EC Directive on Unfair Terms in Consumer Contracts: Towards a European Law of Contract

*Ewoud Hondius**

Introduction

On 5 April 1993 the Council of the European Communities established the long awaited[1] directive on unfair terms in consumer contracts.[2] The directive requires member states to take a number of measures with regard to such terms before 31 December 1994. The same obligation applies to those members of the European Free Trade Association which have ratified the European Economic Space Treaty (that is all members with the exception of Switzerland).[3] For reasons of convenience, I shall refer to all of the countries envisaged above as 'member states'. Most of them will have few problems in adapting their legislation to the directive, since in the seventies and eigthies they introduced legislation on unfair contract terms. In Austria this is the Konsumentenschutzgesetz of 8 March 1979,[4] in Belgium the Loi sur les pratiques de commerce et l'information et protection du consommateur of 1991,[5] in Denmark the Markedsføringslov of 14 June 1974,[6] in Finland Ch 3 of the Act of 20 January 1978,[7] in France the Act 78–23 of 10 January 1978 and 5 January 1988,[8] in Germany the Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz),[9] in Greece the Consumer Protection Act 1991,[10] in Ireland the Sale of Goods and Supply of Services Act of 1980,[11] in Luxembourg the Loi relative à la protection

* Ewoud Hondius is Professor of Civil Law at Utrecht University (The Netherlands). He is a member of the Editorial Board of the *Journal of Contract Law*.

1 In 1975 the European Commission had already prepared an outline for a draft directive. Work on the draft was halted when at the end of the seventies a number of member states introduced widely diverging legislation. In 1984 the Commission published a consultation paper, which gave rise to much discussion. See the Explanatory Memorandum, as well as Peter Duffy, 'Unfair contract terms and the draft EC Directive' (1993) *Journal of Business Law* 67–79.

2 Official Journal EC L 95/29 of 21 April 1993.

3 See N Reich, Europäisches Verbraucherschutzrecht, Baden-Baden 1993, Nr 276.

4 See F Bydlinski in Festschrift Meier-Hayoz, 1982, p 65 ff.

5 See E Balate, J Stuyck (eds), Pratiques du commerce & Information et Protection du consommateur, Brussels 1988; J Stuyck, P Wytinck (eds), De nieuwe wet handelspraktijken, Brussels 1992.

6 See B Gomard, (1982) *Revue internationale de droit comparé* 591–671.

7 See Th Wilhelmsson, (1992) *European Consumer Law Journal* 77–92.

8 See J Calais-Auloy, *Droit de la consommation*, 3rd ed, Paris, 1992, pp 134–149.

9 See O Sandrock, 'The Standard Terms Act 1976 of West Germany' (1978) 26 *American Journal of Comparative Law* 551.

10 See E Alexandridou, (1992) *European Consumer Law Journal* 20–31.

11 See my 'Unfair Terms in Consumer Contracts', Utrecht 1987, pp 65–7.

juridique du consommateur of 25 August 1983,[12] in the Netherlands articles 6:231–48 Civil Code,[13] in Norway the Act 47/1972, as amended in 1981,[14] in Portugal Decree 446/85 of 25 October 1985,[15] in Spain art 10 Ley general para la defensa de los consumidores y usuarios of 19 July 1984,[16] in Sweden the Act 1971:112,[17] in Switzerland art 8 Loi fédérale contre la concurrence déloyale of 19 December 1986[18] and in the United Kingdom, finally, the Unfair Contract Terms Act van 1977[19] (I only mention the most important legislation). Only Italy, with its 1942 Civil Code articles 1341, 1342 and 1370 is running behind.[20]

The legislation referred to often offers more consumer protection than the directive does. The directive does not force member states to withdraw such further reaching legislative measures. It even leaves member states the freedom to adopt more stringent measures in the future: 'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer'.

