



Unfair contract terms in EU law

Unfair Terms Directive and Common European Sales Law

SUMMARY *'Standard terms contracts' are an inevitable part of everyday transactions for both businesses and consumers. Parties using such contracts may, however, rely on their advantageous position in order to impose unfair terms on the other contracting party. This has prompted national courts and legislatures to implement measures aimed at combating such terms.*

In order to bring about harmonisation of such measures in consumer contracts, the EU enacted the [Unfair Terms Directive](#) in 1993. The Commission's [proposal](#) for a Common European Sales Law (CESL) also addresses the issue of unfair terms, not only in consumer contracts, but also in transactions between businesses.

The Directive defines unfairness using broad notions, such as 'good faith' and 'significant imbalance'. The Court of Justice of the EU (CJEU) has given indications as to the concrete factors which should be taken into account when applying those criteria. The CESL also relies on broad concepts, but it takes into account the Court's case law fleshing them out.

As to the effects of unfairness and the ensuing duties of the judge, in its case law, the CJEU has repeatedly put emphasis on the effectiveness of enforcement of consumer rights.



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Background

Standard terms contracts

'Standard terms contracts' (STCs) contain terms which are not negotiated, but proposed by one party (usually the professional) to the other party (usually the consumer) often on a 'take it or leave it' basis. They are used commonly not only in everyday transactions (e.g. public transport) but also in more complex situations (e.g. mortgage loans). They are used not only in business-to-consumer ('b2c'), but also for business-to-business ('b2b') transactions.

Potential imbalance between parties

The party using an STC has certain advantages over the other party, such as:

- **information advantage** – the STC user knows exactly what is in the contract, whilst the other party must analyse the STC to identify potential pitfalls;
- **transaction costs advantage** – the STC user pays only once (e.g. to a lawyer) to draft the STC which it will use for multiple transactions, whereas the other party must analyse such a pre-formulated contract on a one-off basis.

These two advantages lead to an imbalance between the STC user and the other contracting party. This imbalance may also coincide with a **general imbalance of bargaining power** between the parties, especially if:

- the STC user is a trader and the other party is a consumer, or
- the STC user is a large enterprise and the other party is an SME.

Imposition of unfair terms

There is also a risk that the STC user will impose disadvantageous, unfair terms on the other party which will often accept them,¹ because of:

- lack of awareness (many consumers do not think of the risk at the time of buying a good or service);
- lack of time (consumers do not wish to spend time reading the STC);
- lack of knowledge ('small print' terms are too difficult to understand without specialist expertise);
- lack of bargaining power (even if the consumer wants to negotiate, the trader will refuse);
- lack of choice (all traders offering a given good or service use similar terms in their contracts).

Approaches to combating unfair terms

Owing to the various interests involved in protection against unfair terms, MS have developed different regulatory approaches.²

- the Nordic countries have focused on **substantive fairness** of contract law, thus introducing a sweeping judicial review of all unfair terms (standard and negotiated, b2c and b2b);
- France has focused on **abuse of the stronger position** of the trader, thus introducing judicial review of all b2c transactions (even negotiated terms) but not covering b2b transactions;
- Germany has focused on **transaction costs**, thus policing all standard terms, including in b2b transactions.

Harmonisation of law on unfair terms

Owing to divergences of approach to the control of unfair terms in the MS, the [Unfair Terms Directive](#) (UTD), enacted in 1993, contains a **minimum harmonisation** clause which allows MS to adopt or retain a higher

level of protection against unfair terms. This stems from the idea that the UTD is a 'lowest common denominator'.³

The Commission's 2011 [proposal](#) for a [Common European Sales Law](#) (CESL) includes a chapter on unfair terms, with separate sets of rules for b2c and b2b transactions. The CESL, however, is not a harmonising measure, but an additional system of contract law which parties may chose to govern their transaction *instead of* national contract law. Therefore, the CESL has no minimum harmonisation clause.

Scope of protection

Application

The UTD applies exclusively to b2c contracts, with [the notion of 'consumer'](#) limited to natural persons acting outside their trade, business or profession. Many MS go beyond that. For instance, in some countries businesses too may rely on rules against unfair terms. Often, different rules apply to b2b and to b2c transactions.⁴

The proposed CESL follows this trend, as it contains rules on unfair terms both for b2c transactions (a higher level of protection) and for b2b transactions (basic level).

Subjects covered

The UTD limits the scope of review to terms which have not been individually negotiated, and in particular those which were drafted by the professional party in advance. This includes not only 'reusable' standard terms, but also 'one-off' pre-formulated contracts. Furthermore, terms which concern the main subject matter of the contract, as well as the fairness of the price are also excluded from review, provided that they are drafted in plain and intelligible language.⁵ The same approach is followed in the CESL proposal.

Some MS provide a higher standard of protection, allowing courts also to review terms regarding the price, as well as extending the scope of protection to negotiated terms in b2c contracts.

Test of unfairness

Criteria of unfairness under EU law

The UTD defines unfairness by resorting to broadly formulated standards of 'good faith' and 'significant imbalance'.⁶ The Court of Justice (CJEU) [fleshed out](#) these broad concepts by inviting national courts to take into account:

- the nature of the goods or services for which the contract was concluded,
- all the circumstances attending the conclusion of the contract, and
- the consequences of the term under the national law applicable to the contract.

[Later](#), the CJEU added other factors for the national court to consider, such as:

- the other contractual terms,
- the default rules of national law which supplement the contract (implied terms),
- whether the term was drafted in plain, intelligible language, and
- whether the consumer has a right to cancel the contract.

