

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

Beuc's preliminary comments on "Pre-contractual information duties and invalidity",
"Change on the circumstances" and "Performance"

Contact: Ursula Pachl – consumercontracts@beuc.eu

Prepared by Ursula Pachl and Agustin Reyna

Ref.: X/2011/005 - 1/02/2011

BEUC, the European Consumers' Organisation

80 rue d'Arlon, 1040 Bruxelles - +32 2 743 15 90 - www.beuc.eu

 EC register for interest representatives: identification number 9505781573-45 

Contents:

- 4. Pre-contractual information duties and invalidity
- 5. Change on the circumstances
- 6. Performance

4. PRE-CONTRACTUAL INFORMATION DUTIES AND INVALIDITY

Art 2/1 [II.–3:101]: Duty to disclose information about goods, other assets and services

Before the conclusion of a contract for the supply of goods, other assets or services by a business to another person, the business has a duty to disclose to the other person such information concerning the goods, other assets or services to be supplied as the other person can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances and (whether the other party is a consumer or another business) the relative expertise of the parties.

BEUC's comments

- BEUC considers that the structure of the DCFR on information duties is too complex. The rules on consumer information will depend on the proposed consumer rights directive. Although this general rule for information duties represents an improvement, we think that a common list of information requirements should be incorporated – as proposed by the consumer rights directive. This would facilitate the identification of the information that businesses have to provide to consumers without the need of referring to different provisions disseminated in the instrument.

[Art 2/2 [II.–3:103]: Duty to provide information when concluding a distance or off-premises contract with a consumer

(1) A business concluding a distance contract or off-premises contract with a consumer has a duty, as appropriate in the circumstances, to provide clear information about the main characteristics of any goods, other assets or services to be supplied, the price, the address and identity of the business with which the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available right of withdrawal or redress procedures. This information must be provided a reasonable time before the conclusion of the contract. The information on the right of withdrawal must, as appropriate in the circumstances, also be adequate in the sense of II.–5:104 (Adequate information on the right to withdrawal).

(2) Where more specific information duties are provided for specific situations, these take precedence over the general information duty under paragraph (1).

(3) The business bears the burden of proof that it has provided the information required by this Article.]

BEUC's comments:

- Paragraph 1 of this article depends on the result of the negotiations on Chapter III of the CRD. However, we can point out now that the proposed article by the Expert Group is less protective than the pCRD. In this sense, articles 5 and 9 of

Contact: Ursula Pachl – consumercontracts@beuc.eu

Prepared by Ursula Pachl and Agustin Reyna

Ref.: X/2011/005 - 1/02/2011

BEUC, the European Consumers' Organisation

80 rue d'Arlon, 1040 Bruxelles - +32 2 743 15 90 - www.beuc.eu

 [EC register for interest representatives](#): identification number 9505781573-45 

the pCRD contain information details that are missing in the proposed text such as taxes applied to the price, delivery costs, arrangement for payment, delivery and performance, existence of after sales services and commercial guarantees, duration of the contract (if it is open-ended), minimum duration of consumers' obligations, the existence and the conditions of deposits or other financial guarantee, etc.

- The duty to inform "as appropriate to the circumstances" is too vague and deviates from the text of the pCRD. Such a reference should be deleted since the general rule should be the obligation to inform consumers without any mitigating factor.

[Art 2/3 [II.–3:104]: Information duties in real time distance communication

(1) When initiating real time distance communication with a consumer, a business has a duty to provide at the outset explicit information on its name and the commercial purpose of the contact.

(2) Real time distance communication means direct and immediate communication of such a type that one party can interrupt the other in the course of the communication. It includes telephone and electronic means such as voice over internet protocol and internet related chat, but does not include communication by electronic mail.

(3) The business bears the burden of proof that the consumer has received the information required under paragraph (1).

