

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(93) 11 final - SYN 285

Brussels, 26 January 1993

Re-examined proposal for a

COUNCIL DIRECTIVE

on unfair terms in consumer contracts

(presented by the Commission pursuant to Article 149.2(d)
of the EEC treaty)

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Explanatory memorandum

On 15 and 16 December 1992, the European Parliament concluded its second reading of the proposal for a Council Directive on unfair terms in consumer contracts and proposed 7 amendments to the common position adopted by the Council of Ministers on 22 September 1992.

The text of the reexamined proposal clearly incorporates amendments 3 and 5, as well as the spirit of amendment 4. The 17th and 21st recitals have been modified on the basis of the amendments to the provisions of the Directive.

Amendments 1, 2, 6 and 7 have been rejected by the Commission.

Amendment 3 reintroduces the second general criterion for assessing whether contract terms are unfair, which had been deleted from the Commission's amended proposal (March 92).

According to this criterion, a term is regarded as unfair if, contrary to the requirement of good faith, it causes the performance of the contract to be significantly different from what the consumer could legitimately expect. Although it could be argued that this situation is, to some extent, already covered by the criterion contained in the common position, the inclusion of this second criterion could help to clarify the meaning of the phrase "unfair term". It also has the advantage of showing clearly that the requirement of good faith is not restricted to the circumstances prevailing at the time the contract is drawn up but extends to the probable consequences of its performance for the consumer.

Amendment 5 is chiefly concerned with wording. The provision in Article 6(1) of the common position (that unfair terms shall be void) is intended specifically to ensure that no unfair term may be enforced to the detriment of a consumer. The precise legal classification (relative or absolute nullity, non-existence, "voidance", etc.) should be left to the legal system in each Member State. It appears that the term "void" is still not sufficiently neutral. This is why the new wording "not bind the consumer" has been proposed.

Amendment 4 concerns the legal nature of the Annex and aims to reintroduce the principle of a "blacklist", in other words a list of terms always regarded as unfair. However, this is somewhat ill-suited to the present wording of the Annex, chiefly because of the discretionary terms contained in many of its clauses.

Furthermore, the discussions within the Council showed that the majority of Member States would not readily accept a completely "black" list.

However, the solution envisaged in the common position is not entirely satisfactory either. The idea of an "indicative" list is too vague to give a clear indication of the aims. This vagueness would also make the transposition of this part of the text more difficult.

In view of this, the Commission feels that it would be useful to give the Annex more specific legal force, and has therefore incorporated the spirit of amendment 4 by adopting the principle of a list of types of term presumed to be unfair. Generally speaking, all terms listed can be presumed to be unfair, but this presumption may be contested by a seller or supplier who uses this type of term in specific situations.

All the other amendments adopted by the EP were rejected by the Commission.

Amendments 1 and 2 are based on the idea that the word "mandatory" is used in this case, as it is in civil law, as distinct from "supplementary", and are thus aimed at eliminating the contradiction between Article 1(2) and the 13th recital. In fact, there is no real contradiction because the distinction made in civil law has no relevance to the way in which the term "mandatory" is used in Article 1(2), where it has a more general meaning.

Amendment 6 is inadequate for the aims of the Directive. To replace the obligation on Member States to ensure the existence of "adequate and effective means ... to prevent the continued use of unfair terms" by the obligation to "prohibit" unfair terms does not necessarily increase consumer protection. Furthermore, the discussions within the Council showed that the word "prohibit" would make it difficult to determine whether penal sanctions should be imposed. Although the control of unfair terms by means of penal law may be an effective means of implementing the Directive, the Commission considers that it is by no means the only adequate way to eliminate the use of unfair terms.

Finally, Amendment 7 aims to introduce a 14-day "cooling-off" period for the consumer, following the signing of timeshare contracts. Although a similar provision was included in the Commission's first proposal, the Commission has in the meantime presented a specific proposal for a Directive aimed at providing protection for consumers in relation to contracts on the use of timeshare property (Com (92) 220 final of 24.7.92).

The proposal for a Directive already incorporates the principle of a "cooling-off" period, in some cases even longer than that requested by the European Parliament, while at the same time guaranteeing the consumer much fuller protection.

Furthermore, Amendment 7 is not now appropriate to the current text of the common position.

Reexamined proposal for a Council Directive
on unfair terms in consumer contracts

(presented by the Commission pursuant to Article 149(2)(d) of the EEC Treaty)

Common position of the Council

Reexamined proposal

First to sixteenth recitals unchanged

Seventeenth recital

Whereas, for the purposes of this Directive, the annexed list of terms can be of an indicative value only and, because of the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national law;

Seventeenth recital

Whereas, for the purposes of this Directive, a list of terms presumed unfair should be provided in an Annex; whereas, furthermore, because of the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national law;

Eighteenth to twentieth recitals unchanged

Twenty-first recital

Whereas the 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 shall at least be declared void as against the consumer, and the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions;

Twenty-first recital

Whereas the 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 shall not bind the consumer and the contract shall continue to bind both parties upon those terms if it is capable of continuing in existence without the unfair provisions;

Twenty-first to twenty-fourth recitals unchanged

Articles 1 and 2 unchanged

Article 3

1.
1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2.

3. The Annex shall contain an indicative list of the terms which may be regarded as unfair.

Article 3

1.
1. A contractual term which has not been individually negotiated shall be regarded as unfair if, in spite of the requirement of good faith:
- it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer

or

- it causes the performance of the contract to be significantly different from what the consumer could legitimately expect.

2. unchanged

3. The Annex shall contain a list of terms presumed to be unfair.

Articles 4 and 5 unchanged

Article 6

1.
Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, be void as against the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

Article 6

1.
Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not bind the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

Council's joint position

Reexamined proposal

2.

2. unchanged

Articles 7 to 11 unchanged

Annex unchanged

European Parliament amendments rejected by the Commission

(Amendment 1)
Thirteenth recital

...whereas in that respect the wording "mandatory, statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;

Deleted

(Amendment No 2)
Article 1(2)

The contractual terms which reflect mandatory, statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.

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(Amendment 6)
Article 7(1)

The Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

The Member States shall prohibit the use of unfair terms in any contract concluded with a consumer by any person acting in the course of his trade, business or profession; this prohibition shall be without prejudice to the seller's right to obtain compensation from his own supplier.

(Amendment 7)
Annex, paragraph 1, indent g)a (new)

in the case of contracts relating to the purchase of immovable properties on a timeshare basis, establishing the date on which the contract is concluded in such a way as to make it impossible for the consumer to terminate the contract within a period of 14 clear days from the date on which it was concluded.

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ISSN 0254-1475

COM(93) 11 final

DOCUMENTS

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Catalogue number : CB-CO-93-015-EN-C

ISBN 92-77-51948-7

Office for Official Publications of the European Communities
L-2985 Luxembourg