

COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

ON THE IMPLEMENTATION OF COUNCIL DIRECTIVE 93/13/EEC OF 5 APRIL 1993 ON UNFAIR TERMS IN CONSUMER CONTRACTS

SUMMARY

The purpose of this report is not only to appraise Directive 93/13/EEC of 5 April 1993, five years after the deadline for its transposition, but also to raise a number of questions with a view to improving the existing situation.

The first part of the report recapitulates the different stages in the preparation and adoption of the Directive; the second part describes the impact of the various actions mounted by the Commission since 1993. These mainly concern infringement procedures (for non-communication, incomplete transposition and complaints on incorrect implementation), market studies to identify the use of unfair terms in different economic sectors, subsidies granted with a view to eliminating unfair terms in certain economic sectors, the dialogue between consumers and professionals (at national and European level), information campaigns, the conference organised in Brussels in July 1999, and the Clab database. Drawing on the experience gained in implementing the Directive in the Member States, the third part of the report suggests a number of improvements. The suggestions mainly concern the scope of the Directive and its limitations, the notion of unfair term, the list in the annex to the Directive, the failure to supervise pre-contractual terms and conditions, the principle of transparency and the right to information, penalties, existing national arrangements for eliminating unfair terms (as well as the possibility of designing a system for eliminating such terms at European level), the problems posed by certain economic sectors, and the future of the Clab database.

The fourth part highlights the repercussions which the Directive has had for consumers and the business community, the legislation of the Member States, national jurisprudence, the case law of the Court of Justice, and legal doctrine.

Finally, the report includes three annexes. The first annex features the various legal instruments transposing the Directive with a breakdown by Member State. The second contains additional information on the studies carried out by the Commission and the actions it has funded. The third annex consists of a series of graphs and comments on the Clab database.

The Commission, which at this stage has no position on the questions raised, wishes merely to trigger the widest and most fruitful possible debate on the subject; it is keen to receive numerous suggestions on the ideas and issues discussed here (and notably replies to the questions in Part III). If measures should prove to be desirable or even necessary to improve the existing situation, they do not necessarily have to be taken at European level.

TABLE OF CONTENTS

I – INTRODUCTION 5

II – OPERATIONAL MONITORING AND ACTIONS TO REINFORCE THE IMPLEMENTATION OF THE DIRECTIVE 7

1 – Infringement procedures 7

a) For failure to communicate transposition measures 7

b) For incomplete or incorrect transposition 7

c) Complaints concerning incorrect application 8

2 – "Market" studies 9

3 – Subsidies for simultaneous actions for injunctions in several Member States 9

4 – Dialogue between consumers and industry at national level 9

5 – Dialogue between consumers and industry at European level 9

6 – Information campaigns 10

7 – European Conference of 1 to 3 July 1999 in Brussels 11

8 – The CLAB database 12

III – DETAILED ANALYSIS AND DISCUSSION POINTS 13

1 – Current limitations on the Directive's scope 13

a) Individually negotiated terms 14

b) The exclusion concerning mandatory provisions (Article 1.2) 14

c) Exclusion as regards the price and the subject matter of the contract (Article 4(2)) 15

2 – The notion of unfair term and the list in the Annex 16

3 – The principle of transparency and the right to information 17

4 – Sanctions **19**

5 – The national systems for eliminating unfair terms **211**

6 – Towards a "positive" system for eliminating unfair terms **24**

7 – Towards a European system for the elimination of unfair terms **25**

8 – The more problematic sectors **27**

9 – The future of the CLAB database **28**

IV – ADDITIONAL OBSERVATIONS **30**

a) The impact on the legislation in the Member States **30**

b) On national "jurisprudence" **32**

c) On the jurisprudence of the European Court of Justice **34**

d) The impact on legal doctrine **35**

e) Some points for discussion **35**

ANNEX I – National transposition laws

ANNEX II – "Market" studies and subsidies for simultaneous actions for injunctions in several Member States

ANNEX III – Statistics in the CLAB database

I – INTRODUCTION

The adoption by the Council on 5 April 1993 of Directive 93/13/EEC on unfair terms in consumer contracts was a milestone in consumer policy. Ever since the first Community consumer policy programme was adopted in 1975[1] the need for a European-level initiative to ensure consumer protection had become obvious, and the first preliminary draft Directives, discussed informally with the Member States' representatives, were in place just a year later.

Hence the two years and eight months of work carried out by the different institutions between the Commission's formal adoption of the proposal for a Directive on 27 July 1990[2] and its final endorsement by the Council represented only the tip of the iceberg – the final step in the long gestation period of the Community text[3].

It is hardly surprising that the text which the Council ultimately adopted unanimously – the upshot of delicate compromises between the legal traditions of the different Member States[4] – was not to everyone's liking. The European Parliament was particularly critical of the Council's common position (which, with minor changes, corresponds to the text finally adopted) and even threatened to reject it. However, the Directive, despite its gaps[5] and flaws, was at the time a major step forward by comparison with the legislation of most of the Member States and, thanks to its "minimal" character (see Article 8), did not prevent them from adopting or retaining more stringent provisions to ensure a higher level of consumer protection.

Hence, the text was adopted by the Council with the support of a comfortable majority of the members of the European Parliament, which however stressed the importance of the report provided for in Article 9 of the Directive. Article 9 reads:

"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)."

The date in Article 10(1) is 31 December 1994, the deadline for transposing the Community text. Since then five years have elapsed and so the time has come to present this report. The Commission began preparing the report as soon as the Directive was adopted. In a path-breaking initiative, the Commission created an instrument for monitoring the enforcement of the Directive in the various Member States, namely the CLAB database.

The Commission also mounted or supported a large number of actions to combat unfair terms. These actions have furnished invaluable information for measuring the Directive's impact and

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1 Council Resolution of 14.4.1975, OJ C 92/1, 24.4.1975. Besides, on 14 February 1984 the Commission presented a Communication to the Council (COM(84)55 final) on unfair terms in consumer contracts.

2 COM(90)322 final, OJ C 243, 28.9.1990.

3 Notably, with its Communication "Unfair terms in consumer contracts" of 14 February 1984 the Commission launched a public debate on this subject (COM(84)55 final, published in Supplement 1/84 of the Bulletin of the European Communities).

4 While Directive 93/13/EEC goes to the heart of national legislation, several Member States had in the meantime legislated in this area on the basis of different philosophies.

5 One of the gaps was the absence, contrary to the Commission's proposals, of rules approximating national legislation governing the sale of consumer goods. This gap was bridged with the adoption of Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees of 25.05.1999, OJ L 171, 7.7.1999, pp. 12-16.

the effective level of consumer protection against unfair terms. Besides, they have often contributed to reinforcing the Directive's impact.

Unfortunately, the fact that several Member States[6] were slow to transpose the Directive and its incomplete or incorrect transposition by others[7] considerably curtailed, in practice, the five years provided for in the Directive and have not made the Commission's evaluation task any easier.

Hence this report does not contain any formal proposal for an amendment to Directive 93/13/EEC. However, it raises a considerable number of questions on which a vast public consultation is being launched (see Chapter III). These questions concern not only possible Community-level initiatives to improve the existing situation, but also initiatives which could be taken by the Member States themselves to develop the existing national systems. Every interested party is invited to submit replies, together with any other comments they consider useful, to the European Commission.

All correspondence must be delivered to the following address by 30 September 2000:

European Commission

Directorate-General for Consumer Health and Consumer Protection

Rue de la Loi 200

1049 Brussels

Belgium

The correspondence must be clearly marked as follows: *Reply to the Commission Report on Directive 93/13/EEC.*

6 It was not until May 1998 that all the Member States had transposed the Directive, the last country to do so being the Kingdom of Spain.

7 This is the Commission's view, but no judgment of the Court of Justice has been handed down in the cases in point.

II – OPERATIONAL MONITORING AND ACTIONS TO REINFORCE THE IMPLEMENTATION OF THE DIRECTIVE

1. INFRINGEMENT PROCEDURES

a) For failure to communicate transposition measures

The Commission mounted infringement procedures against the Member States that failed to meet the deadline of 31 December 1994 ((DE, UK, E, I, LUX, P)[8]. All Member States communicated the transposition measures to the Commission before the Court of Justice had occasion to hand down a judgment[9].

b) For incomplete or incorrect transposition

The Commission scrutinised the national texts communicated by the Member States. This led to the opening of infringement procedures against all the Member States.

Some of these procedures are still under way, but excellent results have already been obtained. Several Member States have already amended their national law and others have undertaken to do so in the near future.

Hence Belgium has adopted two new instruments - a first act in 1997 which specifically covers contracts with members of the liberal professions and a second act in 1998 aligning the 1991 legislation with the Directive[10]. Likewise, Portugal adopted an amendment to its 1985 legislation on 7 July 1999[11]. The United Kingdom adopted a new instrument in 1999 amending its earlier 1994 Act[12]. Finland recently supplemented its old rules dating from 1994 by adopting a new act in 1999[13].

Greece recently notified the Commission of a new Act of 28 September 1999 amending its earlier legislation[14].

Other Member States have pledged to amend their existing legislation to bring it fully into line with Directive 93/13/EEC. Germany intends to amend its 1976 legislation (as amended

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8 Denmark, France and Ireland notified the transposition measures within a few weeks or with just a few days delay.

9 In some cases, the reason for non-communication was not that the Member State had not legislated in this field, but simply because it had introduced amendments with a view to bringing the old law into line with the Directive. This is the case of Germany, where an act on general contractual terms was adopted in 1976.

10 The Belgian legislation of 1991, whose scope was narrower than the Directive's, did not provide for complete transposition of Articles 5 and 7(2) (as regard to the latter, actions for injunctions were limited to unfair terms listed in the Act as well as those concerning contracts covered by the 1997 Act). Besides, Article 6(2) had not been transposed.

11 Portugal's 1985 legislation (as amended in 1995) had not correctly transposed Article 3(2) and completely ignored the third sentence of Article 5.

12 The Statutory Instrument on Unfair Terms 1994 did not transpose the third sentence of Article 5 and did not fully implement Article 7(2) (since actions for injunctions could only be mounted by the Office of Fair Trading).

13 Act 1259/1994 (which amended Act 38/78) does not transpose Article 6(2).

14 The previous Act No 2251 of 16 November 1994 did not fully transpose Articles 3(2), 5, 6(2) and 7(3) of the Directive. The Greek legislation was limited in scope to general terms and conditions only. Besides, it only protected consumers if the contract had a link with Greek territory and did not provide for remedies against professional associations that use or recommend unfair terms. The new Act No 2741 of 28 September 1999 is currently being examined.

by the 1996 Act) in order to fully transpose Article 6(2)[15]. France also intends to supplement its 1995 Act with a view to correctly transposing Article 4(2)[16]. The Netherlands are reviewing their Civil Code in order to transpose Article 4(2)[17] and Article 5. Finally, Italy has pledged to amend its Civil Code so widen its scope[18] and to fully transpose Articles 5 and 6(2), while contesting the need to transpose Article 7(3) of the Directive.

Although many difficulties have already been resolved (or are currently being cleared up), there are still a number of outstanding problems as regards the scope, the Annex, Article 5, Article 6(2) and Article 7 of the Directive[19].

c) Complaints concerning incorrect application

In 1997 and 1998 several complaints were submitted to the Commission by Italian consumer associations with a view to mounting an infringement procedure against Italy for incorrect transposition of Article 7 of the Directive. Italy has put in place a standard procedure and an emergency procedure in order to transpose this article. The emergency procedure differs from the one existing in ordinary Italian law because the criteria for invoking it have been tightened by the Italian authorities. While in ordinary law the procedure in question can only be relied on in the event of serious and irreparable harm, it may, in the case of injunctions, be invoked when there are good grounds. However the consumer associations claim that the notion of "good grounds" is interpreted too restrictively by the Italian courts and protects only the primary essential rights of consumers (life and health).