(4) If a business has failed to comply with the duty under paragraph (1) and a contract has been concluded as a result of the communication, the other party has a right to withdraw from the contract by giving notice to the business within the period specified in II.–5:103 (Withdrawal period).

(5) A business is liable to the consumer for any loss caused by a breach of the duty under paragraph (1).]

BEUC's comments:

- This provision could be helpful but again depends on the final results of the proposed consumer rights directive; it needs to be seen whether this provision could offer a better protection than article 9 in combination with Article 11 of the pCRD. Moreover, it is necessary to take into account the definition of distance contracts which again depends on the pCRD.
- Paragraph 2 should be moved to the chapter on definitions

Art 2/4 [II.–3:105]: Formation by electronic means

(1) If a contract is to be concluded by electronic means and without individual communication by each of the parties, a business has a duty to provide information about the following matters before the other party makes or accepts an offer:

(a) the technical steps to be taken in order to conclude the contract;

(b) whether or not a contract document will be filed by the business and whether it will be accessible;

(c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;

(d) the languages offered for the conclusion of the contract;

(e) any contract terms used.

(2) The business has a duty to ensure that the contract terms referred to in paragraph (1)(e) are available in textual form.

(3) If a business has failed to comply with the duty under paragraph (1) and a contract has been concluded in the circumstances there stated, the other party has a right to withdraw from the contract [by giving notice to the business within the period specified in II.–5:103 (Withdrawal period).]

BEUC's comments:

- In the case of the conclusion of contract through electronic means, it should be indicated which are those technical steps that the parties have to comply in order to consider the contract concluded, for example the confirmation of the order placed by the consumer (see BEUC's comments re article on time for the conclusion of the contract (II. – 4:205))

Art 2/5 [II.–3:106]: Clarity and form of information

(1) A duty to provide information imposed on a business under this Chapter is not fulfilled unless the requirements of this Article are satisfied.

(2) The information must be clear and precise, and expressed in plain and intelligible language. When a business is under a duty to provide information to a consumer, the information must be sufficiently prominent and clearly distinguished from any other information that the business chooses to provide that an average consumer can readily identify the information which is required.

(3) Where rules for specific contracts require information to be provided on a durable medium or in another particular form it must be provided in that way.

(4) In the case of contracts between a business and a consumer concluded at a distance, information about the main characteristics of any goods, other assets or services to be supplied, the price, the address and identity of the business with which the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures, as may be appropriate in the particular case, must be confirmed in textual form on a durable medium at the time of conclusion of the contract. The information on the right of withdrawal must also be adequate in the sense of II.–5:104 (Adequate information on the right to withdraw).

BEUC's comments:

- This provision depends on article 31 pCRD
- The article should also stipulate a sanction in case the trader supplies a term in breach of the duty of transparency, namely that on this ground alone it can be invalid;
- paragraph 4 again depends on the result of the p CRD as said above in relation to Article 2/ 1, more information items need to be included; this provision deviates considerably from the text of articles 5 and 9 of the pCRD to the disadvantage of the consumer.

[Art 2/6 [II.–3:107]: Information about price and additional charges

Where under this Chapter a business has a duty to provide information to a consumer about price, the duty is not fulfilled unless what is provided:

(a) includes information about any deposits payable, delivery charges and any additional taxes and duties where these may be indicated separately;

(b) if an exact price cannot be indicated, gives such information on the basis for the calculation as will enable the consumer to verify the price; and

(c) if the price is not payable in one sum, includes information about the payment schedule.]

BEUC's comments

- The article depends on the results of the pCRD.
- The trader should be obliged to inform on the final price including charges and delivery cost so the consumer is aware of the total amount he or she would have to afford. In this sense, the proposed text needs to clarify that the price indicated in the pre-contractual information is the final price, the one that the consumer will exactly pay. This is in order to prevent the addition of further costs not foreseen by the consumer after giving his contractual statement.