This 'minimum character'[21] will no doubt displease business interests which would have preferred the directive to bring about total harmonisation. Likewise, consumer interests will be disappointed that, in contrast with an earlier draft, the directive does not deal with individually negotiated contract clauses.

Yet, in my view the directive is important. It is the first such measure which goes to the heart of contract law and therefore may be regarded as a valuable step towards a Europeanisation of contract law.[22] Indeed, the directive is in many regards comparable to the 1985 directive on product liability. This directive has also been criticised both by producers and consumers for not bringing about total harmonisation nor adequate consumer protection.[23] And yet it has been argued that the fact that one of the central issues of tort law is now EC law, will force the courts, the legal professions and academics in European countries to study closely

---

12 See C Hoffmann, (1982) *Revue internationale de droit comparé* 851–86.

13 See the English (and French) translation by P P C Haanappel and Ejan Mackaay, New Netherlands Civil Code/Patrimonial Law (Property, Obligations and Special Contracts), Deventer/Boston, 1990.

14 See Th Wilhelmsson, (1992) *European Consumer Law Journal* 77–92.

15 See D Mallmann, *Recht der Internationalen Wirtschaft* 1987, pp 111–114.

16 See M Coca Payeras, S Diaz Alabart, J Tornos Más, L H Clavería Gosálbez en E Malaret i García, in: R Bercovitz Rodriguez-Cano and J Salas Hernández (eds), Comentarios a la Ley general para la defensa de los consumidores y usuarios, Madrid, 1992, pp 223–353.

17 See Th Wilhelmsson, oc.

18 See B Stauder, (1991) *European Consumer Law Journal* 138–153.

19 See R Lowe and G Woodroffe, *Consumer Law and Practice*, 3rd ed, London, 1991, pp 126–146.

20 See G Alpa and M Bessone (eds), I contratti standard nel diritto interno e comunitario, Torino 1991.

21 See Kamiel Mortelmans, 'Minimum Harmonization and Consumer Law' (1988) *European Consumer Law Journal* 1–18.

22 See Jochen Taupitz, Europäische Privatrechtsvereinheitlichung heute und morgen, Tübingen 1993, with further references on pp 73–87.

23 See G Howells, *Comparative Product Liability*, Aldershot, 1993.

developments on the European level and in other countries. The product liability directive may therefore serve as a catalyst in developing a truly European law.[24]

EC directives do not only have an impact in Europe. The example of the product liability directive shows that the influence may extend to a country as far away as Australia. Although it seems less likely that Australia will also follow the directive on unfair contract terms, it will still be of interest to an Australian audience to know what the Podeans are trying to achieve. In this brief essay I will try to present an overall picture of the directive. In doing so, I will sometimes draw upon the legislative history of the directive. Long before *Pepper v Hart*[25] allowed this method of constructing the true meaning of statutory rules, the European continent has been familiar with this type of construction. One of the practical advantages of the now abolished 'exclusionary rule', as has been set out in England,[26] is that parliamentary proceedings are often unavailable. As for the present directive, there are fortunately some collections of such materials available.[27] For an analysis of an earlier draft of the directive, I refer to Norbert Reich's essay in the *Sydney Law Review*.[28]

Scope of Application

Two issues are usually raised when legislatures discuss bills on unfair contract terms. Should the scope of application be limited to consumer contracts, and should it be limited to standard contract terms. As for the first issue, the history of the directive has quite naturally led to the exclusion of purely commercial contracts. The directive indeed is the outcome of the EC Consumer Protection Programme.[29] This restriction may be deplored, since it is not only consumer contracts which may contain unfair terms. It is to be hoped that the directive will be amended on this point in the near future.

The question whether or not the directive's scope of application should be restricted to standard form contracts has played an important role in its legislative history. The original proposal for a directive covered

24 See my paper on 'The impact of the Product Liability Directive on Legal Development and Consumer Protection in Western Europe' (1989) 4 *Canterbury Law Review* 34–51.