Since there is no established case law on the restrictive interpretation of Article 7 of the Directive, the Commission has not brought an infringement procedure against Italy (however, it has requested the consumer associations to furnish fresh documentation with a view to learning more about Italian case law in this field). This case raises the important question of the effectiveness in practice of the systems put in place by the Member States to enjoin the use of unfair terms by professionals.

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15 German legislation protects consumers only when the contract has a close link with German territory.

16 The French transposition Act 95-96 of 1 February 1995, since it does not completely transpose Article 4(2), makes it impossible to assess the unfairness of terms pertaining to the definition of the main subject of the contract and the correspondence between the price and the services or goods supplied. However, the first sentence of Article 4(2) provides for such an assessment when the terms in question have not been drafted in plain intelligible language.

17 For the same reasons as in the case of France.

18 Italian legislation covers only contracts for the sale of goods or the provision of services.

19 The scope has been restricted by certain national transposition rules to contracts relating exclusively to the supply of goods and services. Although contracts for the sale of products or the provision of services are those most frequently concluded between professionals and consumers, the Directive also covers other contracts such as contracts pertaining to guarantees for the benefit of a financial institution or even cases in which the consumers themselves are sellers (provided the buyer is acting in the course of business, of course). The Annex has not been transposed into the corpus of the transposition instruments of certain Member States (the three Nordic countries), which consider that to do so would run counter to consumers' interests (see point III.3). Article 5 has not been fully transposed (notably the second and third sentences) by all the Member States. Article 6(2) raises certain difficulties in application because certain Member States have either added additional conditions to the application of the Article or made consumer protection exclusively conditional on the criterion of residence. Article 7 has also given rise to certain problems arising either from the restrictions to the second paragraph (limiting the right to bring matters before the courts or administrative bodies to specific persons) or the failure to transpose the third paragraph (which provides for remedies against associations of professionals that use or recommend the use of unfair terms).

2. "MARKET" STUDIES

In 1993 the Commission began launching studies to analyse certain types of standard-term contracts proposed to consumers in the different Member States. These studies concerned contracts of sale, car rental contracts, contracts concerning certain banking services (such as current accounts and consumer credit contracts) and insurance contracts (civil liability for motor vehicles, home insurance), contracts concerning various types of tourist services (rented accommodation, holiday clubs, package holidays, timeshares, etc.), contracts in the field of air transport (terms and conditions recommended by IATA), and contracts concerning the provision of general interest services. These studies have not only demonstrated the ubiquity of unfair terms in standard-form contracts but also the enormous difficulty of getting hold of the contractual terms before concluding a contract or independently of such a contract. On several occasions the Commission has had to intervene directly or via the national authorities to enable the contractors carrying out the studies to access standard-form contracts, which shows not only that transparency is lacking but also that it is impossible to rely on market forces in this area.

3. SUBSIDIES FOR SIMULTANEOUS ACTIONS FOR INJUNCTIONS IN SEVERAL MEMBER STATES

Since 1996 the Commission has been subsidising actions mounted by consumer associations with a view to eliminating (either via negotiation or litigation) unfair terms in different economic sectors in several Member States. Actions for injunctions have been mounted in the new technology sectors (mobile telephony, cable and satellite television), and in the field of car rental, timeshare and holiday services. By and large the results of these actions have been positive, in that the professionals have consented either to modify their contractual terms and conditions or to negotiate changes in the near future.

4. DIALOGUE BETWEEN CONSUMERS AND INDUSTRY AT NATIONAL LEVEL

Dialogue between consumer associations and the business community with a view to drafting fair standard contracts is an established tradition in certain countries, such as the Netherlands. In general, however, these practices are not very widespread in most Member States. The Commission has subsidised a project (contract B5-1000/98/000021- DECO (P)) proposed by a Portuguese consumer association, with a view to drawing up, through negotiation with professional bodies, standard-form contracts for five economic sectors characterised by a large number of individual disputes over terms regarded as unfair - namely the sale and brokerage of real estate, timeshare contracts, travel contracts, contracts for the purchase and sale of used cars and contracts for the repair of vehicles. In four of the five sectors standard-form contracts have been drawn up together with industry, timeshare contracts being the only sector in which the negotiations have not been successful.

5. DIALOGUE BETWEEN CONSUMERS AND INDUSTRY AT EUROPEAN LEVEL

In the case of package holidays, the pilot project spawned a fresh project based on consumer/industry dialogue at European level. After having been contacted by the ECTAA (European Confederation of Travel Agencies) in connection with the package holidays project, the Commission proposed organising a round table with consumer representatives to discuss improvements in the general terms and conditions used in package holiday contracts. This proposal was endorsed by the ECTAA; the next step was to verify how willing the two

parties were to mount this exercise; to this end the ECTAA consulted its members and the Commission consulted the Consumer Committee. A group has been set up, consisting of seven industry representatives, seven consumer representatives and six high-level independent experts from various national authorities. This group convened for the first time on 13 December 1999. At this initial meeting the group discussed the round table's objectives and the methodology to be used to achieve its goals. This is the first experience of its kind and could function as a pilot for fresh initiatives in the future.

Besides, in order to ensure that European citizens are fully aware of their rights, the dialogue between "Citizens and the business community" mounted by the Commission allows for continuous communication with the public. Thanks to an Internet site and a hotline (each Member State providing a freephone number for its citizens), the public can access detailed information, ask questions and receive customised advice concerning their opportunities and rights (such as in the case of unfair terms in consumer contracts) in the internal market. The results obtained improve the interactive nature of a policy designed to develop the internal market, in the interests of citizens and firms.

6. INFORMATION CAMPAIGNS

The first information campaign was mounted from 13 November to 8 December 1995, with a view to alerting the general public to their rights under Community law as regards unfair contractual terms and conditions and also as regards package holidays and overbooking in air transport.

This campaign, which was orchestrated simultaneously by 11 Member States (B, D, E, F, G, I, IRL, LUX, NL, P and UK), consisted mainly of short, hard-hitting messages broadcast by the national radio stations. In certain Member States these messages were also disseminated via other means of communication, such as TV (G, I, NL, P) and the press (IRL and P).

The campaign was accompanied by a series of flanking measures (such as the distribution of brochures and the creation of mechanisms to deal with enquiries from the public) which were developed with the support of the national consumer associations. The messages included postal addresses or freephone numbers to give citizens an opportunity to obtain more detailed information on the issues addressed in the campaign.

According to the evaluation performed by the advertising firm that orchestrated the campaign, the radio messages reached on average 120 million persons (each addressee having the opportunity to relay each message between 10 and 16 times) in the 11 Member States concerned.

This campaign, besides the fact that it was welcomed by the public as a form of direct contact with the European Union, prompted numerous requests for additional information (not only from the public but also from professionals). It also helped promote the role and importance of the national consumer associations involved.

A second information campaign focusing exclusively on unfair terms was mounted in September 1997 in Spain, Greece, Italy, Ireland and Portugal, the EC countries in which consumer representation is weakest. This campaign, which was organised in the context of the "Citizens of Europe" programme, was implemented by a European communications firm and 25 consumer organisations in the countries concerned were involved in the project.

In each country the campaign kicked off with a press conference organised by European and national parliamentarians and was followed by short radio messages drawing the public's attention to unfair terms.

During the campaign, a freephone number was made available to citizens in the Member States concerned, allowing them not only to request more detailed written information (in the form of brochures, information leaflets, etc.) but also to respond to the problems raised.

For their part, the consumer associations were actively involved in the campaign. In particular they tried to sensitise the lower courts and the national bar associations to the scope of Directive 93/13 by hosting conferences and seminars. They also contributed considerably to disseminating information via the national press or in the form of brochures.

Among the key results the evaluation stresses that the campaign encouraged consumer associations (notably in Italy and Portugal) to bring actions for the injunction of unfair terms. In some cases the courts did not have to adjudicate because the professionals were persuaded to modify their contractual terms and conditions following negotiations with consumer associations.

Finally, the campaign gave a big fillip to the consumerist movement in the five Member States covered.

7. EUROPEAN CONFERENCE OF 1 TO 3 JULY 1999 IN BRUSSELS

On 1 to 3 July 1999, with a view to promoting a public debate and to assembling as much information and input possible, the European Commission hosted an international conference on Directive 93/13/EEC. Approximately 300 delegates attended, including not only a large number of leading European specialists but also representatives of the Member States, the consumer movement and the different economic sectors. The applicant countries were also widely represented. After a series of presentations concerning national experiences and the CLAB database and the lively discussions that ensued, six specific themes were addressed at working group level:

– the scope of the Directive (standard terms in consumer contracts)

– the application of the Directive to public services

– the application of the Directive to financial services and the new technologies

– the definition of unfairness

– the obligation as regards intelligibility and the interpretation most favourable to the consumer and

– the mechanisms for monitoring unfair terms.

The working groups' conclusions were then debated in plenary session.

The proceedings of this conference are available on the Commission's Internet site in a multilingual version (http://europa.eu.int/comm/dgs/health_consumer/index_fr.htm) and will shortly be published in book form. They may be obtained on request by writing to the

Directorate-General for Consumer Health and Consumer Protection, European Commission, Rue de la Loi 200, 1049 Brussels, or by fax at (32) 2 29 59490.

8. THE CLAB DATABASE

The CLAB project (unfair terms) was launched by the Commission immediately after the adoption of Directive 93/13. The idea was to create an instrument for monitoring the practical enforcement of the Directive in the form of a database on "national jurisprudence" governing unfair terms. This database can be consulted free of charge on the Commission's server (http://europa.eu.int/clab/index.htm). "Jurisprudence" as understood by CLAB covers not only court judgments but also decisions by administrative bodies, voluntary agreements, out-of-court settlements and arbitration awards. The database concerns the practical enforcement of the Directive[20] and now contains 7 649 cases. Despite all the work that has gone into it, it would be an exaggeration to claim that the database inventories all existing "jurisprudence". However, it contains the most important "jurisprudence" which each contractor was able to assemble. Although the results of a statistical analysis of the data contained in CLAB may not faithfully mirror the realities, they do at any rate reveal clear trendlines where national "jurisprudence" is concerned; hence, some sound conclusions can tentatively be drawn. Thus the Commission scrutinised these data carefully in preparing this report.

Annex III contains a number of graphs concerning the various points analysed.

[20] The database includes not only jurisprudence under specific national laws pertaining to unfair terms but also all jurisprudence which, although based on other provisions or general legal principles (good faith, equity, abuse of rights, etc.) has an unfair terms dimension.

III – DETAILED ANALYSIS AND DISCUSSION POINTS

As Advocate-General Saggio emphasised in his grounds of 16 December 1999[21], the Directive is designed to give special protection to "interests of the community which, while part of the economic order, go beyond the specific interests of the parties".

The use of terms which lead to a significant imbalance in the contractual relations between the parties undermines not only the interests of the consenting party but also the legal and economic order as a whole.

General contractual terms and conditions aim to replace the legal solutions drawn up by the legislator and at the same time to replace the legal rules in force in the Community by unilaterally designed solutions with a view to maximising the particular interests of one of the parties.

From the economic viewpoint this can be extremely harmful. The economy can function correctly only if resources are optimally allocated. This is possible only if the market is competitive enough and if the relations between the economic operators are balanced. In economic terms, a risk should be borne by the person who is best able to prevent this risk or to insure himself against it; an obligation must be assumed by the person who is best placed to assume it.

Unfair terms shift the burden of risks and obligations by externalising the costs in question. This has two major consequences: firstly, the prices of products and services do not reflect true costs, creating distortions to competition in favour of less efficient firms and leading to lower quality products and services; secondly, the costs incurred by society are higher, because the risks and obligations are borne by persons other than those who could bear them most efficiently from the economic viewpoint.

