

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(92) 66 final - SYN 285

Brussels, 4 March 1992

Amended proposal for a

COUNCIL DIRECTIVE

on unfair terms in consumer contracts.

(presented by the Commission pursuant to Article 149(3)
of the EEC-Treaty)

EXPLANATORY MEMORANDUM

This amended proposal for a Council Directive on unfair terms in consumer contracts⁽¹⁾ takes account of the opinions of the European Parliament⁽²⁾ and the Economic and Social Committee⁽³⁾, and of the discussions in the Council.

The text has been reorganised and clarified to make it easier to understand and to apply in practice.

Thus, Article 1(1) now clearly states that the scope of the Directive is limited to contracts concluded "between a seller or supplier and a consumer" (an aspect which, in the earlier version, was only indirectly implied in Article 3). Article 1(2) defines this principle in more specific terms and directly corresponds to an amendment adopted by the European Parliament.

The definition of a "seller or supplier" is added to Article 2 after the definition of a consumer. The expression can then be used throughout the proposal and in particular in the Annex, making the whole text considerably clearer and simpler. The expression was also used by the Parliament in its proposed amendments.

The general criteria for classifying terms as unfair are now laid down in Articles 3 and 4. A distinction is drawn between terms which have been individually negotiated and those which have not (Article 3). This was the terminology used in a European Parliament amendment, although the approach adopted is different. Parliament wanted to exclude completely from the scope of the Directive contracts in which all the terms had been individually negotiated by the parties concerned.

⁽¹⁾ OJ C 243 of 28.9.1990, p. 2

⁽²⁾ Opinion of 20.11.1991, Minutes 42 11 (PE 157.273)

⁽³⁾ OJ C 159 of 17.6.1991, p. 34

The Commission, however, prefers to maintain the scope of the original proposal, although it agrees that, as the Economic and Social Committee also stressed, individually negotiated contract terms should be treated differently. The Commission feels that, if a term has been specifically negotiated by the parties concerned, the principles of freedom of contract and "pacta sunt servanda" should not be restricted except in relatively extreme situations where consumer protection is still required. In such situations, it must be possible to assess whether or not such terms are unfair, but the criteria for doing so need to be more specific. It is therefore proposed in Article 4 that, in every case, the consumer should always be entitled to protection against terms which cause the performance of the contract to be unduly detrimental to the consumer (as specified in the second indent of Article 2(1) of the original proposal) where they have been imposed on the consumer by an abuse of economic power by the seller or supplier, or through the exploitation of the consumer's economic and/or intellectual weakness. Article 4(2) incorporates the provisions of Article 2(5) of the original proposal, omitting the term fairness at the European Parliament's request. The purpose of Article 4(3) is to show that the assessment of unfair terms provided for in this article does not affect any national legislation on contract validity, and in particular on deliberate malpractices such as error or fraud.

On the other hand, the consumer needs more systematic protection with terms which have not been individually negotiated. Article 3 therefore follows the earlier text in listing the general criteria applicable for assessing the unfairness of "non-negotiated" terms. These criteria correspond to the first, third and fourth indents of Article 2(1) of the original proposal.

Nevertheless, to ensure that drawing a distinction between the two types of terms does not reduce the protection provided for the consumer, the definition of terms which have not been individually negotiated is very broad, and every precaution has been taken to prevent sellers or suppliers from circumventing the principle established. This is the purpose of Article 3(2).

Article 3(3) refers to the list of terms given in the Annex, which is now clearly acknowledged to be "non-exhaustive", as requested by the European Parliament and the Economic and Social Committee. The fact that the list is "binding" has also been spelled out. The particular aim of the last sentence of this paragraph is to ensure a high level of protection within the meaning of Article 100a(3) of the EEC Treaty.

Article 5 of the amended proposal is a response to the comments of the European Parliament and the Economic and Social Committee on protecting consumers against unintelligible terms. It establishes the principle that the terms offered by sellers or suppliers to consumers must be drafted in plain and intelligible language, and the principle of "the most favourable interpretation for the consumer". Likewise, the Commission has made it compulsory for sellers or suppliers to give consumers a proper opportunity to examine all the terms before the contract is concluded, and it has introduced the principle that terms added when the contract is concluded should take precedence over standard form terms.

Article 6 incorporates the contents of paragraph c of the Annex to the original proposal, in order to ensure greater clarity. The aim of the provisions in question is to give consumers definite rights regarding guarantees for goods and services, and it seems appropriate to place them in the body of the Directive. Once these rights have been recognised in national legislation, any contractual terms which exclude them will fall by virtue of the provisions of paragraph 1(b) of the Annex.