25 [1992] 3 WLR 1032, [1993] 1 All ER 56.

26 B J Davenport, 'Perfection – But at What Cost?' (1993) 109 *Law Quarterly Review* 149 at 152–153.

27 See the documentation in *Journal of Consumer Policy*, 1992, pp 469–92 and in the book edited by G Alpa and M Bessone, I contratti standard nel diritto interno e comunitario, Torino, 1991. The Explanatory Memorandum can be found in Annex 3 of the Sixth Report of the House of Lords Select Committee on the European Communities (Session 1991–92) HL Papers 28, 36. On the history of the directive see also my 'Unfair Terms in Consumer Contracts: Towards a European Directive' (1988) *European Consumer Law Journal* 180–199.

28 Norbert Reich, 'Protection of Consumers' Economic Interests by the EC' (1992) 14 *Sydney Law Review* 23–61.

29 Only the European Parliament's Commission for Consumer Affairs has argued for extension of the directive's scope of application beyond consumer transactions.

all unfair contract terms. But after pressure by among others, Germany,[30] the scope of application was limited to the more restricted category of standard form contracts: art 3 s 1 only covers terms which have not been individually negotiated and s 2 further specifies:

> 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 the term, particularly in the context of a pre-formulated standard contract.[31]

This approach has the advantage that the black list of clauses deemed to be unfair could be extended considerably. If indeed the list would have applied to individual terms as well, it would have had to be made much shorter since many a clause only is to be considered unfair when the consumer is taken unaware.

Some member states will face particular problems. Thus, the United Kindom will have to consider whether the scope of application of the Unfair Contract Terms Act sufficiently covers other terms than exemption clauses.[32] Italy faces the problem that general conditions of state enterprises, often regarded as not being subjected to the regulation of standard form contracts, are included in the directive.[33]

Terminology and Definitions

The directive's terminology will not present major problems to member states. With the exception of Italy – and perhaps Iceland – they have all introduced the notion of 'consumer' into their legislation.

In most countries the notion of 'A contractual term which has not been individually negotiated' (art 3, s 1) is also well known, although usually under a different wording, such as 'allgemeine Geschäftsbedingungen' (Germany). Why the more common terminology is not used, is not clarified. More in general, the terminology, especially in some of the smaller languages, such as Dutch, gives rise to criticism.

This brings us to the point that in the case of EC directives, it usually is worthwile to study not only the English text, but also the texts in those languages which are available and understandable to the reader. A closer scrutiny of, for example, the Dutch, French and Italian texts shows that what in the English version of art 3 s 2 is called 'pre-formulated standard contract', is referred to as 'toetredingsovereenkomst', 'contrat

30 See the criticism of the original proposal by H E Brandner en P Ulmer, EG-Richtlinie über miβbräuchliche Klauseln in Verbraucherverträge, Betriebs-Berater 1991, pp 701–9 (English translation in (1991) 28 *Common Market Law Review* 647–62.

31 This definition still is broader than that of the AGB- Gesetz, which therefore will have to be adapted, according to P Ulmer, Zur Anpassung des AGB-Gesetzes an die EG-Richtlinie über miβbräuchliche Klauseln in Verbraucherverträgen, *Europäische Zeitschrift für Wirtschaftsrecht* 1993, 337 at 346.

32 UK courts take a very broad view of what constitutes an exemption clause, even extending this to set-off clauses: *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257.

33 Article 2 (c) of the directive.

d'adhésion' or 'contratto di adesione' respectively. In France the notion of adhesion contract indeed still plays a minor role in legal writing.[34]

Definitions can only briefly be dealt with in this paper. The most interesting definition probably is that of 'consumer', who is defined in art 2 (b) in the following terms: 'any natural person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'.