The CJEU [pointed out](#) that it is up to the national court to decide on the unfairness of a particular term. However, there are terms which the CJEU [considers](#) probably unfair in all circumstances, because they deprive consumers of the very effectiveness of protection of their rights under the UTD. One example would be a term conferring jurisdiction to decide disputes arising under a consumer contract to a court or arbitration tribunal close to the trader's place of business.

Criteria under national laws

Most national laws have taken over the idea of defining unfairness of a term by resorting to broad concepts. The exact formulation of such general standards varies, including 'good faith' (e.g. UK, Germany), 'good morals' (e.g. Poland), 'honest business practices' (Denmark), or 'unreasonableness' (Sweden).

Duty of the judge to act on their own motion

The CJEU held that national courts [have the power](#) to ascertain the unfairness of a standard term on their own motion, even if neither party demands it. National law [may not](#) limit this power of the judge which stems directly from EU law. However, the court [must have](#) all the necessary legal and factual data.

Proposed CESL

The definition of unfairness of both b2c and b2b terms resorts to the notions of 'good faith and fair dealing',⁷ which are defined as 'a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question'.

Following CJEU case-law,⁸ the CESL invites a judge to take into account in b2c contracts such circumstances as:

- whether terms are transparently formulated,
- nature of goods/services,
- circumstances at the time of conclusion of the contract,
- other terms of the contract,
- terms of any other contract on which the contract analysed depends.

In the case of unfair b2b terms, the proposal requires that a term, in order to be regarded as unfair, must deviate grossly from good commercial practice, contrary to good faith and fair dealing.

List of unfair terms

An [annex](#) to the UTD contains an indicative and non-exhaustive list of potentially unfair terms. It does not create a presumption of unfairness.

National legislatures have taken divergent approaches to the implementation of a list or lists of unfair terms:

- some have a 'black' list of terms which are always considered unfair (e.g. Austria),
- some have a 'grey' list of terms which are presumed to be unfair, but the presumption may be rebutted (e.g. Poland),
- some have two lists, one 'black' (always unfair), and another 'grey' (presumed to be unfair) (e.g. Germany), and
- France has a list which is only indicative and does not create any presumptions.

The **proposed CESL** follows the two-list model – one ‘[black](#)’ and one ‘[grey](#)’. These lists would apply only to b2c transactions.

Effects of unfairness

The Unfair Terms Directive states that the consumer is not to be bound by an unfair term, adding that the remainder of the contract should remain in force if it can be upheld without the unfair terms.

In its case law, the **CJEU** developed a set of brief rules, holding that:

- national law [may provide](#) that the whole contract be void if that better serves the protection of consumers,
- an unfair term is not binding [regardless](#) of whether the consumer contests its validity, but if the consumer explicitly requests it, the national court may apply such a term,
- when [assessing](#) whether a consumer contract containing one or more unfair terms can continue to exist without those terms, the national court cannot base its decision solely on a possible advantage for the consumer but rather should adopt an objective point of view,
- the national court [may not](#) rewrite the unfair term.

Most **national laws** have translated the broad notion of the ‘non binding’ character of unfair terms into their own conceptual

framework, using notions such as ‘non-existent’ (e.g. France) or void (e.g. Germany).

The **proposed CESL** repeats the formulation of the UTD that an unfair term ‘is not binding’, adding that if the contract can be maintained without the unfair term, the remaining terms of the agreement are binding.

Main references

Unfair Contract Terms Directive (93/13) / Martin Ebers, in: [Consumer Law Compendium](#), 2008, p. 341-438

[Unfair Terms in B2C Contracts](#) / Martijn Hesselink, Marco Loos, CSECL Working Paper no. 7, 2012

Unfair Contract Terms / Paolisa Nebbia, in: [The Cambridge Companion to European Union Private Law](#), 2010

[Unfair Contract Terms Provisions in CESL](#) / Gerard McMeel, Policy Department C Note, 2012

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Endnotes

¹ [Inequality of Bargaining Power versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms](#) / Michael Schilling, in: European Law Review vo. 3, 2008, p. 336-358; [Behavioural Economics in Unfair Contract Terms: Cautions and Considerations](#) / Michael G. Faure, Hanneke A. Luth, in: Journal of Consumer Policy, 2011, p. 337-358.

² [Various Approaches to Unfair Terms and Their Background Philosophies](#) / Thomas Wilhelmsson, in: Juridica International, vol. 14, 2008, p. 51-57.

³ [Unfair Contract Terms in European Law: A Study in Comparative and EC Law](#) / Paolisa Nebbia, 2007, p 9.

⁴ [Unfair Terms in Contracts between Businesses](#) / Martijn Hesselink, CSECL Working Paper no. 7, 2011.

⁵ [Unfair Contract Terms, Unfair Prices and Bank Charges](#) / Simon Whittaker, in: Modern Law Review vol. 74, no. 1, 2011, p. 106-122.

⁶ Cfr. [General Clauses and standards in European contract law](#) / ed. by Stefan Grundmann, Denis Mazeaud, 2006.

⁷ Regulating Transactions: Good Faith and Fair Dealing / Roger Brownsword, in: [Modernising and Harmonising Consumer Contract Law](#), 2009, p. 87-114.

⁸ See e.g. case C-76/10 [Korčoková](#) [2010] ECR I-11557; case C-472/10 [Invitel](#).