[Art 2/7 [II.–3:108]: Information about address and identity of business

(1) Where under this Chapter a business has a duty to a consumer to provide information about its address and identity, the duty is not fulfilled unless the information includes:

- (a) the name of the business;*
- (b) any trading names relevant to the contract in question;*
- (c) the registration number in any official register, and the name of that register;*
- (d) the geographical address of the business;*
- (e) contact details;*
- (f) where the business has a representative in the consumer's [Member] state of residence, the address and identity of that representative;*
- (g) where the activity of the business is subject to an authorisation scheme, the particulars of the relevant supervisory authority; and*
- (h) where the business exercises an activity which is subject to VAT, the relevant VAT identification number.*

(2) For the purpose of II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage), the address and identity of the business include only the information indicated in (1) (a), (c), (d) and (e).]

BEUC's comments:

- This provision depends on article 5/ 9 of the pCRD
- Regarding the contact details (1, e) the text should specify that the trader should provide a telephone number or any other means of communication that allows the consumer to contact the trader rapidly and in a direct and immediate manner.

Art 2/8 [II. – 7:204]: Liability for loss caused by reliance on incorrect information

A party who supplies information before or at the time a contract is made, whether in compliance with the duties imposed by the articles of this chapter or otherwise, has a duty to take reasonable care to ensure that the information supplied is correct and not misleading. If the party to whom the incorrect or misleading information has been supplied in breach of this duty (the recipient) reasonably relies on the information in concluding a contract with the party who gave the information, the recipient has the remedies set out in article [II-3:109(2)-(5)].

- No comments

Art 2/9 [II.–3:109]: Remedies for breach of information duties

(1) If a business has a duty under II.–3:103 (Duty to provide information when concluding a distance or off-premises contract with a consumer) to provide information to a consumer before the conclusion of a contract from which the consumer has the right to withdraw, the withdrawal

period does not commence until all this information has been provided. Regardless of this, the right of withdrawal lapses after one year from the time of the conclusion of the contract.

(2) Where a business has failed to comply with any duty imposed by the preceding Articles of this Section and a contract has been concluded, and as a result of the incorrect information or the absence of information the other party reasonably understood that the business was undertaking an obligation to him, the business will have that obligation. Remedies provided under Book III, Chapter 3 apply to non-performance of these obligations.

(3) In cases not falling within paragraph (2), where a business has failed to comply with any duty imposed by the preceding Articles of this Section and as a result a contract has been concluded which the other party would not have entered, or would not have entered on the same terms, the business is liable for any loss caused to the other party by the failure. Arts III.-3:702 (Foreseeability), III-3:704 (Loss attributable to creditor) and III-:704 (Loss attributable to creditor) apply with appropriate adaptations.

(4) The remedies provided under this Article are without prejudice to any remedy which may be available under II.-7:201 (Mistake) or II.-7:205 (Fraud).

(5) 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:

- The first paragraph of the proposed article depends on the results of the pCRD. Nevertheless, the right of withdrawal should expire one year from the date the consumer received the information concerning the existence or non existence of such a right and not from the time of the conclusion of the contract.

[Art 5/1 [II-7:201]: Scope of Chapter

This chapter does not deal with invalidity arising from lack of capacity.]

BEUC's comments:

- The rapporteur indicated that in the EG is not decided if the Optional Instrument will deal with this issue. However, it is important to note that invalidity arising from lack of capacity is a key aspect of contract law that concerns also consumer contracts for examples when it comes to contracts concluded by minors.

Art 5/2 [II-7:102]: Initial impossibility or lack of right or authority to dispose

A contract is not invalid, in whole or in part, merely because at the time it is concluded performance of any obligation assumed is impossible, or because a party has no right or authority to dispose of any assets to which the contract relates.

- No comments

Art 5/3 [II. – 7:208]: Third persons

Where a third person for whose acts a party is not responsible is guilty of fraud, threats or unfair exploitation, remedies under this Section are available if the party knew or ought to have known of the relevant facts, or at the time of avoidance has not acted in reliance on the contract.