This definition raises the question whether or not activities which are alien to one's business or profession are covered by the directive.[35] The use of the word 'purposes' would perhaps lead one to expect that they do. However, in the Pinto case, the EC Court of Justice has given a very restrictive interpretation of the 'consumer' notion.[36] Because of the requirement of interpretation in conformity with directives[37] this European case is directly relevant for the construction of the 'consumer' notion in domestic law. Although the Pinto case deals with the doorstep directive, which contains a slightly different definition of 'consumer', yet the differences are so small as to be negligible.[38] The only defence left to those in favour of the broader notion of 'consumer' is distinguishing on the basis of the court's arguments[39] between transactions which bear on the sale of a seller or supplier's property and other activities alien to one's business or profession.

Finally, it should be observed that the directive also covers oral terms. This is different in most national legislations, which will have to adapt their definition of standard contract terms in this regard.

The Unfairness Concept

In pursuance of art 3 of the directive a contract term:

34 J Ghestin, Traité de droit civil, Les obligations, Le contrat: formation, 2nd ed, Paris, 1988, Nrs 73–87.

35 In several member states, the courts have extended protection to small businesspersons for activities which are only incidental to their business – see *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321 and Cour de cassation 6 January 1993, *Semaine juridique (JCP)* 27 January 1993 (Actualités) protecting a farmer buying a fire extinguisher on the reasoning that this is not an 'activité qui lui donnerait les compétences pour apprécier l'opportunité de cet achat comme il pouvait le faire pour les achats de matériel agricole'.

36 EC Court of Justice, 14 March 1991, case C-361/89 concerning Patrice Di Pinto: 'le critére d'application de la protection réside dans le lien qui unit les transactions faisant l'objet du démarchage à l'activité professionnelle du commerçant: celui-ci ne peut prétendre à l'application de la directive que si l'opération pour laquelle il est démarché excède le cadre de ses activités professionnelles. Parmi les actes accomplis dans le cadre de ces activités professionnelles, l'article 2, rédigé en des termes généraux, ne permet pas d'établir une distinction entre les actes de pratique courante et ceux qui présentent un caractère exceptionnel'.

37 See EC Court of Justice, 13 November 1990, case 106/89 Marleasing, (1991) 28 *Common Market Law Review* 205.

38 K J M Mortelmans, *Tijdschrift voor Consumentenrecht* 1991, pp 185, 192.

39 'Il y a tout lieu de croire en effet qu'un commerçant, normalement avisé, connaît la valeur de son fonds et celle de chacun des actes que nécessite sa vente, de sorte que, s'il s'engage, ce ne saurait être de manière inconsidérée et sous le seul effet de la surprise'.

> 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.

A comparison with the original wording teaches us that the new formula combines two criteria set out in the earlier draft. According to the Explanatory Memorandum:

> in making an assessment of good faith, particular regard shall be had to the strength of the bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer;...

Contract terms will probably have to be subjected to the test whether or not they are at variance with statutory law. The level of domestic legislation will certainly not be below the directive's, if legislators do not require a 'significant' imbalance but a mere imbalance, as was done in the 1976 Resolution on Unfair Contract Terms of the Council of Europe and is propogated by the European Consumer Law Group.

Excluded from the fairness test under art 4 s 2 is the main subject matter of the contract:

> Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.

This is a well known exclusion in several jurisdictions, such as Germany and the Netherlands. It was designed to keep out of the judicial control the question whether or not for the goods or services to be delivered the price agreed upon by the parties is the 'correct price' (*iustum pretium*). The preamble clarifies this by giving insurance coverage as an example of the main subject-matter, which thus is exempt from control under the directive.[40]

Black List

Although not everyone likes them[41] many modern Unfair Contract Terms Acts do contain, apart from a general clause, a list of terms which aims at giving the general clause some clarification. The directive also contains such a list, but its status is far from clear. Article 3 s 3 refers to it in the following words: 'The Annex shall contain an indicative and non-exhaustive list of terms which may be regarded as unfair'.

---

40 This is apparently not understood by Peter Duffy, who in (1993) *Journal of Business Law* 67–79 argues that the Preamble on this point says something which the text of the directive does not touch upon.