Hence it is disconcerting to ascertain that, despite the endeavours of the Community legislator and the national authorities, balanced contractual relations are anything but the rule, that unfair terms are widely used, and that new types of unfair terms arise by the day.

This chapter scrutinises the various questions raised by the application of the Directive in the light of national experiences and contemplates a number of proposals aimed at improving the system. Note that the questions raised at the end of each subsection in no way commit the Commission to any particular policy. **At this stage the Commission has no position on the questions raised and wishes only to trigger the widest and most fruitful possible debate on these issues.** Hence the Commission has decided to raise all the relevant questions that have been submitted to it over the past five years, notably in the context of the conference of 1 to 3 July 1999, even if they may appear unusual, or too daring or unworkable. **Besides, even if is concluded that certain actions are desirable or even necessary, this does not automatically mean that they have to be undertaken at Community level.**

1 – CURRENT LIMITATIONS ON THE DIRECTIVE'S SCOPE

Several years ago the Union pledged to simplify Community law. This involves not only consolidating several instruments governing the same area but also tidying up the existing law

[21] Joint cases C-240/98 to C-244/98, Océano Grupo Editorial, S.A. and Salvat Editores, S.A. v Rocío Murciano Quintero et al.

with a view to repealing obsolete or redundant provisions and to clarifying rules which have led to difficulties in interpretation. During the negotiations with the Council a number of limitations were introduced into the scope of the Directive. The validity and the practical utility of these limitations were often questioned in the debates on the Directive, and notably at the Brussels Conference in July 1999. From what the Commission has learnt about the transposition and enforcement of these rules, the need for some of these limitations has not been conclusively demonstrated. If this information is confirmed, they should be eliminated with a view to simplifying Community law.

a) Individually negotiated terms

The Directive excludes contractual terms which have been individually negotiated by the consumer[22].

Some Member States (DK, FIN, F, S and to some extent A and NL) have not transposed this exclusion, without any practical problems arising in practice. Besides, the CLAB database also shows that this exclusion has not had any practical effect in the Member States which transposed it, because none of the cases in the database concerns an individually negotiated contractual term. Indeed it is fanciful to think that contracts of adherence could truly contain individually negotiated terms other than those relating to the characteristics of the product (colour, model, etc.), the price or the date of delivery of the good or provision of the service - all terms which rarely give rise to problems concerning their potential unfairness.

On the other hand, the presence of this exemption in the text of the Directive hardly makes for clarity and encourages misinterpretations which may lead to a confusion between what is meant by "negotiated" and what is meant by "expressly accepted". The point is that certain firms have introduced new practices with a view to circumventing the enforcement of the national provisions transposing Directive 93/13/EEC. Some contracts now include terms by which the consumer declares that he has negotiated and expressly accepted the general contractual terms and conditions; indeed, sometimes firms go so far as to use contracts which seem to be tailor-made for the consumer, even though all are entirely computer-generated and do not exist in a pre-printed version!

Although these practices are legally speaking null and void, they are very prejudicial to consumers because they mislead them as to their rights. They are directly inspired by the Directive's scope being limited to contractual terms that have "not been individually negotiated".

b) The exclusion concerning mandatory provisions (Article 1.2)

Several Member States have not transposed this limitation on the scope of the Directive (A, DK, FIN, F, NL, S, EL, B) without this leading to problems of application. Within the meaning of the Directive, the expression "mandatory" does not reflect the normal distinction made in civil law between binding provisions and supplementary provisions. The Directive states that the wording "mandatory, statutory or regulatory provisions" also covers rules which, according to the law, apply between the contracting parties provided that no other arrangements have been established (13th recital). Again, in the spirit of the Directive,

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22 This is merely in the form of an indirect exclusion pursuant to Article 3, which serves only as a criterion for assessing any term "which has not been individually negotiated". This exclusion results from the elimination by the Council of Article 4 of the Commission's amended proposal (COM(92)66 final, OJ C 73, 24.3.1992) which laid down specific criteria applicable to individually negotiated terms.

contracts embodying statutory or regulatory provisions are supposed not to contain unfair terms and can thus be excluded from the scope of the Directive, provided Member States see to it that they do not include unfair terms (14th recital).

Besides in the context of Article 1(2), public services, which are **included** in the definition of the "seller or supplier", i.e. professional, (Article 2c) cannot be excluded from the scope of the Directive in respect of "mandatory provisions". This reading is shored up by the Commission's statement in the Council minutes in connection with the adoption of the common position concerning Article 2 on the notion of the contract. The Commission points out that the notion of contract also includes transactions involving supplies of goods or services in a regulatory framework.

However, the control of general interest service contracts has met with opposition in the different Member States and national courts are reluctant to enjoin due control of contractual terms and conditions governing the provision of these services.

The Commission's study on the application of the Directive to general interest services revealed enormous problems, but also showed that these sprang from the specific nature of these services and the national legal orders and had little to do with whether or not Article 1(2) of the Directive has been transposed.

c) Exclusion as regards the price and the subject matter of the contract (Article 4(2))

Again, many Member States have not transposed this limitation (DK, E, FIN, L, P, S, EL). And again, no problems have arisen in practice. The courts of these Member States have not taken it upon themselves to revise prices or to meddle with the main subject matter of contracts in a massive or indiscriminate way, as had been feared by the proponents of certain doctrines and in certain professional circles. Indeed in the vast majority of cases neither the price as such – which results from the play of market forces – nor terms which plainly concern the definition of the subject matter of the contract are likely to raise problems which could be resolved by applying the legislation on unfair terms. However, their exclusion raises interpretative problems which can compromise the proper application of the text.

Terms concerning the price do indeed fall within the remit of the Directive, since the exclusion concerns the adequacy of the price and remuneration as against the services or goods supplied in exchange and nothing else. The terms laying down the manner of calculation and the procedures for altering the price remain entirely subject to the Directive.

As regards the subject matter of the contract, its exclusion from the Directive in no way contributes to resolving the few cases in which this aspect is of real importance. The typical example concerns insurance: how can one determine whether the exclusion of a certain risk from insurance coverage[23] is a term pertaining to the subject matter of the contract – hence not subject to control – or whether it is a term waiving liability, which is indeed subject to the Directive?

Question No 1: Should one or more of the three abovementioned limitations be eliminated from the scope of the Directive? If so, which limitations should be eliminated and under what conditions?

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[23] Whether worded negatively (exclusion) or positively (risk not included) is irrelevant.

2. THE NOTION OF UNFAIR TERM AND THE LIST IN THE ANNEX

The Directive provides for two ways of determining whether a contractual term is unfair – one main approach and one supplementary one. The Directive contains a general criterion (Article 3(1))[24], supplemented by an indicative list of terms which may normally be regarded as unfair (Annex to the Directive).

The general criterion has been transposed in different ways by the Member States. Some countries have transposed the text literally, while others have rephrased it a greater or lesser extent. However, practice shows that what ultimately counts is the concrete enforcement of the general criterion and not the actual text of the law.

The second way of assessing the unfairness of a contractual term is the indicative list annexed to the Directive. Since the list is indicative, a contractual term corresponding to one of the examples in the annex is not automatically deemed unfair[25]. However, it is an invaluable tool both for the courts, the authorities and the economic operators.

Although the list is "indicative", Member States are obliged to include it in the transposition instrument so as to familiarise legal experts and the general public with its existence. Hence the content of the list should be part and parcel of the national legal instruments. Indeed, the Court has consistently held that it is of the essence, in order to satisfy the requirement of legal uncertainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights[26].

This obligation to transpose the list itself has triggered two types of problems.

Firstly, certain countries have refused to transpose the list as it stands[27]. The national authorities of these Member States argue that an indicative list of unfair terms might create confusion and adversely affect consumer protection (because certain terms are already outlawed in their domestic legal orders); they also fear that the courts might tend to confine their review to the terms in this list, to the detriment of the general assessment criterion.

Secondly, case law has shown that the way the list is drafted has weakened its practical impact. Many of the terms in the list are somewhat vaguely worded, with the result that a single term in the list may relate to a large number of different contractual terms. Indeed, one third of the cases contained in CLAB relating to the annex exclusively concern point b) in the list!

The question as to the status of the list was raised during the preparatory work on the Directive. In the initial proposal of 24 July 1990[28], the nature of the list in the annex was not spelt out by the Commission. However, in the amendments approved at first reading on 20 November 1991 the European Parliament demanded[29] that the list be binding but not

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24 Article 3(1) provides that a term 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".

25 The inverse also applies in the sense that a contractual term which might seem to be authorised by the annex is not automatically "non-unfair".

26 Judgment of 19 September 1996, case C-236/95, *Commission* v *Hellenic Republic*, [1996] ECR I-4459, grounds 13.

27 Namely Finland, Sweden and Denmark. Infringement proceedings have been brought against these countries.

28 COM(90)322 final, OJ C 243, 28 September 1990.

29 In amendment 11.

exhaustive. The Commission's amended proposal of 5 March 1992[30] provided for a binding list, but this was scotched by the Council, which in its common position of 22 September 1992 deemed that the list should be indicative.

The national legislations have not generally followed the approach enshrined in the Directive and often contain more stringent requirements. Thus certain countries (A, E, B, LUX, G) have published lists of terms which are regarded as unfair (black lists), while others provide for black and grey lists (P, NL, D, I); only a minority (F, UK, IRL) has opted for a non-binding list like the one in the Directive.

The role of a "black" list in assessing the unfairness of a term is highly important for the courts. From CLAB it emerges that out of a total of 1 849 cases that refer to national lists of terms, 1 689 concern binding (or black) lists while only 160 concern non-binding (or grey) lists.

Question No 2: As regards the content of the list, should the examples be drafted in greater detail, or should the number of terms be increased to enhance the practical impact of this list?

Should the nature of the list be altered, with a view not only to ensuring more faithful application of the Directive but also to contributing to the harmonisation of national laws?

3. THE PRINCIPLE OF TRANSPARENCY AND THE RIGHT TO INFORMATION

Article 5 of the Directive says that contractual terms offered to the consumer must always be drafted in plain, intelligible language.

The principle of transparency, on which Article 5 is based, has various functions depending on how it is linked with the Directive's other provisions.

The principle of transparency may be seen as a way of vetting the insertion of contractual terms at the time of conclusion of the contract (if analysed on the basis of recital No 20)[31] or of checking the content of the contractual conditions (if read in the light of the general criterion enshrined in Article 3).

Transparency also means that consumers should be able to obtain, prior to conclusion of the contract, the information they need to make their decisions in full knowledge of the facts.

The Commission, aware of the importance for consumers of the right to pre-contractual information, drafted a provision to this effect in the context of its amended proposal of 1992[32].

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30 OJ C 73, 24 March 1992.

31 Recital No 20 provides that: "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;".

32 Originally, Article 5(2) of the Directive provided that *"regardless of whether or not they are unfair, the terms which have not been individually negotiated shall be regarded as having been accepted by the consumer only where the latter has had a proper opportunity to examine the terms before the contract was concluded"*.

Although the right to information was later rejected by the Council[33], certain aspects of the Directive lend themselves to an interpretation which might lead to the implicit recognition of such a right[34].

However, the reality is entirely different, since professionals rarely provide consumers in advance with the contractual conditions which will ultimately govern their contracts, even when consumers expressly ask for them.

This difficulty was noted by the Commission in connection with the studies it commissioned with a view to examining the prevalence of unfair terms in certain economic sectors[35].

Hence the situation is characterised by a total absence of "competition" as regards the quality of contractual terms.

Besides, infringement of the principle of transparency is not penalised in the strict sense of the word, because contractual terms which do not comply with the criteria of clarity and intelligibility are neither removed from the contract nor regarded as unfair[36].