The sentence added to the first indent of Article 7 is intended to prevent the provisions of this Directive being circumvented by designating a non-Community law as the law applicable.

Article 8 incorporates the provisions of Article 4 of the original proposal, which enabled certain organisations to apply to have any terms regarded as unfair declared null and void "in abstracto". The new provisions make this procedure more effective and their target is now clearly identified: the terms in question must have been drawn up for general use, but do not need to be already in use in individual contracts (action may be taken purely on preventive grounds). Furthermore, the amended proposal now specifies against whom such measures should be directed, and formally establishes the possibility of taking joint measures against a number of persons. The criteria for assessing unfairness are also specified: principally the list given in the Annex, but the general requirements of Article 3 must also be taken into account.

The Annex has been reorganised so that all the unfair terms, including new terms, are given in section 1, and all the exemptions in section 2. Most of the new terms arise directly from the Parliament opinion, and are terms which appear unquestionably unfair.

The paragraphs of the Annex to the original proposal correspond to the following paragraphs in the amended text:

Original proposal

Amended proposal

| | |
|----|-------------------------|
| a) | 1. a) |
| b) | 1. f, i, j, 2. a, b, c, |
| d, | |
| c) | --- |
| d) | 1. k and 2. e |
| e) | 1. b |
| f) | 1. r |

Finally, paragraph g) in the original, on time-sharing, has been omitted. The European Parliament's recommendation on a cooling-off period will be taken into account in the draft proposal for a Directive on time-sharing which the Commission is currently preparing.

The Commission has examined with great interest the European Parliament's proposal to appoint a Community Ombudsman for unfair terms to monitor the application of the Directive by the Member States, to take action in trans-frontier disputes and to draw up an annual report on unfair terms. However, the Commission has not incorporated these amendments, since it feels that it is not appropriate to introduce new administrative structures in this field at present.

Amended proposal for a
COUNCIL DIRECTIVE

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on unfair terms in consumer contracts.

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission, (1)

In cooperation with the European Parliament, (2)

Having regard to the opinion of the Economic and Social Committee, (3)

Whereas it is necessary to adopt measures to progressively establish the internal market before 31 December 1992; whereas the internal market comprises an area which has no internal frontiers and in which goods, persons, services and capital move freely;

Whereas national laws of Member States relating to the terms of contract applicable between the seller of goods or services, on the one hand, and the purchaser of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States;

Whereas, in particular, national laws of Member States relating to unfair terms in contracts concluded with consumers show marked divergences, and the same is true of their national laws relating to the obligation of the seller of goods to answer for the quality of them, for their fitness for the purpose for which they are sold, and for their conformity to the contract, and of the supplier of services to answer for the performance of them;

Whereas it is the responsibility of the Member States to ensure that contracts concluded with consumers do not contain unfair terms;

(1)

Whereas, generally speaking, consumers do not know the laws which, in other Member States than their own, govern contracts for the sale of goods or services; and whereas this difficulty may deter them from direct transactions of purchase of goods or services in another Member State;

Whereas in order to facilitate the establishment of a single market and to safeguard the citizen in his role as consumer when buying goods and services by contracts which are governed by the laws of other Member States than his own, it is essential to remove unfair terms from those contracts;

Whereas sellers of goods and services will thereby be helped in their task of selling goods and services, both at home and throughout the single market; and whereas competition between sellers will thus be stimulated, so contributing to increased choice for Community citizens as consumers;

Whereas the Community's programmes for a consumer protection and information policy⁽⁴⁾ underlined the importance of safeguarding consumers in the matter of unfair terms of contract; and whereas this protection ought to be provided by laws and regulations which are either harmonised at Community level or adopted directly at that level;

Whereas in accordance with the principle laid down under the heading "Protection of the economic interests of the consumers", as stated in those programmes: "Purchasers of goods and services should be protected against the abuse of power by the seller, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts";

Whereas more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms; whereas those rules should apply to all consumer contracts, whether concluded in writing or by word of mouth, and, if in writing, whether by means of one document or several;

(4) OJ No C92, 25.4.1975, p. 1 and OJ No C133, 3.6.1981, p. 1.

