



BEUC'S COMMENTS (PART VI)
FOR THE
COMMISSION'S EXPERT GROUP ON
EUROPEAN CONTRACT LAW

BEUC's preliminary comments –
Unfair contract terms

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Unfair contract terms

II.-9:401: Mandatory nature of following provisions

The parties may not exclude the application of the provisions in this Section or derogate from or vary their effects to the detriment of the consumer.

No comments

II.-9:402: Duty of transparency in terms not individually negotiated between a business and a consumer

- (1) A business who supplies terms which have not been individually negotiated with the consumer has a duty to ensure that they are presented at a place where the consumer can reasonably expect to find them, and that they are comprehensible to the consumer.***
- (2) The duty of transparency is not satisfied if the business sets additional payments or charges on the consumer as default options that the consumer is forced to expressly reject in order to avoid the additional payment or charges. In this case, the consumer shall be entitled to reimbursement of any such additional payments, and the business shall be liable for any loss, according to II.-3: 109 (3) that exceeds the amount of such additional payments.***

BEUC's comments:

BEUC considers that fairness rules should apply to all contract terms irrespective whether they have been individually negotiated. In practice the consumer will often lack the bargaining power and the knowledge required to be in a position to influence the content of a contract term during an individual negotiation process.

We consider that in the first paragraph it should be specified that the contract terms shall be expressed in plain, intelligible language and be legible, easily and permanently accessible at a place where the consumer reasonably expects to find them. In addition, contract terms shall be made available to the consumer in a manner which gives him or her a real opportunity of becoming acquainted with them before the conclusion of the contract, with due regard to the means of communication used.

In order to avoid "surprising" terms consumers should not be bound by terms which are placed at inappropriate locations in the contract or to which reference is made but that are not available in the contract or on the website.

Finally, paragraph 2 should make clear that the trader shall seek the prior express consent of the consumer to any payment in addition to the remuneration foreseen for the trader's main contractual obligation. If the trader has not obtained the consumer's prior express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.

II.-9:403: Meaning of “unfair” in contracts between a business and a consumer

In a contract between a business and a consumer, a term supplied by the business is unfair for the purposes of this Section if it significantly disadvantages the consumer, contrary to good faith and fair dealing.

BEUC’s comments:

BEUC does not agree with the proposed definition of unfairness according to which a contract term should be regarded as unfair if it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. The proposed text seems less advantageous for the consumer as significant is linked to the detriment of the imbalance. We prefer the wording of the current 1993 directive.

Moreover, in some countries the requirement of a “significant” imbalance has not been transposed. In LU and NO, an “imbalance” between parties (not even significant) is sufficient.

Also, the requirement of fair dealing/good faith is problematic. 13 Member States have included the notion of good faith in the unfairness test (CY, CZ, DE, HU, IR, IT, LV, MT, PL, PT, SL, ES, UK) while other countries make direct reference to significant balance without adding the criteria of good faith (BE, DK, GR, FR, LU, LT, SK). In the latter group of countries thus the threshold for unfairness is lower;

II.-9:406: Exclusions from unfairness test

- (1) Contract terms are not subjected to an unfairness test under this Section if they reflect provisions of the applicable law, be they these rules, or other EU, International or National rules.***
- (2) For contract terms that are reasonably to be expected and comprehensible to the consumer the unfairness test extends neither to the definition of the main subject matter of the contract, nor to the adequacy of the price to be paid.***

BEUC’s comments:

We do not agree with the exclusion of the control of the unfairness from the main subject matter of the contract or to the adequacy of the remuneration foreseen for the trader’s main contractual obligation. For example, monitoring of core terms is possible in AT (by *laesio enormis*), DK, LV, LU, SL, ES and SW and in the Nordic states terms linked to the price increase, price formation and incidental costs can be subject to the unfairness test as well.

In addition, in paragraph 2 it should be also included the word “main” before the term “price to be paid”.

II.–9:407: Factors to be taken into account in assessing unfairness in contracts between a business and a consumer.

When assessing the unfairness of a contractual term for the purposes of this Section, regard is to be had to whether the terms are reasonably to be expected and comprehensible to the consumer, to whether the terms have been individually negotiated, to the nature of what is to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the other terms of the contract and to the terms of any other contract on which the contract depends.

BEUC's comments:

We consider that when assessing the fairness of a contract term, the competent court or national authority shall take into account also the manner in which the contract term has been communicated to the consumer and, where applicable, the manner in which it was drafted in accordance to the transparency rules.

Moreover, the unfairness of the term should be assessed considering the nature of the products for which the contract was concluded and by referring to all the circumstances occurring before, during and after the conclusion of the contract and to all the other terms of the contract or of another contract on which the former is dependent.