Indeed Article 5 provides that in such cases the interpretation most favourable to the consumer shall prevail, so that the contractual term may be maintained despite its irregularities.

Question No 3: Is there a need to flesh out the notion and function of the principle of transparency in the Directive?

Question No 4: Should consumers be given the express right to become effectively acquainted with the contractual terms prior to concluding the contract[37]? Should this right be extended to all interested parties, such as researchers, competitors themselves, in order to improve market transparency and thus competition?

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33 Although the Council was in favour of vesting such a right in consumers, it considered that this did not come within the legal framework of Directive 93/13 but rather that of national rules concerning the formation of contracts.

34 Recital No 20 concerning Article 5 provides that *" the consumer should actually be given an opportunity to examine all the terms"*. Point i of the Annex provides that a term that "*irrevocably bind[s] the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract*" may be deemed unfair.

35 For example, it proved particularly difficult to obtain contractual terms and conditions in the context of the studies concerning insurance contracts, tourist contracts and financial services.

36 However, some courts have ruled that the absence of clarity in a contractual term may be illegal in itself. The CLAB database contains some examples, such as the judgment of 20 September 1989 of the Creteil Court of Final Instance, before which consumer associations had sought an injunction against a term in a credit contract. The term provided, without further indications, that the borrower would have to prepare his dossier within the stipulated deadline for his request to be approved. The court considered the term to be illegal because of the absence of clarity (Clab FR 000012).

37 Various sectoral Directives have explicitly enshrined the right to pre-contractual information. Examples include Directive 85/577 on contracts negotiated away from business premises (Article 4), Directive 90/314 on package travel, package holidays and package tours (Article 4), Directive 94/47 on the purchase of the right to use immovable properties on a timeshare basis (Article 3), Directive 97/7 on distance contracts (Article 4), etc.

Question No 5: In the event of infringement of the principle of transparency, should the level of consumer protection be raised by providing either for an extension of the scope of Article 7 (possibility of actions for injunctions in respect of unclear terms, regardless of their unfairness[38]), or a specific sanction (such as providing that contractual terms that are unclear to the consumer be deemed unenforceable if the consumer does not have an opportunity to familiarise himself with them before conclusion of the contract)?

4. SANCTIONS

Article 6(1) of the Directive provides that unfair terms contained in an individual contract shall not be binding on the consumer, as provided for under national law. Hence the objective envisaged has to be achieved in the light of the different legal orders governing unfair terms.

Because of the diversity of legal traditions, this provision has been transposed in different ways (the civil penalties include non-existence, nullity, revocability, voidability and unenforceability of such unfair terms).

However, with a view to maintaining the scope and the effectiveness of the Directive, the legal orders must respect a number of principles to ensure that an unfair term does not actually bind the consumer. In this respect consumers must not only have the unwaivable opportunity of invoking the unfairness of the contractual terms during a court procedure, but they must also be free to refuse to honour their obligations under unfair terms before a court has adjudicated on the matter in hand[39].

Besides, any court judgment that finds a term to be unfair must provide that the judgment take effect from the time of conclusion of the contract (*ex tunc*). Finally, the court should be *ex officio* entitled to rule on the unfairness of the contractual term, to the extent that this is necessary for its decision. It is somewhat difficult to gauge to what extent the different national legal orders meet these requirements, but it seems they do not always do so.

The Belgian system is a good example. This Member State had adopted an act prior to the Directive containing a general definition of unfair terms as well as a black list of terms regarded as unfair. The terms included in this list were automatically considered as null and void and banned, while those that came within the general definition were not automatically null and void. In this system it seemed that the courts were free to set aside any such terms, but were not obliged to do so, with the effect that an unfair term could still be binding on the consumer. This situation, which runs counter to the spirit of the Directive, was resolved by amending the act.

However, other problems exist in this area. Hence, it is far from evident that the courts are obliged, or even entitled, to adjudicate *ex officio* as to the unfairness of contractual terms. It goes without saying that we are referring to the courts' power or obligation to assess *ex officio* the unfairness of contractual terms which are relevant to the resolution of the dispute at issue

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38 This possibility might also be derived from Directive 98/27/EC on actions for injunctions, which must be transposed by 1 January 2001.

39 It goes without saying that, if the firm challenges the consumer's position, it may sue the consumer in question and win the case, with all the associated consequences for the consumer, if the court finds that the contested term is not unfair.

and not all the other terms of the contract. Experience in the Member States shows that some national courts are reluctant to address such terms *ex officio* and that, on the other hand, when they proceed to do so they risk being penalised. In this connection the French Court of Cassation set aside – on procedural grounds – a court decision which assessed *ex officio* the unfairness of a contractual term (Cass. civ. 16/02/94 – INC No 3326 – Clab fr000524).

However, in order to ensure that the Directive is fully effective (and notably Article 6(1), which provides that unfair contractual terms shall not be binding on consumers), national courts should be empowered to assess such terms *ex officio*[40]. Besides, the civil penalties provided for by the Member States do not seem sufficient to protect consumers and to effectively oblige professionals to refrain from using unfair terms[41]

Indeed the only risk (and it is a minor one) run by the professional when a consumer challenges a term before the courts is that this term may be declared invalid. Besides, when an action for an injunction is brought against a professional the only risk he runs is that he may have to replace the offending term by another one. In both cases the professional is ultimately in a situation pretty similar to the one which would have existed if he had never used the unfair term. However, he can make the most of the term in respect of all consumers who do not have the information or wherewithal to react. In the case of injunctions the penalty is not dissuasive enough to the extent that it does not penalise the prior use of the unfair term, but simply means that the professional may not use it in future.

Question No 6: Should the existing civil penalties be reinforced in order to ensure genuine and effective protection of consumers against unfair contractual terms?

Question No 7: Should national courts be explicitly obliged / empowered to assess *ex officio* the unfairness of contractual terms which may be relevant to the outcome of a dispute?

Question No 8: Should other penalties be envisaged (criminalisation, damages) in order to effectively dissuade professionals from using unfair terms?

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40 The Conclusions of the Advocate General of 16 December 1999 (joint cases C-240/98 to C-244/98 – *Océano Grupo Editorial, S.A. and Salvat Editores, S.A. v Rocío Murciano Quintero et al*) fully support this position. According to the Advocate General the penalty provided for in Article 6(1) of the Directive "means that the Directive's provisions can be characterised as "imperative" rules of public economic order which cannot but be reflected in the powers vested in the national court". The Advocate General also stresses that "it is in the public interest that terms harmful to consumers be unenforceable" and that "the ex officio involvement of the court is not only extremely effective with a view to suppression but also seems likely to genuinely dissuade firms from including unfair terms in consumer contracts".

41 In this connection, the Commission indicated in its Communication to the Council and the European Parliament on the role of penalties in implementing Community internal market legislation (COM(95)162 final) that it was important to ensure the transparency of national penalties so as to be able to confirm that they are effective, proportionate and dissuasive. In its Resolution of 29 June 1995 (on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, OJ C 188 of 22 July 1995) the Council reiterated these arguments and added that, pursuant to Article 5 of the Treaty, Member States must take any appropriate measures to guarantee the scope and effectiveness of Community law by, inter alia, making the chosen penalty effective, proportionate and dissuasive.

5. THE NATIONAL SYSTEMS FOR ELIMINATING UNFAIR TERMS

Article 7 of the Directive requires Member States to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers. Although the Directive allows Member States to choose between a legal procedure and an administrative one, all countries have opted for the legal procedure.

Pursuant to existing positive law in the Member States, only the courts are empowered to prohibit the use of unfair contractual terms.

There are big differences between the different national judicial systems as regards these powers.

As regards the *rationae materiae*, jurisdiction lies with the ordinary courts (in most Member States) or designated bodies (such as the High Court in the United Kingdom and Ireland and the Market Court in the Nordic countries).

As regards the *rationae loci*, jurisdiction lies either with the courts of the defendant's place of residence (in most Member States) or a dedicated court which is responsible for the entire national territory (such as the Market Court in the Nordic countries).

Finally, there are also substantial differences as regards the authority of the courts' decisions as *res judicata*. Although in most legal orders the court decisions may be appealed, in some national courts the decision handed down is final (this is the case of the Market Court in the Nordic countries).

It is interesting to note that, although the courts play a predominant role, many systems have a substantial "administrative" admixture. In some Member States it is not only consumer associations that are entitled to seek injunctions against unfair terms: the initiative may be taken by a person responsible for upholding the public interest. This is notably the case of the Director of the Office of Fair Trading in the United Kingdom, the Director of Consumer Affairs[42] in Ireland, the consumer ombudsman in the Nordic countries, and the Verbraucherschutzvereine[43] in Germany. The cases of Portugal and Spain[44] are particularly interesting because in these two Member States the Public Ministry is also entitled to sue, meaning that the national territory is completely covered since they are present throughout the country.

Besides, other Member States (France and Belgium) have created collegiate bodies whose main mission is to recommend the elimination of unfair terms. Indeed in practice the courts often refer to the recommendations issued by these bodies in the grounds to their judgments[45].

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42 In Ireland, Instrument No 27/1995 transposing the Directive provides that only the Director of Consumer Affairs shall be entitled to bring actions for an injunction (an infringement procedure has been brought against the Republic of Ireland for failure to transpose Article 7(2) of the Directive correctly).

43 Although the Verbraucherschutzverein is not formally an administrative body but an association under private law, it is largely subsidised by public funds for fulfilling missions of general interest.

44 Even before the Directive was adopted, Portuguese legislation (Decree-Law No 446/85 of 25 October 1985) already empowered certain consumer associations and certain trade unions, professional and business associations and the Ministry of the Public to bring proceedings. Besides, the Spanish transposition Act No 7/1998 of 13 April 1998 also vested this power in the Public Ministry.

45 The summary of the case files concerning the elimination of unfair terms dealt with by UFC- Que Choisir (a French consumer organisation) since 1984 (published in 1999) contains examples of judgments which mention the recommendations of the Unfair Terms Commission. Besides CLAB contains numerous decisions handed

As regards the court system, a number of problems have arisen. Procedures are time-consuming and the offending terms continue to have their effects until the decision is handed down, which may take several years. In order to address this problem, which is due to the slowness of the law in the Member States, it would be a good thing to introduce procedures to ensure the swift elimination of unfair terms[46].

Besides, Italian case law has also recognised the need for an emergency procedure with special criteria[47]. Italian law provides for two procedures in respect of actions for injunctions, namely a "normal one" and an emergency one. In the dispute in question the court considered that the criteria for triggering an emergency procedure, when this concerned the injunction of an unfair term, should be assessed in the light of specific considerations and not the general conditions of "*periculum in mora*".

Another equally important problem concerns the consequences of the effect in relation to the *res judicata* not only between the parties but also as regards the term in question.

Firstly, a court decision declaring a term to be unfair is binding only on the professional who is party to the dispute and so the effects of the decision do not affect other professionals who use identical terms[48].

Hence, these decisions are not much help cleaning up the market. When 100 firms use unfair terms and one of these firms is served with an injunction, the other 99 firms remain unaffected, so that all of them would also have to be sued in order to prohibit them from using terms having the same effect as the one declared to be unfair! Besides, the situation resulting from the first judgment leads to a distortion of competition between the firm that has been obliged to relinquish the term and those that may continue to use it with complete impunity.

To avoid a situation like this, one might consider putting in place a special procedure making it possible to seek a fresh ruling with a view to extending the effects of the first judgment to other professionals in the same economic sector. In this scenario it goes without saying that these other professionals would have a right to defence under this special procedure.

Besides, a court decision declaring a term to be unfair and enjoining its elimination applies only to the wording of the term in question and not to the effect is produces.