Whereas more effective protection of the consumer can be achieved by adopting rules of law which, in the matter of unfair terms, are to apply to all of them; whereas in this respect, a distinction must be made in individual contracts between individually negotiated terms and terms which have not been individually negotiated;

Whereas contracts should be drafted in plain, intelligible language, the consumer should be given a proper opportunity to examine all the terms, and, if in doubt, the interpretation most favourable to the consumer should prevail;

Whereas Member States should ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used they will be treated as void, but the remaining terms will remain valid and the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the void provisions;

Whereas it is desirable to identify certain types of terms which must not be used in contracts offered to consumers;

Whereas it is possible that, in certain cases, the consumer may be deprived of protection under this Directive by designating a law of a non-Member State as the law applicable to the contract; whereas it should therefore be laid down that the implementing provisions of this Directive must govern such situations;

Whereas the list of terms always regarded as unfair if not individually negotiated with the consumer is not exhaustive;

Whereas persons or organisations, if regarded under national law as having a legitimate interest in the matter, must have facilities for initiating proceedings concerning terms of contract drawn up for general use in contracts concluded with consumers, and in particular unfair terms, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings;

Whereas the courts or administrative authorities must have powers enabling them to order or obtain the withdrawal from use of unfair terms in contracts concluded with consumers,

HAS ADOPTED THIS DIRECTIVE:

Article 1

- (1) The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.
- (2) This Directive shall not apply to contracts relating to employment, to succession, to rights under family law, or to contracts relating to the incorporation and organisation of companies or partnership agreements.

Article 2

For the purposes of this Directive the following terms shall have the following meanings:

- a) "unfair terms": the terms of contract defined in Articles 3 and 4;
- b) "consumer": any natural or legal person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade, business or profession;
- c) "seller or supplier": any natural or legal person who, in transactions covered by this Directive, is acting for purposes relating to his trade, business or profession, and in particular the activities of suppliers, whether publicly owned or privately owned, and the sale, hiring out or other provision of appliances by those suppliers.

Article 3

- (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, of itself or in combination with another term or terms of the same contract, or of another contract upon which it is dependent, contrary to the requirements of good faith:
 - it causes to the detriment of the consumer a significant imbalance in the parties' rights and obligations arising under the contract;or
 - it causes the performance of the contract to be significantly different from what the consumer could legitimately expect.

- (2) A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of that term, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this article if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Any seller or supplier who claims that a term has been individually negotiated shall thereby wholly assume the burden of proof.

- (3) The Annex to this Directive contains a non-exhaustive list of terms which shall always be regarded as unfair if they have not been individually negotiated. The clauses listed in 1 a), b), c), and p) of the Annex shall be regarded as unfair even if they have been individually negotiated.

Article 4

- (1) A contractual term, whether or not individually negotiated, shall also be regarded as unfair if, of itself or in combination with another term or terms of the same contract, or of another contract upon which it is dependent,

- it causes the performance of the contract to be unduly detrimental to the consumer;

and

- it has been imposed upon the consumer as a result of the economic power of the seller or supplier and/or the consumer's own economic and/or intellectual weakness.

- (2) In the cases provided for by this Article, the unfairness of a contractual term is to be determined by reference to the time at which the contract is concluded, to the surrounding circumstances at that time and to all the other terms of the contract.

- (3) This Article shall be without prejudice to national provisions on contract validity.

Article 5

- (1) In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. Where pre-formulated terms contradict terms added when the contract is concluded, the latter shall prevail.
- (2) Regardless of whether or not they are unfair, terms which have not been individually negotiated shall be regarded as having been accepted by the consumer only where the latter has had a proper opportunity to examine the terms before the contract was concluded.

Article 6

- 1) The Member States shall take the necessary measures in order to ensure that the consumer is guaranteed, as purchaser under a contract for the sale of goods, the right to receive goods which are in conformity with the contract and are fit for the purpose for which they were sold, and to complain, within an appropriately extensive period, about any intrinsic defects which the goods may contain.
- 2) For the purpose of exercising these rights, the Member States shall take the necessary measures in order to ensure that the consumer is guaranteed, the choice of the following available options:
 - the reimbursement of the whole of the purchase price
 - the replacement of the goods
 - the repair of the goods at the seller's expense
 - a reduction in the price if the consumer retains the goodsand the right to compensation for damage sustained by him which arises out of the contract.
- 3) In cases where the seller transmits to the consumer the guarantee of the manufacturer of the goods, the Member States shall take the necessary measures in order to ensure that the consumer is guaranteed, the right to benefit from the manufacturer's guarantee for a period of twelve months or for the normal life of the goods, where this is less than twelve months, and to enforce payment, either by the seller or by the manufacturer, of the costs incurred by the consumer in obtaining implementation of that guarantee.
- 4) The Member States shall take the necessary measures in order to ensure that the consumer is guaranteed, as purchaser under a contract for the supply of services, the right:
 - to be supplied with those services at the agreed time and with all due efficiency;
 - to have the supplier's warranty that the supplier has the requisite skill and expertise to supply the services in the manner specified in the foregoing indent.