41 Trade and industry often sees such lists as unwanted patronising – see UNICE, in: Alpa and Bessone (eds), I contratti standard nel diritto interno a comunitario, Torino 1991, pp 220, 223. The Scandinavian countries consider lists useless in their control system of Consumer Ombudsmen – see Th Wilhelmsson, (1992) *European Consumer Law Journal* 77, 87, n 48 who uses the argument – proven false in Germany – that a black list may be interpreted a contrario, thus leading to the result that clauses just outside the list's scope of application will not be held to be unfair.

In an earlier proposal the list was presented as 'mandatory'. But according to the Commission, it appeared impossible to reach agreement between member states as to the terms to be put on the list.[42] The Commission considers the Annex's list 'nonetheless a useful indication for judges, national authorities and economic agents, and will help to specify the general criteria set out in Article 3 of the Directive'.

Useful the list surely is. Two examples from Dutch law may clarify this. Subparagraph (a) of the European list deals with a group of exemption clauses, for example, those concerning death and personal injury. Under art 6:237 (f) of the Dutch Civil Code the seller or supplier has a possibility to rebut the presumption that his exemption clause is unfair. Subparagraph (a) now makes it virtually impossible for a seller or supplier to provide such rebuttal. Another example may be taken from the last subpara (q) of the European list, which blacklists clauses requiring consumers to take disputes exclusively to arbitration not covered by legal provisions. Such clauses are allowed by the Dutch Civil Code's art 6:236 (n), which was the object of a heavy battle between pro- and contra-arbitration lobbies. The pro-arbitration lobby won, but the European blacklisting of those arbitration clauses which do not allow consumers a choice between arbitration and the court may well influence the tendency of the Dutch judiciary to find arbitration clauses unfair under the Code's general clause.[43]

Unlike several European laws (Austria, Germany, the Netherlands), the directive does not encompass two lists, a black one and a 'grey' one. However, several of the clauses do give the judiciary some discretion by using terms such as 'inappropriately' (b), 'disproportionately high' (e), 'reasonable' (g), 'unreasonably early' (h), 'without a valid reason' (j and k), 'too high' (l) and 'unduly' (q). What also strikes one, is that a number of clauses is blacklisted if the right which they accord the seller or supplier is not accorded to the consumer. Examples of such mirror image rules are to be found in subparas (c), (d), (f 1) and (o).

Finally, a piece of Brussels lobbying may be observed in the Annex's exemption from subparas (g), (j) and (l) made for financial services.

The List in Some Detail

This is not the place to give an exhaustive account of what the black list does and does not encompass. Instead I will try to give an indicative and non-exhaustive overview, thereby making some comparisons with the lists contained in the Austrian, Belgian, Dutch, German and Italian legislation: basically § 6 Austrian Konsumentenschutzgesetz, art 32 Belgian Loi sur les pratiques du commerce, arts 6:236 and 237 Dutch Civil Code, §§ 9 and 10 German AGB-Gesetz and art 1341 Italian Codice civile. Subparagraph (a) I already mentioned above. Subparagraph (b) covers a number of terms concerning non-performance or inadequate

42 In 1976, the Council of Europe did arrive at a list in its Resolution on Unfair Terms in Consumer Contracts and an Appropriate Method of Control, Resolution (76) 47.

43 *Botman v Van Haaster*, Hoge Raad 23 March 1990, Nederlandse Jurisprudentie 1991, Nr 214 (note by H J Snijders).

performance by the seller or supplier. The Belgian Act deals with this in art 32 (19)(general) and (14)(set off), the Dutch Code in articles 6:236 (b)(specific performance) and 6:237 (g)(right of set off), the German Act in § 11.3 (right of set off). Subparagraph (c) is the first example of a mirror image rule: making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone. The same provision is to be found in § 6 (1)(1) of the Austrian Act and in art 32 (1) of the Belgian Act; a similar provision is given in art 6:237 (a) of the Dutch Code and in § 10.1 of the German Act. Subparagraph (d) contains an even better example of the mirror image rule, comparable to art 6:237 (i) of the Dutch Code. Subparagraph (e) on liquidated damages and penalty clauses is regulated in art 32 (10) of the Belgian Act, in art 6:94 of the Dutch Code and in § 11.6 of the German Act.