- No comments

Section 2: Vitiated consent or intention

(i) Fraud

[II-7:204: Reliance on incorrect information: moved to chapter 3, see above]

Art 5/4 [II. – 7:205]: Fraud

(1) A party may avoid a contract when the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose.

(2) A misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. A non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.

(3) In determining whether good faith and fair dealing required a party to disclose particular information, regard should be had to all the circumstances, including:

- (a) whether the party had special expertise;
- (b) the cost to the party of acquiring the relevant information;
- (c) whether the other party could reasonably acquire the information by other means;
- (d) the nature of the information; and
- (e) the apparent importance of the information to the other party.

BEUC's comments:

- It is necessary to establish the link between this provision and the existing rules on Unfair Commercial Practices (Directive 2005/29/EC)
- The reference made in point (c) of para. 3 is not appropriate for consumer contracts. The consumer must be informed in due form according to the rules on information requirements and he or she should not be supposed to acquire such information by other means.

(ii) Mistake

Art 5/5 [II. – 7:201]: Mistake

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:

(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or ought to have known this; and

(b) the other party;

(i) caused the mistake;

(ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, , when the other party knew or ought to have known of the mistake, unless the circumstances or the nature of the mistake were such that good faith and fair dealing would not require the other party to point it out; or

(iii) made the same mistake.

(2) However a party may not avoid the contract for mistake if:

(a) the mistake was inexcusable in the circumstances; or

(b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.

(3) In determining whether good faith and fair dealing required a party to point out that the other is mistaken about relevant information, regard should be had to all the circumstances, including:

- (a) whether the party had special expertise;
- (b) the cost to the party of acquiring the relevant information;

- (c) whether the other party could reasonably acquire the information by other means;
- (d) the nature of the information; and
- (e) the apparent importance of the information to the other party.

(4) A party may not avoid the contract under this article on the ground that one or both parties made a mistake over the terms of the contract. The true terms of the contract are established by applying the provisions of Chapter 8 (Interpretation). If the terms of a contract cannot be determined by the application of these provisions, there is no sufficient agreement within art [II. – 4:103]

BEUC's comments:

- The original reference to pre-contractual information (from the original provision of the DCFR, para. 1, a, iii) should be incorporated again. It is important to establish a clear link in case the mistake is caused by the lack of information.
- The condition introduced in para. 3 that the mistake should rely on relevant information seems to be excessive for consumer contracts.
- As indicated in the comments to the previous article the reference made in point (c) of para. 3 is not appropriate for consumer contracts.

Art 5/7 [II. – 7:206]: Threats

(1) A party may avoid a contract when the other party has induced the conclusion of the contract by the threat of an imminent and serious harm which it is wrongful to inflict, or of an act which it is wrongful to use as a means to obtain the conclusion of the contract.
 (2) A threat is not regarded as inducing the contract if in the circumstances the threatened party had a reasonable alternative.

- No comments

Art 5/8 [II. – 7:207]: Unfair exploitation

(1) A party may avoid a contract if, at the time of the conclusion of the contract:
 (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and
 (b) the other party knew or ought to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.
 (2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed.
 (3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice without undue delay after receiving it and before that party has acted in reliance on it.

- No comments

Art 5/9[II-7:209]: Notice of avoidance

Avoidance is effected by notice to the other party.

BEUC's comments:

- The article should indicate that the avoidance is effective by “simple” notice to the other party. This would clarify that it is not subject to any formality like in many legislations from Member States (DE, NL, PL, EE, IR, UK,)

Art 5/10 [II. – 7:210: Time]

A notice of avoidance is ineffective unless given within a reasonable time, with due regard to the circumstances, after the avoiding party knew or ought to have known of the relevant facts or became capable of acting freely.

BEUC’s comments:

- Is it possible to clarify what is a reasonable time in this context? In consumer contracts it could lead to abusive situations. In this sense, the simplicity of the notification system of the previous article could be distorted by traders arguing that the notice was not given in a “reasonable time”.

