

## **Advisory report's full text of a different regime for non-conformity**

*In its advisory report on the proposal for a directive on consumer rights, the Committee for Consumers Affairs (CCA) of the Social and Economic Council of the Netherlands has proposed the following with respect to Articles 24 to 29 of the proposal: Conformity with the contract.*

In the event of a lack of conformity, disagreements often arise between traders and consumers concerning what the consumer may expect of a product, for example: what is normal for a particular product? What is the product's life-span? What about other products of the same type, price category and age? What undertakings were given by the trader when the consumer purchased the product?

The CCA therefore believes that the arrangements concerning non-conformity should be at the heart of the new directive. It is important to put a system in place at European level that is as unambiguous and clear-cut as possible on this point for both the trader and the consumer. The system should furthermore be internally consistent and be regarded as an integrated whole.

The CCA has a number of objections to the conformity/non-conformity arrangements in the proposal. It fears that these arrangements will only give rise to further disagreement between traders and consumers, potentially resulting in disputes – something that must be avoided. As it now stands, the proposal also encourages traders and consumers to select an inappropriate remedy.

The CCA has therefore put together a proposal consisting of the following inseparable elements:

- time limits and burden of proof;
- remedies;
- obligation to inform;
- and commercial guarantees.

### *Time limits and burden of proof*

To begin with, the arrangements can be made unambiguous by setting a fixed time limit during which the trader – as the party responsible for the product – is legally liable for any lack of conformity with the contract. A fixed time limit is justifiable because product flaws generally become apparent within a short period of time. A fixed time limit also avoids putting upward pressure on consumer expectations of a product's life-span. It may also encourage traders to distinguish themselves in the market by offering commercial guarantees that cover longer periods than those stipulated by law. It will in any event clarify who is liable within the fixed time limit and provide for a uniform statutory basis throughout the European Union.

To avoid situations in which it would be unfair to adhere to the fixed time limit, the CCA believes that there should be a hardship clause: the time limit applies unless it is unreasonable and unfair for the trader to invoke the fact that the time limit has passed.

The next question concerns the length of the time limit. The proposal for the directive sets a time limit of two years. Beyond the fact that the existing directive on consumer sales and guarantees also prescribes a two-year time limit, the proposal does not provide any further arguments for this time limit. In fact, most of the Member States adopted the two-year time limit when implementing the sales and guarantees directive.

In view of the hardship clause set out above and combined with what follows concerning burden of proof, remedies and commercial guarantees, the CCA agrees with the two-year time limit. However, it also believes that the proposal for a directive does not adequately consider products whose life-span can be reasonably expected to be less than two years. The CCA believes that should be clarified by adding the words “and price category” after the words “of the same type” in Article 24(2)(c) and (d).

In addition to setting a fixed time limit, another way to make the system unambiguous is to distribute the burden of proof fairly between trader and consumer within the liability period. One of the disagreements that now arises between traders and consumers is whether the lack of conformity already existed when the product was delivered – a question currently regarded as crucial under the law. The proposal for a directive now recommends that “any lack of conformity which becomes apparent within six months of the time when the risk passed to the consumer, shall be presumed to have existed at that time”. That means that during the first six months, the trader bears the burden of proof; it is up to the trader to prove that the lack of conformity did *not* exist. That may be considered reasonable, as it is the trader that is most aware of the quality that may be expected of a product. After six months, it is up to the consumer to demonstrate that the product flaw existed from the very beginning.

The burden of proof arrangement frequently puts both trader and consumer into a difficult situation. For that reason, and given the huge variety of products with varying expected life-spans, the question is whether the current distribution of the burden of proof between the parties is reasonable and fair. The CCA therefore proposes that during the two-year liability period, it should be up to the trader to demonstrate that the lack of conformity did not yet exist at delivery. Only if the trader has presented plausible evidence should the consumer be required to provide full evidence to the contrary.