One of the elements of subparagraph (f) – the seller's right of rescission – is dealt with similarly in art 32 (9) Belgian Act and art 237 (d) of the Dutch Code. Subparagraph (f)'s retention right for consumers is dealt with in § 6 (1)(7) of the Austrian Act. Subparagraph (g) deals with the termination by the seller or supplier of contracts of indeterminate duration, as is done by the Dutch Code's art 6:237 (d). Subparagraph (h), as do § 15 Austrian Act, art 32 (16-17) of the Belgian Act, art 6:236 (j) and 6:237 (l) in the Netherlands and § 11.12 in Germany, bears on the continuation of contracts of fixed duration. Subparagraphs (i) and (j) do not have a close parallel in the member states' lists. Subparagraph (k) forbids unilateral alteration of any characteristics of the product or service to be provided, as does § 6 (2) (3) in Austria, art 32 (3) in Belgium and art 6:237 (c) in the Netherlands. The price increases dealt with in subpara (l) are regulated in § 6 (1)(5) and (2)(4) Austrian Act, art 32 (2) of the Belgian Act, art 6:236 (i) of the Dutch Civil Code and § 11.1 AGB-Gesetz. Like subparagraph (m), § 6 (1)(10) Austrian Act, art 32 (5) of the Belgian Act and art 6:236 (d) Dutch Code do not allow sellers and suppliers to determine whether the goods or services supplied are in conformity with the contract. Subparagraph (n) on the seller's obligation to respect commitments of his agents and on form requirements is regulated in the Dutch Code's art 6:238 (agency) and 6:237 (m)(form requirement). Subparagraph (o) excludes exclusion of suspension, as do art 32 (6-8) Belgian Act and art 6:236 (c) of the Dutch Civil Code. Subparagraph (p) on transferral of rights by the seller finds support in § 6 (2)(2) Austrian Act, art 6:236 (e) Dutch Code and § 11.13 AGB-Gesetz.

Subparagraph (q) finally deals with forum choice, arbitration, restriction of evidence and the burden of proof, as do § 6 (1)(11) of the Austrian Act, arts 32 (18, 20) of the Belgian Act, art 6:236 (n) Dutch Civil Code and art 1341 s 2 of the Italian Civil Code.

Interpretation; Plain Language

In all countries, a traditional means of protection against unfair contract terms is the *contra proferentem* rule: unclear terms shall be interpreted against the draftsperson. Article 5, second sentence, explicitly lays down

this rule: 'Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail'.

This construction rule does not apply in the collective actions envisaged in art 7 s 2. The object of this exception is not to offer consumers less protection, to the contrary. Since the *contra proferentem* method will usually result in a construction which is most advantageous to consumers, the consequence would be that in abstract proceedings doubtful clauses could be saved and would survive for years on end.[44] It therefore appears better to rather use a *pro proferentem* method in these proceedings or at least a neutral approach.

Article 5, first sentence also states: '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'.

This is an important innovation. It has probably been inspired by the development by German case law of a transparency requirement[45] and perhaps also by the 'plain language' movement in some English speaking countries.[46] Much depends upon how this provision will be put into practice. The experience so far with art 10 s 1 of the Spanish Ley general which prescribes 'Concrecin, claridad y sencillez en la redaccin' does not make one optimistic.