Art 5/11 [II. – 7:211]: Confirmation

If the party who is entitled to avoid a contract confirms it, expressly or impliedly, after it knows of the ground for avoidance, or becomes capable of acting freely, avoidance of the contract is excluded.

BEUC’s comments:

- The implicit confirmation of the contract should be interpreted restrictively, especially in case of avoidance for fraud. In a consumer contract the trader could plead that the continue use of the good by the consumer is an implicit confirmation even if the consumer really is not aware of the existence of the fraud and this would be very difficult to prove.

Art 5/13 [II. – 7:213]: Partial avoidance

If a ground of avoidance affects only particular terms of a contract, the effect of an avoidance is limited to those terms unless it is unreasonable to uphold the remaining contract.

BEUC comments:

- The article should specify that the party entitled to avoid the contract has the choice to decide whether to avoid the particular term or the whole contract. This is expressed in the comments to the article in the DCFR but is not reflected in the text.

Art 5/14 [II. – 7:214]: Damages for loss

(1) A party who has the right to avoid a contract under this Section (or who had such a right before it was lost by the effect of time limits or confirmation) is entitled, whether or not the contract is avoided, to damages from the other party for any loss suffered as a result of the mistake, fraud, threats or unfair exploitation, provided that the other party knew or ought to have known of the ground for avoidance.

(2) The damages recoverable are such as to place the aggrieved party as nearly as possible in the position in which that party would have been if the contract had not been concluded.

- (3) *If the party chooses not to avoid the contract, or has lost the right to do so, the damages are not to exceed the loss caused by the mistake, fraud, threats or unfair exploitation.*
- (4) *In other respects the rules on damages for non-performance of a contractual obligation apply with any appropriate adaptation.*

- No comments

Art 5/15 [II. – 7:215]: Exclusion or restriction of remedies

- (1) *Remedies for fraud, threats and unfair exploitation cannot be excluded or restricted.*
- (2) *Remedies for mistake may be excluded or restricted unless the exclusion or restriction is contrary to good faith and fair dealing.*

BEUC's comments:

- the exclusion of any remedies (including mistake) in consumer contracts should be prohibited.

Art 5/16 [II. – 7:216]: Overlapping remedies

A party who is entitled to a remedy under this Section in circumstances which afford that party a remedy for non-performance may pursue either remedy.

BEUC's comments:

- The article should clarify that the party entitled to avoid the contract has to choose between avoidance and/or damages for loss and a remedy for non-performance only if both remedies are not compatible - This can be deduced from the title but needs to be specified in the text.

5. CHANGE ON THE CIRCUMSTANCES

Proposed CFR

~~Variation or termination by court on a~~ Change of circumstances

- (1) *A [contractual] obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.*
- (2) *If, however, performance ~~of a contractual obligation or of an obligation arising from a unilateral juridical act~~ becomes so excessively onerous because of an exceptional change of circumstances ~~that it would be manifestly unjust to hold the debtor to the obligation, a court may~~ which satisfies the requirements of paragraph (5), the parties have a duty to enter into negotiations in accordance with good faith and fair dealing with a view to adapting the contract or terminating it.*
- (3) *If the parties fail to reach an agreement within a reasonable time, upon request by either party a court may:*
- (a) *adapt the contract in order to make it reasonable and equitable in the new circumstances; or*
 - (b) *[Terminate] the [contract] at a date and on terms to be determined by the court.*
- (4) *In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.*
- (5) ~~Paragraph (2)~~ *This Article applies only if:*

- (a) *the change of circumstances occurred after the time when the obligation was incurred,*
- (b) *the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances; and*
- (c) *the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances. ~~and~~*
- ~~(d) *the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.*~~

BEUC's comments:

The EG proposes the introduction of a rule that allows the revision of the contract by a court because of an exceptional change of the circumstances that make one of the performances excessively onerous. This disposition can be applied upon request of the interested party and the judge will have to verify 3 conditions in order to adapt or terminate the contract and award damages, if applicable. The conditions are:

- exceptional change of (initial) circumstances at the time the contract was concluded,
- disproportionality between performances and
- lack of agreement

BEUC considers that the addition of the re-negotiation duty would be detrimental in consumer relations because the consumer would have to prove that the parties tried to reach an agreement in the revision of the contract. This is an excessive burden since in most consumer contract the consumer has no chance to negotiate the terms and if they do so the result of the negotiation would not be the most favourable to the consumer. This is an aspect to take into account because if the sense of the rule is to (re)establish the balance between the performances by obliging consumers to negotiate with a powerful party that objective would not be necessary achieved.

6. PERFORMANCE

GENERAL REMARKS:

- The language used is very technical and difficult for consumers to understand. If it is intended to be a user-friendly instrument its rules should be accessible to the average consumer so he or she can easily identify their rights as well as the other party's obligations.
- Many rules on performance would be covered by the CRD (delivery, payment). Hence, our comments are only basic and of a provisional nature as the result of the negotiation in the pCRD need to be taken into account.
- It is not clear if there will be specific rules on performance in the Chapter dedicated to consumer contracts.

SPECIFIC COMMENTS:

Art. 9.101 [Art. III.–2:101 DCFR: Place of performance]

- (1) *If the place of performance of an obligation cannot be otherwise determined from the contract it is:*

- (a) *in the case of a monetary obligation, the creditor's place of business at the time of conclusion of the contract;*
- (b) *in the case of any other obligation, the debtor's place of business at the time of conclusion of the contract.*
- (2) *For the purposes of the preceding paragraph:*
 - (a) *if a party has more than one place of business, the place of business is that which has the closest relationship to the obligation; and*
 - (b) *if a party does not have a place of business, or the obligation does not relate to a business matter, the habitual residence is substituted.*

BEUC's comments:

- The relationship of this provision and article 5.1(b) of Brussels I Regulation: BEUC considers that the solution provided by the latter is clearer and the commented text should follow the same approach.
- How will the "closest relationship to the obligation" be determined?
- It is necessary to determine the relationship to the rules on passing of risk.

Art. 9.102 [Art. III.–2:102 DCFR: Time of performance] *

- (1) *If the time at which, or a period of time within which, an obligation is to be performed cannot otherwise be determined from the contract it must be performed within a reasonable time after it arises.*
- (2) *If a period of time for the performance can be determined from the contract, the obligation may be performed at any time within that period chosen by the debtor unless the circumstances of the case indicate that the creditor is to choose the time.*
- (3) *Unless a contract concluded at a distance between a business and consumer provides otherwise, a business must perform the obligations as soon as possible and no later than 30 days after the contract was concluded.*

BEUC's comments:

- This rule depends on the negotiations of article 22 (delivery) of the pCRD.
 - The term "as soon as possible" is too vague and should be replaced by "immediately"
 - There is no reason to limit this rule to distance contracts. It should be a horizontal obligation applicable to every contract since in many face-to-face contracts the delivery does not take place at the moment of the conclusion.
- (4) *If a business has an obligation to reimburse money received from a consumer, the reimbursement must be made as soon as possible and in any case no later than 30 days after the obligation arose.*

BEUC's comments:

- As in the previous disposition, the term "as soon as possible" should be replaced by "immediately"
- The proposed period of 30 days is too long, the pCRD proposed 7 days. BEUC considers that 14 days would be adequate.

- The object of the reimbursement need to be clarified. What does “money” cover? Should it include the price of the good or also delivery costs? In the latter case, what happens if it is a third party who perceives such costs, for example the carrier? Is the business obliged to reimburse delivery costs to the consumer under such a situation?