Indeed there is a contradiction between the goal of the legislation on unfair terms and the result of its enforcement. We know that the grounds for declaring a term to be unfair is the imbalance which the term creates between the professional and the consumer (a term is considered to be unfair because of its effects). However the force of *res judicata* of a decision enjoining the elimination of an unfair term is limited to the term itself, to its actual wording. The effects of the term, which underlie the court's decision, lie outside the scope of the force

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down by French courts of first instance and French appeal courts which refer to the recommendations of the Unfair Terms Commission. This is the case as regards contracts for the purchase of motor vehicles (Clab FR 000411), holiday contracts (Clab FR 000412), seasonal rental contracts (Clab FR 000414), motorway subscription contracts (Clab FR 000450), remote surveillance contracts (Clab FR 000579), cable or pay television subscription contracts(Clab FR000653), etc.

46 As in Directive 84/450 on misleading advertising and also in Directive 98/27 of 19 May 1998 on injunctions for the protection of consumers' interests, which require Member States to provide for emergency procedures. This Directive must be transposed by 1 January 2001 at the latest.

47 Ordinanza of the Palermo Court 17-22 October 1997.

48 It is interesting to note that Brazil has found a solution to this problem: in certain conditions, actions for injunctions may have an effect erga omnes.

of *res judicata*. This means that professionals who have been prohibited from using a term found to be unfair may circumvent the judgment by replacing the offending term by another one whose effect and/or object is also unfair.

Hence the rules designed to protect consumers do not achieve their stated goal, since it would be necessary to bring another action for an injunction against the new term introduced by the professional. It would make more sense if the effects of a judgment were wider and not just limited to the wording of the terms, in order to avoid further litigation.

In order to offset the drawbacks posed by the principle of the *res judicata* effect, Spain[49] has recently created a register of contractual terms which have been declared unfair by final court decisions. The effects of these decisions are not only *inter partes* but also *erga omnes* and *ultra partes* to the extent that anybody can invoke the unfairness of these terms before other Spanish courts and instances[50].

Finally, in prescribing the use of "adequate and effective means", the Directive requires Member States to ensure that the courts or supervisory bodies have real power to oblige professionals to remove unfair terms from their contracts. The Member States have introduced mechanisms to dissuade professionals from ignoring injunctions. This mechanism normally takes the form of a fine in the event of a repetition of a specified infringement[51]. However, as regards fines, several practical problems arise when the professional does not comply with the decision. In order to obtain satisfaction the plaintiff must not only be able to prove that the professional has repeatedly infringed the law, but also take him to court once again.

Question No 9: Should there be a special accelerated procedure to enjoin the rapid elimination of unfair terms?

Question No 10: Should a mixed system be put in place whereby an administrative body would be responsible for analysing and prohibiting the use of certain contractual terms, it being for the professional to bring proceedings if he does not accept the administrative decision?

Question No 11: Should the force of the *res judicata* be widened to include not only the wording of the term itself but also its effects and hence prevent professionals from replacing prohibited terms by other terms having the same effect?

Question No 12: Should a special procedure be established to ensure that decisions concerning injunctions in respect of a particular firm be declared applicable to other firms involved in the same kind of activity? If so, what types of decisions could be subject to such a procedure and how could one ensure the right of all the parties concerned to defend themselves?

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49 Transposition Act No 7/1998 of 13 April 1998.

50 Portugal and certain Nordic countries have also introduced a system for registering court decisions on unfair terms handed down in the context of individual actions or actions for an injunction.

51 In certain cases the legal system of the Member States also considers this refusal to comply with an injunction to be a penal infringement, and sometimes this may be more dissuasive than a fine.

Question No 13: Should specific, coercive penalties be imposed on professionals who intentionally use unfair terms?

Question No 14: Should more specific or supplementary penalties be introduced to ensure compliance with injunctions, such as publication of the court judgment at the firm's expense?

6. TOWARDS A "POSITIVE" SYSTEM FOR ELIMINATING UNFAIR TERMS

The traditional approach to eliminating unfair terms based on actions for injunctions is a "negative" system. Once a term is deemed to be unfair, the court orders that it be removed from the contracts. The professional must cease to use this term in consumer contracts. Normally he will replace this term by another one.

As a result the new term may also be unfair and the only way to remove it is to start all over again. Unfair terms are like the Hydra: cut off one head and others grow in its place. Besides, the judgments rarely spell out the parameters for amending the term: for example, the court may declare that imposing a penalty of 50% of the price for non-performance by the consumer to be unfair, but will refrain from saying what amount is deemed acceptable – 10%, 20%, 40% or nothing at all?

Besides, unfairness may result not only from the presence in contracts of certain contractual terms but also from the vagueness of certain terms or even the fact that contracts are silent about certain matters.

Cases like this are prevalent in the insurance sector. Certain insurance policies are imprecise or silent as to the obligations to pay the premium, which means that policyholders may not know how to meet their obligations and the consequences for their insurance cover if they fail to pay[52].

In order to effectively eliminate terms and to remove unfair silences, certain national systems for monitoring unfair terms (such as the ombudsman in the Nordic countries or the OFT in the United Kingdom) have encouraged direct negotiations between individual professionals and professional associations, with considerable success.

At the level of individual negotiation the case of the United Kingdom is particularly interesting, since the Office of Fair Trading plays a pivotal role in eliminating unfair terms. Once it receives a complaint about a term regarded as unfair, the OFT directly initiates

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[52] According to a 1995 study performed by the Centre du Droit de la Consommation of the University of Montpellier, certain optional insurance policies contain no details e.g. as regards the obligation on the insurer to reply to an accident statement, the appointment of an expert, the payment of commission, etc. ... which may give rise to unfair "silences". CLAB also contains abundant examples from the insurance sector of vaguely worded terms or unfair silences. As regards vague contractual terms, the Belgian Court of Cassation deemed unfair a term waiving the guarantee in respect of certain damages on the grounds that that *an exclusion clause cannot be validly relied on against the insuree unless the clauses in question are "clear, express and limited" …* (Clab BE 000447). As regards unfair silences, the Lyons Court of Final Appeal in its judgment of 23 May 1996 ruled that a term was unfair *because it does not subject increases in the premium to any contractrual condition and gives the insurance company an unfair advantage because it does not have to justify any increase in the premiums it decides to adopt* (Clab FR 000324). Likewise, the Athens Court of First Instance considered a term to be unfair *… on grounds that the increase in the price of the premium was not governed by special and precise criteria set out in the contract* (Clab GR 000189).

discussions and negotiations in order to persuade the professional to modify the term in question[53].

At the level of collective negotiations, certain national systems provide for *a priori* control of contractual conditions. This control begins with the very drafting of the contractual terms in the context of collective agreements. Standard-form contracts are drafted in the framework of negotiations between the consumer associations (the Netherlands is a typical case) or bodies with a legitimate interest in protecting consumers (such as the consumer ombudsman in the Nordic countries) and professionals or associations of professionals[54].

Experience with these collective agreements has been mixed. For example, although these agreements have not had much impact in France (mainly because their effects were limited to the signatory organisations and valid only at local level), experience in Sweden has shown that, following negotiations in the individual sectors, the number of judgments handed down by the courts in the field of unfair terms dropped significantly[55]. Likewise in the Netherlands the professional organisations and consumer associations have concluded full-fledged sectoral-level agreements. The originality of the Dutch system, besides the use by professionals of standard terms endorsed by the consumer associations, lies in the gradual establishment of a system for the out-of-court resolution of disputes over these standard-form contracts. Indeed, following the negotiations, a genuine sector-specific complaints bureau is being put in place and will be entitled to handle disputes concerning the conclusion and performance of consumer contracts in the economic sector in question.

Question No 15: Should one provide for and encourage the establishment of systems that encourage the negotiation and discussion of terms with the professionals (obviously without prejudice to competition law)?

Question No 16: Should the courts, in the context of actions for injunctions, be empowered to propose that the parties adopt a new wording in the case of terms that have to be eliminated, or at least to provide for special arbitration procedures, integrated into the injunction procedure, to facilitate out-of-court settlements whose goal would be to reword the offending terms?

7. TOWARDS A EUROPEAN SYSTEM FOR THE ELIMINATION OF UNFAIR TERMS

The need to protect consumers against unfair terms is all the greater now that consumers are increasingly required, because of the single market, to conclude contracts that are drawn up in a language other than their own and that are governed by a different legal order than their own.

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53 The results speak for themselves: between 1995 and 1998, a total of 1 200 professionals modified or eliminated unfair terms from their contracts following discussions with the Office of Fair Trading.

54 For example in the United Kingdom a new standard contract was recently drafted by the Office of Fair Trading and the British Vehicle Rental and Leasing Association (a professional association which alone represents 85% of turnover in the rental and leasing of vehicles in the United Kingdom).

55 The CLAB database shows that, in Sweden, nine decisions were handed down since 31 December 1994 (the deadline for transposition of the Directive), while 189 judgments had been handed down before that date. Likewise in the Netherlands 28 decisions have been handed down since 31 December 1994 as opposed to 69 judgments prior to that date.

Certain contracts are steadily acquiring a cross-border dimension or have cross-border repercussions (rental of vehicles, credit accounts, international haulage contracts, package holidays, timeshares, electronic commerce, etc.). Besides, companies are becoming increasingly international and are often present on different national markets simultaneously. Finally, in certain cases contractual terms are based on international agreements – as in the case of the IATA agreements in the field of civil aviation, which lay down the standard-form contracts used by most airline companies. The Commission has carried out various pilot tests to eliminate unfair terms in certain types of contracts. The idea is to encourage cooperation between different consumer associations in several Member States at the same time, in order to enjoin the removal of unfair contractual terms of this kind[56].

The creation of a European system to eliminate unfair terms could improve the practical enforcement of Directive 93/13 and maximise its impact, thanks to the resulting economies of scale.

In this connection the European Parliament, in the amendments it made to the proposal for a Directive of 18 November 1991, proposed creating a Community mediator for unfair terms[57]. The Commission did not take up this idea in its amended proposal of 1992[58] because it considered that the time was not ripe to create new administrative structures in this area.

In its 1998 opinion "Consumers and the insurance market"[59], the Economic and Social Committee (ESC) pointed out that certain institutional mediation systems in the Member States *are not impartial and do not even provide consumers and insurance companies with identical guarantees of protection. They may discriminate on grounds of nationality, especially in cases where complaints are assessed by professional bodies*. However, the ESC ascertains that the mediations performed by independent arbitration bodies or by independent specialised mediators (such as the ombudsman in Great Britain) have led to positive results in practice.

Taking these points into account, the ESC proposed to the Commission and the Member States *to put in place not only arrangements to settle disputes by arbitration or the appointment of independent ombudsmen but also to consider creating an observatory to deal with complaints about insurance at Community level*.

Besides, among the action lines set out in the last three-year action plan[60], the Commission, in Annex 1 to the plan, adumbrated the appointment of a European ombudsman responsible mainly for transnational consumer complaints. It argued that one of the main missions of consumer policy was to ensure complete respect for consumers' economic interests and insisted on the need to improve the enforcement and follow-up of the existing legislation so as to resolve problems with a European if not indeed global dimension.

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56 The Commission has subsidised actions for injunctions in regard to car rental contracts, timeshare contracts, contracts concerning new technologies and contracts concerning holidays. Besides, the Commission has mounted a project that focuses on dialogue between professionals and consumers in the field of package holidays (see Chapter II of this report).

57 In amendment No 49, the European Parliament suggested that the main functions of the mediator should be to *"supervise the implementation of the Directive by the Member States, try to settle disputes associated with the presence of unfair terms on an amicable basis, organise meetings between the contracting parties when they reside in two or more different Member States, and prepare an annual report on unfair terms."*

58 OJ C 73/7, 24.3.1992.

59 OJ 95, 30.3.1998, p. 72.

60 Consumer Policy Action Plan 1999-2001 – COM(1998) 696 final of 1.12.1998.

One interesting case is currently being addressed by the Office of Fair Trading in the United Kingdom. It concerns a complaint brought by the Air Transport Users' Council against unfair terms in air transport contracts recommended by IATA. The Director-General of the Office of Fair Trading has begun negotiations with IATA. The latter has announced that it is preparing recommendations to change certain contested terms.