Procedure

Wherein lies the problem of unfair contract terms? This is a heavily debated question. According to some, a problem arises once an enterprise invokes an unfair contract term. In the view of others, a problem arises as soon as such a term has been incorporated into a contract. In the first-mentioned view it is sufficient for a term to be avoided by the court and the problem is solved. In the view mentioned in second place, unfair terms should rather be struck out or prevented from being incorporated even before a conflict has arisen. The directive opts for the last-mentioned view:

> 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.

Article 7 s 2 gives a further indication of these means:

> The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the

44 R H C Jongeneel, De Wet algemene voorwaarden en het AGB-Gesetz, thesis, Deventer 1991, p 162.

45 See Norbert Reich, Le principe de la transparence des clauses limitatives relatives au contenu des prestations dans le droit allemand des conditions générales des contrats, in: J Ghestin (ed), Les clauses limitatives ou exonératoires de responsabilité en Europe, Paris 1990, pp 77–93.

46 See Ontario Ministry of Consumer and Commercial Relations, *A Consultation Draft of the Consumer and Business Practices Code*, Toronto, 1990, and the papers on this Draft by Marvin G Baer, Roderick J Wood and Nicole L'Heureux in (1992) 21 *Canadian Business Law Journal* 254–305.

> courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

This provision will require countries such as Ireland and the United Kingdom to introduce group actions after the example of their continental partners.

The directive does not provide for the establishment of a European Consumer Ombudsman, which the European Parliament's Commission for Consumer Affairs had asked for.[47]

Consequences of the Directive

The directive's consequences will first be felt by legislatures. In most instances legislatures may meet the directive's requirements without too many problems. They have seen the directive coming for some time and most have existing legislation which can easily be adapted.

Countries such as Ireland, the Nordic countries, Switzerland and the United Kingdom will have to decide what to do with the black list. Ireland and the United Kingdom will have to introduce group actions. The Netherlands will have to codify the *contra proferentem* and the 'plain language' rules; it will also, as some other countries, have to adapt its definition of 'standard contract terms' so as to include oral terms. The impact of the directive will be felt most in the country which was the first to legislate on unfair contract terms, Italy. What once was the most advanced legislation, now has turned into a slightly archaic institution as far as standard form contracts are involved.

In the long run, however, it is more important that on the basis of interpreting domestic legislation in conformity with directives, courts and, therefore, also lawyers in member states will have to interpret implementation measures in conformity with their interpretation by the EC Court of Justice.[48] A novelty of the present directive is that under art 10 s 2 a reference to the directive in implementation statutes will be necessary.[49]

Conclusion

The EC directive on unfair terms in consumer contracts is an important document, since it is a first step towards harmonisation of European contract law. Trade and industry will not endorse the directive with enthusiasm, because it does not provide for total harmonisation. Likewise, consumers and their organisations will be disappointed in the restriction of the directive's scope of application and in the unclear status of the black list. But the development of a European law of contract will only benefit from the directive. After directives which cover certain specific contracts, such as financial services, insurance and time-sharing,

---

47 See Alan Davis, 'The Amended Proposal for an EEC Directive on Unfair Contract Terms in Consumer Contracts' (1992) *European Consumer Law Journal* 65, 72.

48 Kolpinghuis, Jur 1987, p 3969.

49 Compare J S Watson, *Tijdschrift voor Consumentenrecht*, 1991, pp 25–6.

and directives which aim to regulate specific aspects of contract law (distance selling, doorstep sales), there finally exists a European legislative approach to a centerpiece of the law of contract.[50]

COUNCIL

COUNCIL DIRECTIVE 93/13/EEC
of 5 April 1993
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 100 A 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 with the aim of progressively establishing the internal market before 31 December 1992; whereas the internal market comprises an area without internal frontiers in which goods, persons, services and capital move freely; Whereas the laws of Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer 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, the laws of Member States relating to unfair terms in consumer contracts show marked divergences;

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

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

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

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

---

50 As to alternatives to legislation see Ole Lando, 'Principles of European Contract Law/An Alternative or a Precursor of European Legislation' (1992) *RabelsZeitschrift* 261–73.