Art. 9. 103 [Art. III.–2:103 DCFR: Early performance]

[(1) A creditor may not reject an offer to perform before performance is due unless the early performance would cause the creditor unreasonable prejudice.]

(2) A creditor's acceptance of early performance does not affect the time fixed for the performance by the creditor of any reciprocal obligation.

BEUC's comments:

- It is not clear how the first paragraph would work. If the consumer, as a creditor, wants to reject an early performance under the proposed text seems that he or she would have to prove the existence of a prejudice.
- Unreasonable prejudice in non-monetary obligations: It is not clear how to it will be determined.

Art. 9.104 [Art. III. – 2:104 DCFR and Art. 6.1.4. (2) UNIDROIT Principles: Order of performance]

(1) If the order of performance of reciprocal obligations cannot be otherwise determined from the contract then, to the extent that the performances of the parties can be rendered simultaneously, the parties are bound to perform simultaneously unless the circumstances indicate otherwise.

(2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

BEUC's comments:

- This rule might affect the prohibition to request payments during the withdrawal period in some Member States by establishing the simultaneously performance of obligations in case of silence by the parties in the contract.

Art. 9.105 [Art. III.–2:106 and Art. III. – 2:107 DCFR: Performance by a third person]

(1) A debtor may entrust performance of an obligation to another person, unless the contract otherwise provides or personal performance by the debtor is required under the circumstances. The debtor remains responsible for performance.

(2) Where personal performance by the debtor is not required, the creditor cannot refuse performance by a third person if:

- (a) the third person acts with the assent of the debtor; or*
- (b) the third person has a legitimate interest in performing and the debtor has failed to perform or it is clear that the debtor will not perform at the time performance is due.*

BEUC's comments:

- BEUC does not agree with the proposed article. In case of B2C contracts the consumer should not be obliged to accept the performance by a third person even if the personal performance by the debtor is not required.

(3) Performance by a third person in accordance with the previous paragraphs discharges the debtor.

BEUC's comments:

- This rule could apply only if the performance by the third party is in conformity with the contract concluded between the trader and the consumer.
- If the consumer is the 'debtor' in this scenario then it must be clear who is providing the goods. This clause should say that the debtor is always the one to perform the obligation UNLESS the contract says otherwise.

(4) Where personal performance by the debtor is not required and the creditor accepts a performance by a third party in circumstances not covered by paragraphs (1) and (2) the debtor is discharged but the creditor is liable to the debtor for any loss caused by that acceptance.

- No comments

Art. 9.106 [Art. 6.1.3 UNIDROIT Principles: Partial performance]

(1) The creditor may reject an offer to perform in part at the time performance is due unless the creditor has no legitimate interest in so doing.

(2) Additional expenses caused to the creditor by partial performance are to be borne by the debtor without prejudice to any other remedy.

BEUC's comments:

- The last part of the first paragraph should be deleted. The consumer should never be obliged to accept a partial performance. It is not justified why even without a legitimate interest to refuse the partial performance the creditor should be obliged to accept it. It is the creditor's decision to accept or not the partial performance without giving any reason.

Art. 9.107 [Art. III.-2:108 DCFR: Method of payment]

(1) Payment may be made by any method used in the ordinary course of business at the place of payment taking into account the nature of the transaction.

(2) A creditor who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The creditor may not enforce the original obligation to pay unless the order or promise is not honoured.

(3) However, the debtor's original obligation is extinguished if the creditor accepts a promise to pay from:

(a) a third party with whom the creditor has a pre-existing arrangement to accept the third party's promise as a means of payment by debtors who are members of scheme of which this third party is also a member; or

(b) a third party who the creditor knows or ought to know has already been paid by the debtor; or

(c) a third party whom the creditor knows or ought to know the debtor will be liable to pay irrespective of whether this third party pays the creditor.

BEUC's comments:

- a difference between monetary and non monetary payments should be made.
- In case of monetary payments, would the chapter on consumer contracts contain specific rules on this issue, for example choice of means of payments, discriminatory charges between the offered means, etc?