The contractual terms recommended by IATA are used not only in the United Kingdom but in Europe generally, and indeed throughout the world. In this connection the procedure brought by a Member State authority, namely the Office of Fair Trading, may have cross-border consequences. Would it not be more appropriate for a European body to address such issues in cases of this kind?

Question No 17: Should actions be mounted at Community level to eliminate unfair contractual terms? What type of actions?

8. THE MORE PROBLEMATIC SECTORS

The question of approximating or harmonising national legislation is particularly relevant to certain economic sectors, such as general interest services (utilities) and financial services.[61]

On the one hand, general interest services are highly complex because of the intrinsic need to regulate them. The liberalisation and privatisation of these utilities (water, gas, electricity, post and telecommunications, transport, etc.) have profoundly altered the regulatory framework of public services.

In this connection, the study carried out for the Commission in 1997 (see above, II.2) showed that a large number of contracts used by privatised general interest services (water, gas, electricity, telecommunications, post, transport and health) not only contained grossly unfair terms but also lacked transparency, notably as regards the terms applied.

Besides, the study revealed that there are major obstacles to supervising public service contracts in the different Member States and that the national courts are reluctant to review the terms under which public services are provided on the grounds that basically these services are governed not by contract but by regulation. In practice, therefore, whole swathes of the economy are not subject to control in respect of unfair contractual terms.

Besides, financial services "consume" a large quantity of contractual terms. For example, in the insurance sector the product sold is in reality the contract itself. The control of unfair terms in contracts of this kind is highly complex because of the uniqueness of the sector. In this connection, a study[62] carried out in different Member States on unfair terms in certain insurance contracts revealed numerous infringements of Directive 93/13.

Though at the current stage full harmonisation in the insurance field is still a long way off, certain Member States are keen to bring about partial approximation of the sector.

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[61] At the conference in June 1999, the financial community expressed its misgivings about the different degrees of protection within the Member States (these misgivings being all the more pronounced in the field of the crossborder provision of financial services because of the need for a clear and standard contractual framework).

[62] Study on unfair terms in certain insurance contracts carried out for the Commission by the Centre du Droit de la Consommation, University of Montpellier/France, July 1995

In its opinion "Consumers and the insurance market"[63], the Economic and Social Committee urged the Commission to define minimum common requirements at Community level for insurance contracts, notably by creating a black list of unfair terms.

Finally, it is interesting to note that in the field of insurance, Article 7 of Commission Regulation (EEC) No 3932/92 of 21 December 1992[64] provides a black list of clauses in standard policy conditions to which the exemptions from the Treaty's cartel rules do not apply. Besides, Article 17 of the Regulation provides that the Commission may withdraw the benefit of the Regulation *where it finds in a particular case that a … concerted practice … has certain effects which are incompatible when the standard policy conditions contain clauses …which create, to the detriment of the policy holder, a significant imbalance between the rights and obligations arising from the contract.*

Question No 18: Should mechanisms be established via which contracts or supplies of general interest services would be subject to prior control?

Question No 19: Is there a need for specific action in certain sectors? If so, which ones?

Question No 20: Should these actions include legislative measures? What other types of action are conceivable? Should codes of conduct or similar instruments be envisaged for certain problematic sectors?

9. THE FUTURE OF THE CLAB DATABASE

The CLAB project consists of a database created by the Commission which is currently accessible to the public via the Internet and also of a network of contractors in different Member States who input data into this database. In the first year the contractors had to assemble all existing case law in the field of unfair terms before the European Directive, wherever possible. In the following years the contractors were responsible for keeping the database up-to-date. These contractors were selected on the basis of an open invitation to tender. The Commission provided them with the necessary software for the creation of standardised jurisprudence files. These files are sent to the Commission, which, after checking their quality, inputs them into the CLAB database. A more modern and user-friendly query interface will shortly be available.

Each file in CLAB concerns a contractual term whose fairness has been disputed, regardless of whether it has been declared unfair or not. Thus, one and the same court decision may give rise to several files. It is the contractual term and not the decision that is the focus of the database.

Although it focuses on contracts concluded with or offered to consumers, CLAB also contains certain decisions handed down in disputes between professionals which are of interest for consumer law (because they are transposable). Currently, the query interface exists only in English, but the text of the base (the contractual term and the commentary on the decision) can be consulted in the original language, in French and in English. The database allows very fine-tuned searches based on criteria such as the nature of the decision, the type of procedure, the type of term, the type of contract, the economic sector, etc.

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63 OJ C 95, 30.3.1998.

64 On the application of Article 81(3) of the Treaty (ex-Article 85(3)) to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 398, 31.12.1992.

In mounting this project, the Commission was inspired by two basic ideas: firstly, it wanted to create a tool for the systematic monitoring of the practical enforcement of Directive 93/13/EEC in the different Member States[65], notably with a view to preparing this report; secondly it wanted to provide this information to the public with a view to promoting the harmonious and consistent enforcement of the Directive in the different Member States.

The CLAB project was initially launched for a period of five years. These five years come to an end in the course of 2000. Thus we should now reflect on the future of this project, which until now has been entirely funded under the Community budget.

Question No 21: Should the CLAB project be continued in the future or should one discontinue updating the database? What kind of amendments are in order? Would it be possible to create a partnership with the Member States or with certain institutions or non-profit associations in which the partners could assume responsibility for assembling the jurisprudence and preparing the files and the Commission would be responsible for the technical management and translation of the files?

Question No 22: Should users be charged for accessing CLAB, with a view to financing the updating and development of the database?

65 The base also includes the EEA countries Iceland and Norway.

IV – ADDITIONAL OBSERVATIONS

a) The impact on the legislation in the Member States

Despite the misgivings of the proponents of a certain legal doctrine who feared that unity of contract law would be rent asunder, the Member States were able to integrate the Directive into their legal orders without major problems. The impact of the Directive on their domestic laws varied from country to country. It was considerable in countries which did not have existing legislation in the field of unfair terms or in countries whose legislation was incomplete (Ireland, Italy or Belgium for example). The impact was also considerable in countries which, although legislation had long been enacted in this area, did not make use of certain mechanisms, such as actions for injunctions (for example the United Kingdom and Spain). Generally speaking, other countries that already had quite detailed legislation in this area (for example, Germany, the Netherlands, Portugal and the Nordic countries) merely had to amend their existing laws. France is a unique case: the text of the law adopted in 1978 had major gaps by comparison with the Directive. However, most of these gaps were subsequently filled by the courts. The legislator eventually decided to bring the text of the law into line with case law and replaced the 1978 act by a new one.

However, the relationship between the Directive and the national legislations involves far more than simply transposing the Directive. In order to determine whether a term can be declared unfair, it is not enough just to apply the general assessment criterion; one also has to determine what legal rule would apply in the absence of such a term.

In a word, the yardstick is based not only on the general criterion, but also on how supplementary substantive law would apply if the term in question did not exist. Thus the application of the same general criterion in two Member States may give rise to very different decisions, as a result of the divergences between the rules of substantive law that apply to different contracts. Hence harmonisation under the Directive is more apparent than real.

There is a close relationship between the control of unfair terms and supplementary substantive law which must not only make up for the inadequacies of the contracting parties but also fill in the gaps resulting from the elimination of contractual conditions declared to be unfair. This supplementary substantive law, most of which is not harmonised, must ensure a balance in the rights and obligations of the parties. However, certain sectors of supplementary substantive law (some of which have even been partially harmonised) raise a number of problems and do not provide for balance between the parties.

A persuasive example is that of the Luxembourg regulation of 1994 concerning package travel, package holidays and package tours. The case in question concerned a travel agent based in the Grand Duchy of Luxembourg whose contracts contained an unfair term pursuant to which consumers could not transfer their contract any later than 21 days before the departure. The professional pointed out that this term was prescribed by Luxembourg law itself. Indeed the Luxembourg instrument[66] transposing Directive 90/314 on package travel,

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66 Grand-Ducal Regulation of 4 November 1997 on prior information and the terms of contracts relating to package travel, package holidays and package tours, pursuant to Articles 9, 11 and 12 of the Act of 14 June 1994 governing the conditions for the exercise of activities relating to the organisation and sale of holidays and travel.

package holidays and package tours[67] contains an explicit provision of this kind in regard to cancellations and transfers of the contract[68].

In order to remedy distortions of this kind, some parties have suggested and have long been calling for an approximation of the private law of the Member States.

Hence the European Parliament called for harmonisation in this area in two resolutions of 1989[69] and 1994[70] on the approximation of the private law of the Member States.

The issue of the approximation of civil law was also raised at the extraordinary Tampere European Council of 15 and 16 October 1999 on the creation of a common zone of freedom, safety and justice within the European Union.[71]

In this context one should also reconsider the Directive's scope, which is limited to contracts between "sellers or suppliers" (i.e. professionals) and consumers (Article 1). The definition of these two terms corresponds to criteria which have already been very clearly enshrined in the field of consumer protection policy. However the idea of widening the scope to relations between professionals has been regularly adumbrated at several levels and on different occasions, notably in the context of the last July's conference on unfair terms.

It is interesting to note that in certain Member States (D, NL, P, E) the law on general terms and conditions also applies to relations between firms, although stricter rules apply to relations with consumers. This approach has worked very well in practice.

Relations between firms are of various kinds, notably taking the form either of a seller / final consumer or producer / distributor relationship, or a 'horizontal' relationship in the case of a partnership within a joint venture. Regardless of the nature of this relationship, firms– like consumers – may be in a weak position when they are confronted with the general contractual terms and conditions imposed on them by their trading partners[72].

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67 OJ L 158/59, 23.6.1990.

68 Considering that the period of 21 days before departure imposed an unfair limitation on the right to transfer the booking provided for by Article 4(3) of the Directive 90/314, infringement proceedings have been brought against the Grand Duchy of Luxembourg. The Luxembourg authorities recently informed the Commission that they will shortly amend the contested provision with a view to bringing it into line with Directive 90/314.

69 In its Resolution on the approximation of the private law of the Member States (OJ C 158/400), Parliament called in particular for preparatory work to be begun with a view to drafting a common Community code of private law, and the creation, by the Member States that accept the principle of unification, of a committee of qualified scientists who could propose priorities and organise all the activities needed with a view to harmonising private law in these states.

70 In its Resolution on the harmonisation of certain sectors of private law in the Member States (OJ C 205, 25.7.94), Parliament urged the Commission to begin work on the possibility of drafting a common Community code of private law and reiterated its opinion that a committee of qualified scientists should be created to propose priorities for partial harmonisation in the short term and more general harmonisation in the long-term.

71 The Council and the Commission were invited to strive towards greater convergence of private law and in particular to prepare a general study on the need to approximate the legislation of the Member States in civil matters with a view to eliminating barriers to the smooth functioning of civil procedures.

72 **The CLAB database also contains approximately 500 cases pertaining exclusively to relations between undertakings which are considered to be of great interest for consumers.** Besides, some of these decisions apply the criteria of the Directive to disputes between professionals. One example is the judgment of the Milan court of 5 September 1995, which examined and declared to be unfair certain contractual terms waiving liability in respect of an insurance company which had been sued by another company, in regard to the provisions of the Directive (Clab IT 000452).