II.–9:408: Effects of unfair terms in contracts between a business and a consumer

- (1) A term which is unfair under this Section is not binding on the consumer.*
- (2) If the contract can reasonably be maintained without the unfair term, the other terms remain binding.*

No comments

II.–9:409: Terms which are deemed unfair in contracts between a business and a consumer

- (1) A term in a contract between a business and a consumer is deemed unfair for the purposes of this Section if it has the object or the effect of the following:*
 - (a) excludes or limits the liability of the business for death or personal injury caused to the consumer through an act or omission of the business;*
 - (b) excludes or limits the liability of the business for damage to the property of the consumer caused deliberately or as a result of gross negligence through an act or omission of the business;*

- (c) limits the business's obligation to be bound by commitments undertaken by its authorized agents or makes its commitments subject to compliance with a particular condition, the fulfilment of which depends exclusively on the business;*
- (d) excludes or hinders 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 generally foreseen by the legal provisions of a Member State;*
- (e) confers exclusive jurisdiction for all disputes arising under the contract to the place where the business is domiciled unless the chosen court is also the court for the place where the consumer is domiciled;*
- (f) gives the business the exclusive right to determine whether the goods or services supplied are in conformity with the contract or gives the business the exclusive right to interpret any term of the contract.*

BEUC's comments:

We consider that the following should be added:

- A term which *"restricts the evidence available to the consumer or imposing on him a burden of proof which, according to the applicable law, should lie with the trader"*, as included in the text of the proposed Consumer Rights Directive.

We also consider that the terms b, c, d, e, g, h, k and m of the next article should be transferred to this article in order to be considered unfair in all circumstances.

II.-9:410: Terms which are presumed to be unfair in contracts between a business and a consumer

- (1) A term in a contract between a business and a consumer is presumed to be unfair for the purposes of this Section if it has the object or the effect of the following:*
 - (a) restricts the evidence available to the consumer or imposing on him a burden of proof which should legally lie with the business);*
 - (b) inappropriately excludes or limits the remedies available to the consumer against the business or a third party for non-performance by the business or the employees of the business of obligations under the contract;*
 - (c) inappropriately excludes or limits the right to set-off claims that the consumer may have against the business against what the consumer may owe to the business;*

- (d) permits a business to keep money paid by a consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the business in the reverse situation;**
- (e) requires a consumer who fails to perform his or her obligations to pay a disproportionately high amount of damages;**
- (f) entitles a business to withdraw from or terminate the contractual relationship on a discretionary basis without giving the same right to the consumer, or entitles a business to keep money paid for services not yet supplied in the case where the business withdraws from or terminates the contractual relationship;**
- (g) enables a business to terminate a contractual relationship of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;**
- (h) automatically extends a contract of fixed duration unless the consumer indicates otherwise, in cases where such terms provide for an unreasonably early deadline for giving notice;**
- (i) enables a business to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;**
- (j) enables a business to alter unilaterally without a valid reason any characteristics of the goods, other assets or services to be provided;**
- (k) provides that the price of goods or other assets, or services is to be determined at the time of delivery or supply, or allows a business to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;**
- (l) obliges a consumer to fulfil all his or her obligations where the business fails to fulfil its own;**
- (m) allows a business to transfer its rights and obligations under the contract without the consumer's consent, unless it is to a subsidiary controlled by the business, or as a result of a merger or a similar corporate transaction, and such transfer is not likely to negatively affect any right of the consumer;**
- (n) allows a business, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the business must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to cancel.**

BEUC's comments:

We consider (based on the Swedish presidency text for chapter V of the CRD) that the following presumes unfair clauses should be added to this list:

- (a) irrevocably binding the consumer to a contract with immediate effect, whereas the time for the traders contractual commitment depends exclusively on the trader;**

- (b) *requiring that the consumer also must enter into further contracts with the same trader in the future;*
- (e) *allowing a shorter period of notice for the trader than the consumer when terminating an open-ended contract;*
- (f) *enabling the trader to decide the price of goods or services to be determined at the time of the delivery according to factors depending on the traders will alone;*
- (j) *allowing the time limit for supplying a product or performing a service to be decided or amended unilaterally by the trader.*

In case the European contract law instrument would cover digital products, it should be considered as presumed unfair the following contract terms:

- (l) *excluding the entire liability of the trader for any lack of conformity;*
- (m) *enabling the trader to limit the agreed performance of the product or to unduly limit the interoperability of digital products with hardware and software;*
- (n) *restricting the use of digital products permitted under copyright law;*

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