Art. 9.108 [Art. III.–2:109: Currency of payment]

(1) A monetary obligation can be paid in another currency than the currency in which it was expressed if the terms of the contract permit it.

(2) Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made.

BEUC's comments:

- BEUC considers that this rule should not apply to B2C contracts. In consumer contracts the price has to be always determined or determinable. If the currency is not indicated then it is not possible to comply with such a requirement and the execution may be subject to avoidance.

Art. 9.109 [Art. III.–2:110 DCFR: Imputation of performance]*

(1) Where a debtor has to perform several obligations of the same nature to the same creditor and makes a performance which does not suffice to extinguish all of the obligations the debtor may at the time of performance notify the creditor to which obligation the performance is to be imputed.

(2) If the debtor does not make such a notification the creditor may, by notifying the debtor within a reasonable time, impute the performance to one of the obligations.

(3) An imputation under paragraph (2) is not effective if it is to an obligation which is not yet due or is disputed.

(4) In the absence of an effective imputation by either party, the performance is imputed to that obligation which satisfies one of the following criteria in the sequence indicated:

- (a) the obligation which is due or is the first to fall due;*
- (b) the obligation for which the creditor has no or the least security;*
- (c) the obligation which is the most burdensome for the debtor;*
- (d) the obligation which has arisen first.*

If none of the preceding criteria applies, the performance is imputed proportionately to all the obligations.

(5) The performance may be imputed to a prescribed obligation only if the debtor so indicated or there is no other obligation to which the performance could be imputed in accordance with the previous provisions.

(6) In the case of a monetary obligation, a payment by the debtor is to be imputed, first, to expenses, secondly, to interest, and thirdly, to principal, unless the creditor makes a different imputation.

BEUC's comments:

- This entire clause is far too complicated. If this is to apply B2C, how would a consumer ever understand this?

- Imputation of performance in a monetary obligation: BEUC considers that the solution provided by article 497(3) of the German BGB is more adequate for consumers. The order should be 1) expenses, 2) principal and 3) interests in order to prevent the accumulation of interests that could lead to a situation of flagrant injustice for the debtor.

Art. 9.110 [Art. III.–2:111 DCFR: Property not accepted]*

(1) A debtor who has to deliver or return corporeal property other than money and who is left in possession of the property because of the creditor's failure to accept the property, is obliged to take reasonable steps to protect and preserve it.

(2) If preservation would be unreasonable the debtor may obtain discharge from the obligation mentioned in the preceding paragraph:

(a) by depositing the property on reasonable terms with a third person to be held to the order of the creditor, and notifying the creditor of this; or

(b) by selling the property on reasonable terms after notice to the creditor, and paying the net proceeds to the creditor.

(3) The debtor is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.

BEUC's comments:

- Point b) of paragraph 2 should be deleted since it could lead to abuses from traders in possession of a good property of a consumer and gave it to the first for example in consignment.

Art. 9.111 [Art. III.–2:112 DCFR: Payment not accepted]*

(1) Where a creditor fails to accept payment properly tendered by the debtor or where the creditor is unknown, the debtor may obtain discharge from the obligation to pay by depositing the money to the order of the creditor in accordance with the law of the place where payment is due.

(2) Paragraph (1) applies to payment properly tendered by a third person in circumstances where the creditor is not entitled to refuse such performance.

- No comments

Art. 9:112 [Art. III.–2:113 (1) DCFR: Costs of performance]

The costs of performing an obligation are borne by the debtor.

- This rule is problematic in b to c contracts and cannot be generally applied. There are situations where the consumer performs an obligation but the trader bears the costs. For example, when returning a good after exercising the right of withdrawal, is the trader who may have to pay the cost of the return of the goods (see for example the German rule that obliges the trader to pay for return costs, if the value of the good to be returned is above a certain amount – this case will also be covered by the pCRD).

END