

CCBE Proposal for a Revision of Directive 93/13/EC on Unfair Terms in Consumer Contracts

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

In this paper the CCBE responds to the actions undertaken in the context of the European Commission's Regulatory Fitness and Performance programme (REFIT) regarding the review of EU Consumer law (Fitness Check). In particular, the CCBE wishes to provide its views in relation to a possible review of Directive 93/13/EC on unfair terms in consumer contracts (Unfair Contract Terms Directive) in order to ensure a higher level of consumer protection and legal certainty.

Within this context the following proposals are made:

I. General

The CCBE believes that the Unfair Contract Terms Directive should be changed from minimum harmonisation (Article 8) to maximum harmonisation¹. Such change will serve the goal of a higher level of consumer protection (Article 114(3) TFEU) against the imminent and permanent risks consumers envisage as they are exposed to unfair standard terms of contract by traders. Furthermore, high level harmonisation will remove the (national) obstacles presently existing within the different applicable consumer laws of the Member States pursuant to Article 6 Sec. 2 Rome I.

The CCBE, therefore, favours the implementation of a new rule into the Unfair Contract Terms Directive governing all relevant aspects of incorporation of standard terms into an individual contract.

In order to further increase the present level of consumer protection, another rule should be inserted stating that any contract and any contract term individually negotiated between the parties shall have priority over any divergent standard term of contract.

¹ The UK delegation to the CCBE considers that there is insufficient empirical evidence to support this change. The Austrian Delegation to the CCBE strongly opposes the view that the Unfair Contract Terms Directive should be changed from minimum harmonisation to maximum harmonisation. Furthermore, the European Commission should seek a balanced approach between the protection of consumer interests and the interests of the economy.

II. Unfair Terms - General

The main element of any necessary review of the Unfair Contract Terms Directive should rest with a complete² change of the Annex to Article 3(3), as, at present, this Annex is only 'indicative' for a limited number of standard terms to be held invalid.

The two-tier approach of Article 3(1) (objective test of unfairness) and Article 4(1) (individual unfairness test in consideration of all circumstances of the case) invalidating any standard term should be upheld.

However, it seems desirable to fully revise the Annex to Article 3(3) and to incorporate a list of certain contract terms that will 'always' be held to be unfair and thus invalid ('black list'), whilst another list of standard terms should be elaborated as a 'grey list', stating that these standard terms will be presumed to be unfair on the basis of the specific circumstances of the case at hand.

III. The 'Black List'

The 'black list'³ should contain the following standard terms as being 'always' unfair:

1. Exclusion or limitation of trader's liability for death or personal injury caused to the consumer due to an act or omission of the trader or any person acting on his behalf;
2. Exclusion or limitation of trader's liability for any loss or damage to the consumer, either caused deliberately or by gross negligence;
3. Exclusion or limitation of trader's liability for the proper fulfilment of any obligation undertaken by its authorised agents;
4. Making the commitment of the trader to fulfil the contractual obligations towards the consumer subject to a particular condition the fulfilment of which is depending exclusively on the trader;
5. Excluding or limiting the consumer's right to take legal actions or to exercise any legal remedy against the trader;
6. Stating that the consumer shall be bound to take any dispute to arbitration or mediation, unless such referral is based on pre-existing statutory requirements;
7. Stating that the consumer shall be bound by a standard term referring exclusive jurisdiction to a court of the place where only the trader is domiciled;
8. Giving the exclusive right to the trader to determine whether the trader has fulfilled its contractual obligations towards the consumer;
9. Giving the exclusive right to the trader to interpret any of the terms of the contract;
10. Providing that the consumer shall be bound by any contract term whilst the trader is not;
11. Obliging the consumer to pay for goods and services not delivered or rendered, either totally or in part, and thus eliminating or restricting the withholding right of the consumer;
12. Eliminating or restricting the right of the consumer to off-set its payment obligation, provided that the counter-claim of the consumer has duly been acknowledged by the trader or there is evidence that such counter-claim is uncontested;
13. Shifting the burden of proof to the detriment of the consumer, provided that such burden, in line with the applicable legal rules, rests with the trader;

² The UK delegation favours retaining an indicative list

³ The UK delegation would not advocate for a black list, but if one is introduced, it would support inclusion only of the first two proposed clauses, in line with the Consumer Rights Act 2015, s 57 and 65.