After the fixed time limit has lapsed, is the consumer deprived of all his rights should a lack of conformity become apparent? The CCA does not believe that is the case. In addition to the hardship clause referred to above and the rights offered under any commercial guarantee, the consumer may still resort to existing general contract law, which is unaffected by the proposal for a directive. Incidentally, the European Commission has neglected to clarify which general contract law rules are and which are not affected. To prevent the Member States from broadly invoking general contract law, the CCA believes that the directive should set out strict and unambiguous arrangements on this point at European level. Without such arrangements, the effectiveness of full harmonisation of the system may be undermined.

### *Remedies*

The proposal for a directive sets out a system of four remedies in the event of a lack of conformity: repair, replacement, having the price reduced, and having the contract rescinded (Article 26(1)). One important requirement that must be set for these remedies is that none of them should be so legally and economically appealing for either the trader or the consumer that it distorts the discussion between them, causing them to seek out not the most appropriate remedy, but rather the remedy that costs them the least in terms of money and effort or the most attractive in these respects. For example, based on the text of the current proposal for a directive, it may be more economically advantageous for traders (in terms of lower costs) to repair a product several times because the statutory non-conformity period ceases after two years and is not interrupted by repairs. After all, Article 26(4)(d) of the proposal makes it possible for the trader to carry out several repairs within a short period of time. This incentive can be removed by having the directive include a provision (whether or not in the recitals) that the number of product repairs must be restricted and that the parties can agree on the repair through-put time. The provision would link up with Article 26(5), which seeks to avoid significant inconvenience for the consumer. The directive should also ensure that the trader offers a guarantee on the product repair, and that the trader's liability period for non-conformity set out in the directive is interrupted while the product is being repaired.

The consumer, on the other hand, should not be unfairly advantaged if a product is replaced within two years by a new product in the event of non-conformity. This can be avoided to some extent by limiting the consumer's choice of remedy, as is now the case in the consumer sales directive and the Dutch Civil Code; Article 26(2) clearly leaves the decision to the trader, which is, after all, in a better position to determine whether a product repair is reasonably possible. It is in fact the trader that often takes the decision, and in that sense the proposal does not represent a radical break with actual practice. In those cases where the consumer would be demonstrably better off by receiving a new, replacement product, it would be reasonable for the consumer to pay the trader compensation for use. The full two-year liability period should apply to this replacement product.

### *Obligation to inform*

The proposal for a directive gives consumers two months after observing a lack of conformity to inform the trader. This is a fairly short time period, but one that the CCA can agree to, as taking immediate action to inform the trader will prevent disagreements from arising and also avoid situations in which the observed non-conformity has been exacerbated to the point where repair has become impossible or too expensive.

It is possible, however, that in some exceptional circumstances, the consumer will not be able to inform the trader of the product flaw within two months. It would therefore be preferable to include a hardship clause in Article 28(4) as well, stating: "...., unless it would be unreasonable and unfair to expect such of the consumer." The consumer would, however, be expected to produce evidence that he in fact could not have

submitted his complaint at an earlier date. In the Netherlands, the prevailing obligation to limit damage (Article 6:101 of the Dutch Civil Code) would also apply, according to which the consumer is obliged, within reasonable limits, to take steps to prevent or limit any further damage.

### *Commercial guarantees*

Until now, the CCA's comments have focused on the non-conformity arrangements as set out in Articles 24 to 28 of the proposal for a directive. The commercial guarantees are described in Article 29 of the proposal. These guarantees, which are tailored to the specific product, may prevent disagreements about conformities/non-conformities and burden of proof during the guarantee period. The nature of full harmonisation ensures that, in general, the Member States will all have the same statutory non-conformity arrangements. This may encourage traders with cross-border operations to bring their own commercial guarantees into line at European level. As a result, buyers in Member States other than the trader's will be less inclined to invoke commercial guarantees, reducing the number of cross-border disagreements about such guarantees.

In terms of the substantive relationship between the statutory conformity arrangements and commercial guarantees, the CCA once again advocates making things clearer for the consumer and trader in actual practice. Such clarity can be fostered by the procedural requirement set out in the proposal for a directive, that is, that where applicable, traders set out in a guarantee statement that the commercial guarantee cannot be transferred to a subsequent buyer.

Translation: Balance Translations, Maastricht