Whereas the two Community programmes for a consumer protection and information policy[4] underlined the importance of safeguarding consumers in the matter of unfair terms of contract; whereas this protection ought to be provided by laws and regulations which are either harmonized 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 'acquirers of goods and services should be protected against the abuse of power by the seller or supplier, 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 contracts concluded between sellers or suppliers and consumers; whereas as a result *inter alia* contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements must be excluded from this Directive;

Whereas the consumer must receive equal protection under contracts concluded by word of mouth and written contracts regardless, in the latter case, of whether the terms of the contract are contained in one or more docu- ments;

Whereas, however, as they now stand, national laws allow only partial harmonization to be envisaged; whereas, in particular, only contractual terms which have not been individually negotiated are covered by this Directive; whereas Member States should have the option, with due regard for the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive ;

Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; 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;

Whereas Member States must however ensure that unfair terms are not included, particularly because this Directive also applies to trades, business or professions of a public nature;

Whereas it is necessary to fix in a general way the criteria for assessing the unfair character of contract terms;

Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an

overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith ; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account;

Whereas, for the purposes of this Directive, the annexed list of terms can be of indicative value only and, because of the cause 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 laws;

Whereas the nature of goods or services should have an influence on assessing the unfairness of contractual terms;

Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, *inter alia*, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer;

Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an 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 not bind the consumer, and the contract will continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair provisions;

Whereas there is a risk that, in certain cases, the consumer may be deprived of protection under this Directive by designating the law of a non-Member country as the law applicable to the contract; whereas provisions should therefore be included in this Directive designed to avert this risk;

Whereas persons or organizations, if regarded under the law of a Member State 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 competent to decide upon complaints or to initiate appropriate legal proceedings; whereas this possibility does not, however, entail prior verification of the general conditions obtaining in individual economic sectors;

Whereas the courts or administrative authorities of the Member States must have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts,

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. 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

Article 2

For the purposes of this Directive

(a) 'unfair terms' means the contractual terms defined in Article 3;
(b) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
(c) 'seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

Article 3

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. 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 the 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 to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.
Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.
3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Article 4

1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services

for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.

Article 5

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. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).

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 be binding on 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.
2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

Article 7

1. 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.
2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.
3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.

Article 8

Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.

Article 9

The Commission shall present a report to the European Parliament and to the Council concerning the application of this Directive five years at the latest after the date in Article 10 (1).

Article 10

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 December 1994. They shall forthwith inform the Commission thereof.
These provisions shall be applicable to all contracts concluded after 31 December 1994.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate the main pro- visions of national law which they adopt in the field covered by this Directive to the Commission.

Article 11

This Directive is addressed to the Member States.
Done at Luxembourg, 5 April 1993.
For the Council
The President
N HELVEG PETERSEN

ANNEX

TERMS REFERRED TO IN ARTICLE 3 (3)

1. **Terms which have the object or effect of:**
   (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
   (b) inappropriately excluding or limiting the legal rights of the consumer vis-á-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
(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 receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
(f) authorizing 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 for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
(l) 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 in both cases 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;
(m) 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;
(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

(p) 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;

(q) 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 not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. **Scope of subparagraphs (g), (i) and (l)**

(a) Subparagraph (g) 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 where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

(b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

(c) Subparagraphs (g), (j) and (l) do not apply to:

- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
- contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;

(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

§ Reprinted from the *Official Journal of the European Communities*, No L 95, 21 April 1993.

1 OJ No C 73, 24. 3. 1992, p. 7.

2 OJ No C 326, 16. 12. 1991, p. 108 and OJ No C 21, 25. 1. 1993.
3 OJ No C 159, 17. 6. 1991, p. 34.
4 OJ No C 92, 25. 4. 1975, p. 1 and OJ No C 133, 3. 6. 1981, p. 1.