Such a situation could also be covered by European competition law, and notably by Article 82 (ex Article 86) of the EC Treaty, to the extent that it might point to a dominant position. Besides, extending control of unfair terms to the general terms and conditions used in relations between firms would make it easier for firms to shift their obligations vis-a-vis consumers to a higher level in the marketing chain. For example, in the absence of such control, the seller cannot exclude his liability vis-à-vis the consumer for the sale of a defective product, but his rights in respect of his supplier might be limited by the general terms and conditions used by the latter[73]. Finally, in many contracts of adherence it is difficult to find any difference between the "adherent" to the contract, regardless of whether the person is "acting in the course of business" or not. Why should the relationship between the airline passenger and the terms governing the travel contract differ when he is travelling to a conference rather than simply taking a holiday?

b) On national "jurisprudence"

The term "jurisprudence" is used here in the same sense as in CLAB: all concrete applications of the Directive, including not only court judgments but also administrative rulings and any other relevant decisions.

There has been a considerable increase in the number of cases in several countries, particularly in the field of preventative control (actions for injunctions) of unfair terms. The prime example is the United Kingdom: in the past, there was no control whatsoever; today, the Office of Fair Trading examines over 800 cases annually, and in over 500 cases firms have taken measures which have generally involved a change or elimination of the offending contractual terms[74].

Spain is also a good example: here, the transposition of the Directive led to the introduction of actions for injunctions as a new means of reviewing unfair terms. In this respect CLAB shows how Spain has begun to use this instrument in practice.

Besides, in certain countries which already provided for actions for injunctions, such as Portugal and Belgium, there has also been a considerable increase in the number of cases, and it seems that the Directive may have functioned as a catalyst.

In qualitative terms it is interesting to note that certain national courts are becoming increasingly sensitive to European law and often refer to it in their decisions. An analysis of CLAB shows that already 4.4% of the judgments handed down by national courts in the field covered by the Directive refer to the Community text. At the current stage of European construction this is a figure to be proud of and reflects the progressive impact of Community law on the national legal orders.

A very recent Belgian judgment provides a good illustration[75]. A consumer association brought an action for an injunction against unfair terms imposed by a bank on its clients. This action was not based on the list of terms that may be regarded as unfair but on the general

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73 Article 4 of Directive 99/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees touches on this problem, but does not fully resolve it, since it leaves it to national law to protect the final seller vis-à-vis his supplier. The nature of this protection generally depends on whether or not there is a general law governing contractual conditions.

74 The CLAB database highlights the importance of the cases addressed in the United Kingdom by administrative procedures since the time limit for transposition of the Directive: 625 of the 865 administrative measures listed up to now in the database hail from this Member State.

75 Judgment delivered on 8 September 1999 by the Merchant Court of Namur.

definition of what constitutes an unfair term. The bank challenged the court's competence, claiming that an action for an injunction could only be brought in respect of the unfair terms mentioned in the list and arguing that a consumer association did not have standing to sue if the unfairness of the terms in question derived only from the general definition, as was the case[76].

The court decided otherwise and declared that an association was entitled to sue regardless of whether the offending terms came within the general definition or were contained in an indicative list. To support this interpretation of the law, the court directly referred to the European Directive and included many citations from the relevant legal literature.

Another interesting example concerns a judgment recently handed down in Italy[77]. A consumer association brought an action for an injunction against recommendations made by professionals concerning the use of unfair terms. Although Italian law does not expressly provide that actions may be brought against recommendations, the court found for the plaintiff and interpreted the law in the light of the Directive. Indeed the court mentioned the fact that there was an ongoing infringement procedure in regard to this point in the grounds for its decision.

Our final example[78] concerns a landmark Spanish ruling. The novelty of the judgment lies in the rationale for recognising the direct horizontal effect of Directive 93/13/EEC (which has not yet been transposed into Spanish domestic law)[79]. In the case in question the Spanish Supreme Court recognised the direct horizontal effect of Article 3(3) (reference to the Annex, in particular point q)) of the Directive. According to this provision, terms requiring express submission to a specific jurisdiction may be considered unfair. Despite the opposition of a certain part of Spanish doctrine to the judgment's line of reasoning, this decision demonstrates the increasing importance of Community law within the national legal orders, even before transposition, as in this particular case.

Also from a qualitative viewpoint, there have been some very interesting developments in the way the unfairness of certain terms is assessed. Austrian case law provides an interesting example. In 1996 the Austrian Supreme Court endorsed a waiver of liability on the part of a firm in respect of personal harm to a consumer during a package holiday, on the grounds that there had only been minor negligence on the part of the professional[80]. On the contrary, in a 1997 case, a term that waived liability for a mere mistake was found to be unfair. The reversal was occasioned by the amendment made to Austrian law in 1996, which took effect on 1 January 1997, to ensure proper transposition of the Directive[81].

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76 Indeed this interpretation could be in accordance with the Belgian act before it was recently amended in order to bring it into line with the Directive, following the initiation of an infringement procedure. This shows the real impact of these types of procedures on national law.

77 Decision of the Ordinary Court of Turin of 7 July 1999.

78 Judgment of the Spanish Supreme Court of 8 November 1996.

79 The CJEC does not recognise the direct horizontal effect of a Directive. Hence, a private individual can directly rely on a Directive before a national court only against the Member State to which it is addressed but not against another private party. Nevertheless the CJEC has allowed for the possibility of a "indirect horizontal effect" via reliance on interpretative criteria, notably in Von Colson v Harz (14/83 and 79/83 of 10.4.1984). The indirect nature of the horizontal effect presumes that national court are duty bound to interpret national law in the light of the wording and the objectives of the Directive, in order to arrive at the result required by Article 249 of the Treaty, though without prejudice to legal certainty and non-retroactivity.

80 OGH 11.1.1996. ecolex 1996, 358 = KRES 3/94.

81 "Vorprozessuales Abmahnverfahren" (Pre-trial Reprimand Procedure) Decision of 25 December 1997, AGB-Info 1997/17.

c) On the jurisprudence of the European Court of Justice

Despite the growing familiarity of national courts with European law, Directive 93/13/EEC has so far had very little impact on the case law of the Court of Justice. Up to now the Court has only had to adjudicate on two references for a preliminary ruling in this field.

The first[82] concerned a dispute between the Consumers Association and the UK Government and concerned the fact that British legislation had deprived consumer associations of the right to seek injunctions for the removal of unfair terms (this right having been exclusively vested in the Office of Fair Trading). Following an agreement between the parties (which led to a change in British law), the case was closed by the Court.

The second case[83] is still pending and concerns the important question of determining whether the court may (or even should) assess the validity of a contractual term in the light of the legislation on unfair terms, even if the parties do not demand this. The judgment in question concerns various disputes between professional sellers and Spanish consumers concerning the performance of hire purchase contracts. The contracts contained a clause specifying Barcelona as the only place of jurisdiction (a city in which none of the individuals were domiciled but in which the professionals had their head offices). The Barcelona Court of First Instance, in the light of contradictory national rulings as to whether Spanish courts may *ex officio* assess the validity of unfair terms concerning the choice of jurisdiction, requested the European Court for an interpretation of Directive 93/13/EEC in 1998. The judgment has not yet been handed down but the grounds presented by Advocate General Saggio on 16 December 1999 are exemplary and include an extensive and in-depth analysis of the Directive and its goals. As to the substance, the Advocate General considers that the Directive entitles the national court to rule *ex officio* on the nullity of such a term and to ignore any national law which would prevent the court from doing so (see also under III.6).

National courts could have referred many cases to the Court of Justice for a preliminary ruling and it would have been very useful if the judgments of Court of Justice had been able to cast light on the scope of some of the Directive's more obscure provisions. Indeed the doctrine reveals the reluctance of the national courts to refer cases to the Court of Justice in this legal field.

This may be illustrated using a concrete example taken from German doctrine.

The Directive was transposed into German law by amending an existing act, namely the Standard Terms and Conditions Act (AGB). At the time of transposition the German legislator considered that Article 8[84] of this Act was consistent with the Directive, because the contractual terms which, pursuant to this provision, are not subject to review in respect of their content would not be subject under Article 4(2) of the Directive either.

However, the differences in the wording of these two provisions suggest that there may also be differences in their application. Indeed, in many disputes the German courts, in applying Article 8 of the AGB, have developed a very broad notion of the "main subject matter of the

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82 Case C-82/96 The Queen v Secretary of State for Trade and Industry.

83 Joint cases C-240/98 to C-244/98 Océano Grupo Editorial, S.A. and Salvat Editores, S.A. v Rocio Murciano Quintero and others.

84 Article 8 of the General Terms and Conditions Act (Gesetz über allgemeine Geschäftsbedingungen/ABGB) provides that only "general terms and conditions whose rules derogate from ordinary law or supplementary rules" are subject to control in respect of their content.

contract" (a term which does not exist in German law!), hence limiting the extent to which the contract may be reviewed in respect of its content. This notion of "main subject matter" includes, for example, terms setting out the conditions under which a consumer may rely on an insurance contract, or terms concerning additional charges imposed by a credit institution for certain additional services provided in connection with the issuance of a credit card or a savings account.

German legal reviews contain many reports on cases in which the Bundesgerichtshof discussed the application of Article 8 of the Act and Article 4(2) of the Directive to contracts of adhesion, without ever considering the consistency of its jurisprudence with the other language versions of the Directive and the interpretations made by other European supreme courts and without ever entertaining the idea of requesting the European Court of Justice for a preliminary ruling. Indeed as one decision the Bundesgerichtshof says quite tersely: "*der Bundesgesetzgeber hat die an die Mitgliedstaaten gerichtete und nur für sie verbindliche Richtlinie … in nationales Recht umgesetzt. Er hat dabei zu einer Änderung des § 8 AGBG wegen seiner Übereinstimmung mit Art. 4 Nr. 2 der Richtlinie keinen Anlaß gesehen … Die Beantwortung der Frage, ob die beanstandete Klausel einer Überprüfung am Maßstab der §§ 9 - 11 AGBG entzogen ist, ist Sache der deutschen Gerichte, über die der Europäische Gerichtshof nach Art. 177 EG-Vertrag nicht zu entscheiden hat*"[85].

d) The impact on legal doctrine

The Directive has had an enormous impact on legal doctrine. Hundreds of articles and dozens of monographs have been published on the subject of unfair contractual terms. This has not only influenced case law itself but has also made the business community more aware of the need to draft more equitable terms. Some doctrines focused on the particularities of the national legal orders, while other doctrines have highlighted the specific nature of European law and endeavoured to incorporate it into national law, even if the results are hard to reconcile with traditional orthodoxy. The emergence of a European doctrine on unfair terms is one of the more successful achievements of Directive 93/13/EEC.

e) Some points for discussion

The Directive's impact has clearly been positive, but it has not always achieved the desired result: the establishment of balanced contractual relationships between consumers and professionals.

Despite the legal mechanisms created to encourage the elimination of unfair terms in consumer contracts, such terms continue to be used on a wide scale.

Besides, declaring an unfair term to be "null and void" is a very ineffective mechanism for protecting specific consumers, since the way it works largely depends not only on ease of access to justice for consumers but also - and perhaps primarily - on consumer information and education in these fields.

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85 "The Federal legislator has transposed into national law a Directive addressed to the Member States which is binding only on these States. There is no need to amend Article 8 of the General Terms and Conditions Act because it is already in conformity with Article 4(2) of the Directive. It is for the German courts to determine whether the term in question is subject to review in respect of its subject matter, and the European Court of Justice, pursuant to Article 177 of the EC Treaty, has no say in this area". – BGH 7.7.1998, Der Betriebs-Berater 1998, 1864.

New problems are continually cropping up, as a result of the development of the consumer society. It may well be that the natural development of economic relationships will not tend towards greater equity in contractual relations.

