The article should also include as a criterion the consideration of the purpose, the appearance and finish, the freedom from minor defects and the durability of the product, availability of after-sales services and of spare parts and the conformity to legal requirements regarding the safety of goods.

IV. A. – 2:304: Incorrect installation under a consumer contract for sale

Where goods supplied under a consumer contract for sale are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as a lack of conformity of the goods if:

- (a) the goods were installed by the seller or under the seller's responsibility; or
- (b) the goods were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.

- No comments

IV. A. – 2:305: Third party rights or claims

The goods must be free from any right or³ claim of a third party[, including rights or claims based on intellectual property].⁴

- No comments

IV. A. – 2:307: Buyer's knowledge of lack of conformity in a non-consumer case

In a contract which is not a consumer contract for sale, the seller is not liable for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

- No comments

IV. A. – 2:308: Relevant time for establishing conformity

(1) The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer.

(2) In a consumer contract for sale, any lack of conformity which becomes apparent within six months of the time when risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or the nature of the lack of conformity.

³ Shall only an obviously unfounded claim be excluded (CISG) or also a not reasonably well founded one (DCFR)? In case we follow the CISG: shall it read: "... or not obviously unfounded claim..."?

⁴ The CISG wording "Industrial property or other intellectual property" is rather old-fashioned. Traditionally trademarks, patents and design rights were labelled as "industrial property" and copyright and the like as non industrial or "other" intellectual property rights, but this distinction is now really out-dated (cf. also the list in TRIPS).

(3) In a case governed by IV. A. – 2:304 (Incorrect installation under a consumer contract for sale) any reference in paragraphs (1) or (2) to the time when risk passes to the buyer is to be read as a reference to the time when the installation is complete.

BEUC's comments:

- This article depends on the negotiation of art. 28 CRD (Time and burden of proof).
- Nevertheless, it is often very difficult for a consumer to show that a defective product was already defective at the time of delivery. The help of an expert is often necessary to provide such proof, and it is much easier for industry to argue technical details. Retailers will be able to produce proof of the contrary. Against his background the proposed 6 month period for the reversal of the burden of proof should be extended to one year.

IV. A. – 2:309: Limits on derogation from conformity rights 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 rights resulting from the seller's obligation to ensure that the goods conform to the contract is not binding on the consumer.

BEUC's comments:

- This rule should be placed in the section dedicated to unfair contract terms.
- The expression "concluded with the seller" should be replaced by "concluded with the consumer"
- The provision should not cover only the cases where the "agreement" is before the lack of conformity but also "after" since in the current text of the Unfair Contract Terms Directive such distinction is not included (point b of the annex):

Chapter 3: Obligations of the buyer

IV. A. – 3:101: Main obligations of the buyer

The buyer must:

- (a) pay the price;
- (b) take delivery of the goods; and
- (c) take over documents representing or relating to the goods as may be required by the contract.

IV. A. – 3:103: Price fixed by weight

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

IV. A. – 3:104: Taking delivery

The buyer fulfils the obligation to take delivery by:

- (a) doing all the acts which could reasonably be expected in order to enable the seller to perform the obligation to deliver; and

(b) taking over the goods, or the documents representing the goods, as required by the contract.

IV. A. – 3:105: Early delivery and delivery of excess quantity

(1) If the seller delivers all or part of the goods before the time fixed, the buyer may take delivery or, except where acceptance of the tender would not unreasonably prejudice the buyer's interests, refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for by the contract, the buyer may retain or refuse the excess quantity.

(3) If the buyer retains the excess quantity it is regarded as having been supplied under the contract and must be paid for at the contractual rate.

(4) In a consumer contract for sale paragraph (3) does not apply if the buyer believes on reasonable grounds that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered. In such a case the rules on unsolicited goods apply.

BEUC's comments

- According to this provision the consumer can retain or refuse an excess quantity. However in many consumer cases the consumer may not be aware that an excess quantity had been delivered. Thus, it should be clarified what the link between this provision and those on unsolicited goods is.
- In paragraph 3 it should be made clear that it is the seller's responsibility to arrange for collection of the excess if the buyer does not wish to accept them.

Chapter 4: Remedies *(see draft on Non-Performance Sections 9 and 10)*

Chapter 5: Passing of risk

Section 1: General provisions

IV. A. – 5:101: Effect of passing of risk

Loss of, or damage to, the goods after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

- No comments

IV. A. – 5:102: Time when risk passes in non-consumer cases

(1) The risk passes when the buyer takes over the goods or the documents representing them.

(2) However, if the contract relates to goods not then identified, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or other wise.

(3) The rule in paragraph (1) is subject to the Articles in Section 2 of this Chapter.

(4) This article does not apply to a consumer contract of sale.

IV. A. – 5:103: Passing of risk in a consumer contract for sale⁵

(1) In a consumer contract for sale, the risk does not pass until the consumer or a third person other than the carrier and designated by the consumer for this purpose has acquired the physical possession of the goods.

(2) Paragraph (1) does not apply where the consumer fails to perform the obligation to take over the goods and the non-performance is not excused under III. – 3:104 (Excuse due to an impediment). In this case the risk passes at the time when the consumer, or the third person, would have acquired the physical possession of the goods if the obligation to take them over had been performed.

(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:

- This provision depends on the negotiations of article 23 of the Consumer Rights Directive.

Section 2: Special rules

- General remark: Are these rules applicable to B2C contracts? In some cases there are contradictions in relation to article IV. A. – 5:103

IV. A. – 5:201: Goods placed at buyer's disposal

(1) If the goods are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer from the time when the goods should have been taken over, unless the buyer was entitled to withhold taking of delivery under III. – 3:401 (Right to withhold performance of reciprocal obligation).

(2) If the goods are placed at the buyer's disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at the buyer's disposal at that place.

BEUC's comments:

- Is this rule applicable to B2C? If yes, the risk should pass to the consumer when he or she collects the good in the indicated place in the contract terms.
- In addition paragraph 2 could lead to abuses if the risk passes when the consumer is aware that the goods are at his or her disposal. For example, the risk might pass to the consumer when he or she reads in his or her mailbox that the good was delivered to a neighbour although the consumer has not the physical possession.

IV. A. – 5:202: Carriage of the goods

(1) This Article applies to any contract of sale which involves carriage of goods.

(2) If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract.

(3) If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.

⁵ Provision phrased along Art. 23 draft CRD (as of 10 Dec 2010) including recital 38b and extended to all consumer contracts. May need adaptation to outcome of legislative process.

(4) The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk.

BEUC's comments:

- Is this article applicable to B2C contracts? If yes, it should be adopted according to article 5:103 (to be adapted in relation to article 23 of the Consumer Rights Directive) which establishes that the risks passes to the consumer once he or she acquires the physical possession of the good. This article should not apply to B2C contracts. The risk should always pass to the consumer once he or she acquires the material possession or indicates a third party to receive it on her or his behalf.

V. A. – 5:203: Goods sold in transit

(1) This Article applies to any contract of sale which involves goods sold in transit.
2) The risk passes to the buyer at the time the goods are handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer as from the time of the conclusion of the contract.
(3) If at the time of the conclusion of the contract the seller knew or could reasonably be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

- Idem as before, this rule cannot be applied to B2C transactions