14. Imposing an amount of liquidated damages on the consumer for any alleged breach of contract, unless such amount is proportionate to the actual amount of damages incurred by a trader in the normal course of circumstances of such breach of contract.

IV. The 'Grey List'

The 'grey list' listing such terms of contract that are presumed to be unfair (in view of the specific circumstances of the case) should contain the following contract terms:

1. Inappropriately exclude or limit the remedies available to the consumer under the respective legal rules to be applied for any non-performance of the trader;
2. Entitle the trader to terminate the contract or to change or amend any of its terms or conditions on a discretionary basis, unless the same right has been granted to the consumer;
3. Enable the trader to terminate the contract with an indefinite duration without reasonable notice, unless the consumer has been given serious and good reasons for such termination;
4. Enable the trader to automatically extend the duration of a contract, unless the consumer notifies otherwise;
5. Enable the trader to unilaterally modify the terms of the contract without a valid reason to be specified in the contract; if such contract is of indefinite duration, the trader may reserve such right, provided that the consumer then will be entitled to terminate the contract by giving notice within a period of one month;
6. Enable the trader to unilaterally determine the price for any goods or services upon delivery or during the duration of the contract, unless the consumer is entitled to then withdraw from the contract or to terminate the contract with immediate effect;
7. Enable the trader to increase the price to be paid by the consumer for any goods or services, unless the consumer is entitled to then withdraw or to terminate the contract with immediate effect;
8. Oblige the consumer to perform the contract whilst the trader fails to perform its contractual obligations;
9. Enable the trader to transfer its rights and obligations under the contract to a third party without having obtained the consumer's written prior consent, unless such third party is a subsidiary of the trader, named as such in the contract;
10. Allow a trader, where the good or service that has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the trader is obliged to pay the costs of what the consumer has received under the contract, if the consumer decides to exercise its right to reject performance;
11. Allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;
12. Allow the trader to reserve an unreasonably long or inadequately specified period to perform its obligations;
13. Require from the consumer an excessive or inadequate advance payment or guarantee of any performance;
14. Bundle the contract in an unjustified manner with another contract with the trader or any other third party in a way that cannot be expected to be reasonably foreseen by the consumer;
15. Enter into any contract with a consumer for the delivery of goods or services for a period longer than one year; the one-year period shall also apply for any renewal periods thereafter;

16. Stipulating that mere silence of the consumer shall be deemed to amount to a consent of the consumer, either for the entry into the contract or for any amendment or change of the terms of such contract, unless the trader has granted to the consumer the right to withdraw or to terminate the contract with immediate effect upon being notified of any amendment or change of the terms of the contract.
17. Stipulating that any standard term may not be amended or changed by any oral understanding of the parties;
18. Stipulating that the consumer shall be obliged to observe any other formalities other than the requirement of a written form.

V. Consequences of the 'Black List'

In view of the proposal concerning a 'black list' it is suggested⁴ that the Court of Justice of the European Union (CJEU) should be empowered to not only interpret these standard terms as falling into the category of the 'black list', but to also adjudicate and to then hold that such standard terms shall be unfair and thus invalid. Such (new) powers vested in the CJEU will considerably increase the level of consumer protection and will thus contribute to the goal of full harmonisation.

VI. Suggestion to expand the scope to End User License Agreements (EULAs)

The CCBE⁵ calls upon the Commission to expand the scope of the Unfair Contract Terms Directive also to the field of consumer protection of standard terms, generally used in IP-contracts, as the Internet and the terms in the EULAs become more and more important, whilst the schemes of consumer protection, granted by Regulation No 2016/ 679 and by the Draft of Directive 2015/634, do not cover EULAs.

⁴ The UK delegation considers that this is a matter for national courts (see Consumer Rights Act 2015 Act, s 71) and would not support this extension of powers of the CJEU.

⁵ The UK delegation reserves its position on this issue, pending clarification of the inter-relationship between the relevant EU measures. Note also that the UK Consumer Rights Act 2015, s 33 ff already applies to digital content and services (s 48 ff).