Article 7

Member States shall:

- prohibit the use of unfair terms in any contract concluded with a consumer by a seller or supplier, regardless of the law applicable; this prohibition shall be without prejudice to the seller's right to obtain compensation from his own supplier;
- provide that if, notwithstanding this prohibition, unfair terms are used in such a contract they shall be void, and that the remaining terms of the contract shall continue to be valid and the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the void provisions.

Article 8

- 1) Member States shall ensure that in the interests of consumers and users, competitors and the public generally, adequate and effective means exist for the control of unfair terms in contracts concluded with consumers and of the terms of contracts for the sale of goods and services to them.
- 2) Such means shall include provisions of law whereby persons or organisations, if regarded under national law as having a legitimate interest in protecting consumers, may take action before the courts or before an administrative authority competent to make a decision for determination of the question whether contractual terms drawn up for general use, regardless of whether they are actually included in individual contracts, are inconsistent with the provisions of this Directive.
- 3) The measures referred to in the foregoing paragraph may be directed jointly against a number of persons using, preparing to use or recommending the use of the same general contractual terms or identical terms; the decision reached by the competent authorities shall be binding on all the persons concerned.
- 4) As part of the measures referred to in the foregoing paragraphs, the competent authorities shall assess the unfairness of the terms in question in the light of the list of standard terms given in the Annex and, secondarily, by applying the criteria laid down in Article 3(1).

Article 9

The Commission shall present a report to the Council and the European Parliament concerning the application of this Directive by 31 December 1997 at the latest.

Article 10

- 1) Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 31 December 1992 and shall forthwith inform the Commission thereof. Those provisions shall apply to all contract concluded with consumers after 31 December 1992.

The provisions adopted pursuant to the first subparagraph shall make express reference to this Directive.

- 2) Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

Article 11

This Directive is addressed to the Member States.

ANNEX

1. The following types of terms are unfair if they have the object or effect of:
 - a) excluding or limiting the liability of a seller or supplier in the event of death or personal injury to the consumer resulting from an act or omission of that seller or supplier;
 - b) 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 of any of the contractual obligations, and in particular the rights described in Article 6 of this Directive;
 - c) making the signing of the agreement binding on the part of the consumer and non-binding on the part of the seller or supplier;
 - d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to be paid double the amount of the said sums by the seller or supplier where the latter is the party cancelling the contract;
 - e) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid by the consumer where it is the seller or supplier himself who dissolves the contract;
 - f) enabling the seller or supplier to terminate unilaterally a contract of indeterminate duration without reasonable notice;
 - g) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to do so is unreasonably early;
 - h) irrefutably binding the consumer to other contractual requirements;
 - i) enabling the seller or supplier to alter the terms of contract unilaterally;
 - j) enabling the seller or supplier to alter unilaterally any characteristics of the product or service to be provided;

- k) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price, without giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
 - l) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
 - m) limiting the seller or supplier's obligation to respect commitments undertaken by his agents;
 - n) obliging the consumer to fulfil all his obligations where the seller or supplier has not performed his;
 - o) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
 - p) requiring any consumer who fails to fulfil his obligations to pay a disproportionately high sum in compensation, without requiring any seller or supplier who fails to fulfil his obligations to pay a similar sum;
 - q) restricting the legal possibilities available to the consumer, in particular the possibility of applying for termination of the contract if the seller or supplier fails to fulfil his obligations, or of offsetting a debt owed by the seller or supplier against a debt owed to him;
 - r) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration, restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie on another party to the contract.
2. a) Paragraph 1(f) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice, provided that the supplier is required to inform the other contracting party/parties thereof immediately;

- b) Paragraph 1(i) is without hindrance to terms by which a supplier of financial services reserves the right to alter the rate of interest payable by or to the consumer or the amount of other charges for financial services without notice, provided that the supplier is required to inform the other contracting party/parties thereof as soon as possible and provided that the latter are free to terminate the contract immediately;
- c) Paragraphs 1(f) and (i) do not apply to:
- stock exchange transactions
 - contracts for the purchase of foreign currency, traveller's checks or international money orders denominated in foreign currency;
- d) Paragraph 1(j) is without hindrance to terms by which a seller or supplier reserves the right to make alterations as a result of technical developments, provided that these do not result in any increase in price or reduction in quality and that the terms give the consumer the possibility of stating the conditions to which his agreement is subject;
- e) Paragraph 1(k) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

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DOCUMENTS

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