Just as this report was being finalised, the Danish Consumer Ombudsman alerted his opposite numbers in the context of the IMSN – International Marketing Supervision Network[86] – to new contractual practices. Apparently, a growing number of car rental contracts offered to foreign tourists contain terms to the effect that surcharges, damages resulting from accidents, etc. may be directly debited from their credit cards. Concrete problems are said to have arisen in the case of Danish consumers who, following the insolvency of the travel agent to whom they had paid the rental in advance, found that the amount in question had been deducted a second time from their credit cards.

The problem posed by terms like these is all the more acute in that consumers may sign and perform contracts of this kind entirely on the territory of a third country, although theoretically Article 6(2) should be able to cover these situations. However, such practices are very worrying and illustrate the profusion of new problems that are cropping up in the context of an increasingly globalised economy.

The Commission hopes that this report will pave the way to a comprehensive discussion of these complex and important issues and hopes to receive numerous comments and suggestions on the ideas put forward here.

[86] The International Marketing Supervision Network is a cooperative network involving the authorities responsible for implementing Community law.

ANNEX I – National transposition laws

	Legislation notified	Laws that have been amended or replaced
Austria	Bundesgesetz vom 10.01.1997 mit dem (u.a.) das Konsumentenschutzgesetz geändert wird (BGBl. I N° 6/1997)	Konsumentenschutzgesetz vom 08.03.1979; Allgemeines Bürgerliches Gesetzbuch vom 01.06.1811; Bundesgesetz über das internationale Privatrecht; Zivilprozeßordnung
Belgium	Loi sur les pratiques et sur l'information et la protection du consommateur (Chapitre X, art. 31-34) Loi du 12.06.1991 sur le crédit à la consommation, modifiée par la loi du 06.07.1992Loi du 25.06.1992 sur le contrat d'assurance terrestre Loi du 04.08.1992 relative au crédit hypothécaire Loi du 03.04.1997 relative aux clauses abusives dans les contrats conclus avec leurs clients par les titulaires de professions libérales Loi du 07.12.1998 sur les pratiques du commerce et sur l'information et la protection du consommateur	*Loi du 14.07.1991 sur les pratiques de commerce et l'information et protection du consommateur (L.P.C.)*
Denmark	Lov N° 1098 af 21.12.1994 om ændring af lov om aftaler og andre retshandler på formurettens område og visses andre love Lov N° 428 af 01.06.1994 om markedsføring	Marketing Act of 14 June 1974
Finland	Laki kuluttajansvojalain 3 ja 12 luvun muuttamisesta N° 1259, 16.12.1994 Laki kuluttajansvojalain 4 ja 12 luvun muuttamisesta N° 416, 18.12.1998	Kuluttajansvojalaki N° 38, 20.01.1978
France	Loi N° 95-96 du 1.02.1995 concernant les clauses abusives et la présentation des contrats régissant diverses activités d'ordre économique et commercial. (J.O. du 2.02.1995, p. 1755)	Loi N° 78-23 du 10.01.1978 Loi N° 88-14 du 05.01.1988
Germany	Gesetz vom 19.07.1996 zur Änderung des AGB-Gesetzes und der Insolvenzordnung (BGBl. I N° 36/1996)	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz) vom 09.12.1976

Greece	Act 2741 of 28 September 1999 (Greek Government Gazette, 28 September 1999)	Consumer Protection Act 1961/1991 Consumer Protection Act 2251 of 15.11.1994 (Greek Government Gazette, 16.11.1994)
Ireland	Statutory Instrument 95, No. 27 of 1 February 1995: the unfair terms in consumer contracts.	Sale of Goods and Supply of Services Act of 1980
Italy	Art. 25 della Legge N° 52, 06.02.1996 (Gazzetta Ufficiale della Repubblica Italiana No. 34, 10.02.1996) Art. 3 della Legge N° 281, 30.07.1998	Art. 1341, 1342 e 1370 Codice Civile 1942
Luxembourg	Loi du 26.03.1997, Mémorial, A-N° 30 du 29.04.1997	Loi relative à la protection juridique du consommateur du 25.08.1983
Netherlands	Art. 6.231 tot 6.248 *Burgerlijk wetboek* (nieuw Burgerlijk Wetboek 1992)	Art. 6.231 - 6.248 *Burgerlijk wetboek*
Portugal	Decreto-Lei No. 220/95 do 31.08.1995 Portaria n° 1093/95 do 06.09.1995 Decreto-Lei No. 249/99 do 07.07.1999 modificando o Decreto-Lei 446/85	Decreto-Lei N° 446/85 do 25.10.1985
Spain	Ley 7/1998 del 13.04.1998 sobre las condiciones generales de la contratación (LCGC)	Artículo 10 Ley general para la defensa de los consumidores y usuarios (LCU) del 19.07.1984
Sweden	Lag om avtalsvillkor I konsumentförhållanden (1994: 1512) 15.12.1994 Lag 1994:1513	Lag (1971:112)
United Kingdom	Unfair Terms in Consumer Contracts Regulations of 22 July 1999 (Statutory Instrument 1999 N° 2083) revoking the Unfair Terms in Consumer Contracts Regulations of 1994	Unfair Contract Terms Act (UCTA) of 1977 (This act has not been amended and remains in force) Unfair Terms in Consumer Contracts Regulations (UTCR) of 8 December 1994 (Statutory Instrument 1994 No. 3159)

ANNEX II – "Market" studies and subsidies for simultaneous actions for injunctions in several Member States

a) "Market" studies

(1) **Unfair terms in contracts for the supply of certain goods (Professor Hans Micklitz, Berlin (D))**: this study analyses the impact of Directive 93/13/EEC on contracts for the sale of consumer goods in the Member States. The study examines 545 contracts in four sectors: motor vehicles (155), washing machines (119), furniture (124) and video recorders (147). The study shows that standard form contracts are currently used in these sectors in Germany, the Netherlands, France, Portugal and Italy but that they are almost unknown in Denmark, Ireland and the United Kingdom.

The unfair terms most frequently encountered concern exclusion or limitation of liability on the part of the professional (in 301 of the 545 contracts) and abrogation of the consumer's statutory rights (in 267 of the 545 contracts), these two being the biggest problem areas in the four sectors analysed.

Besides, the study revealed certain differences between contracts in the Member States. In France, the Netherlands, Germany, Spain and Italy contracts are mainly characterised by terms waiving or limiting liability and abrogating statutory rights. However, in Belgium the most frequent terms concern limitations and obstacles to legal redress. In Denmark, terms relating to unilateral price changes in the contracts predominate. In the United Kingdom, terms allowing professionals to unilaterally rescind their obligations were most widespread.

(2) **Unfair terms in certain insurance contracts (Montpellier Law Faculty (F))**: this study examined 440 insurance contracts throughout the EU Member States, with a breakdown by two categories (motor cars and housing). The study revealed great differences between the Member States (for example no unfair term was found in the Danish contracts!; however, certain types of unfair terms have been identified in almost all contracts in the other Member States). The most common unfair terms are those which, because of their ambiguity or vagueness, give the insurer the right to appraise the content of the contract and thus give him an unfair advantage (so vagueness seems to be the fundamental problem in insurance policies used in the Netherlands, Spain, Luxembourg and Greece). Terms authorising the insurer to postpone payment of the claim are also ubiquitous (except for Denmark and Italy). The study also highlighted just how different insurance contracts are. For example, German, Belgian, French and Italian contracts contain terms allowing unilateral cancellation by the insurer after an accident, while Spanish, Irish, Netherlands and Portuguese contracts do not. Likewise, unfair terms stipulating excessively long notification periods for terminating the contract are frequently found in German, Belgian, Greek and Italian insurance policies but not at all in Spanish, French, Irish, Luxembourgish, Dutch or Portuguese policies.

(3) **Unfair terms in financial services (Confédération syndicale du cadre de vie (F))**: This study was carried out in 1994. It examines 87 motor car finance contracts and 88 bank account contracts and shows that unfair terms are commonplace.

The study shows that motor car finance contracts contain many unfair terms limiting the remedies available to the consumer (34 cases out of a total of 87) or imposing swingeing financial penalties on consumers for non-performance (28 cases out of a total of 87).

As regards contracts governing bank accounts, the study shows that the general terms and conditions used by banks operating in the Netherlands, Belgium, Greece and Denmark are very similar both in form and substance.

According to the study, the most commonly used unfair terms in the banking sector are those which restrict or totally waive the bank's liability (43 cases out of a total of 88). However, clauses of this kind are not to be found in the general terms and conditions of banks operating in Spain, Luxembourg and Germany.

(4) **Unfair terms in motor car rental contracts for private purposes in the EU (UFC Que choisir (F))**: This study analyses contractual terms in 130 motor vehicle rental contracts on the basis of the criteria set out in the Directive. The authors ascertained that the most frequently used unfair terms are those that place excessive liability on the hirer (for example, all the French, Greek, Italian, Luxembourgish and Dutch contracts contain terms of this kind) or that limit or waive the professional's liability (terms of this kind are to be found in all standard-form contracts in Spain, Italy, the Netherlands, Germany and the United Kingdom). Besides, terms authorising professionals to unilaterally alter the contract are to be found in most Belgian, Spanish, Italian, Irish, Luxembourgish and German contracts. Only the Portuguese and Dutch contracts do not contain such terms. Moreover, firms draft their contracts with an eye to the different national legislations, as can be seen from a comparison of contracts drafted by one and the same firm in different countries. A comparison of the contractual terms and conditions of medium-sized firms with those of international companies indicates that they are very similar in substance, and the number of terms considered unfair does not vary significantly as between the two groups.

(5) **Unfair terms in the European tourist sector (Bishop & Robertson Chalmers)**: This study examined general terms and conditions in brochures and contracts offered by holiday organisers and agents, with regard to different tourist sectors (rental of holiday accommodation, timeshares, car rental, cruises and other services) in the 18 member states of the EEA. A total of 1 773 contracts and brochures were examined and 356 general terms or conditions were considered unfair, of which 87 on the basis of the Directive's general criterion within the meaning of Article 3(1). Of the 356 terms investigated, 101 concerned contractual liability (this being the most problematic area); such terms are to be found notably in Belgian, Spanish, Portuguese, Irish, Swiss and Norwegian contracts. Another 56 terms concerned enforceability and the formation of the contract (although a considerable number of terms of this kind were found in Danish, Finnish, Irish, UK and Italian contracts, none were found in the Dutch and Norwegian contracts), 50 concerned the annulment of the contract and 47 the alteration of the contract price (but no term of this kind was found in the Austrian contractual terms and conditions). It should be noted that a large number of terms designed to eliminate or discourage reliance on procedures or remedies were identified in the UK, Belgian and Austrian contracts.

(6) **Application of Directive 93/13 to public services (National Consumer Council (UK) and Institut national de la Consommation (F))**: This study examined unfair terms in general conditions for the supply of certain services (water, electricity, post, telecommunications, gas, railways, public transport, health services) and verified whether these terms could be reviewed in the framework of Directive 93/13/EEC. The study noted that no unfair terms were to be found in the general conditions governing the supply of electricity in France or in bus and underground transport contracts in Spain. The study identified a good number of unfair terms in the conditions governing the relations between the supplier and consumer, notably as regards the alteration and unilateral termination of the contract on the part of the supplier (example: supply of water in Austria, Finland, France, Greece and Portugal) as well as liability waivers in the case of interruption in the service (electricity in Belgium and Sweden). The authors ascertained that the possibility of reviewing the substance of public utility contracts differs greatly from country to country. With the exception of certain countries (such as Austria, Denmark and Greece), review is limited either by the application of Article 1(2) of the Directive or a similar provision already in force, or by the notion of the hierarchy of norms, or by the rule of separation of powers, or by the fact that the relationship between the supplier and consumer is non-contractual. The authors of the study emphasise the need to bring public services within the remit of the Directive, either in the shape of *a priori* control or by appointing an independent regulator, or by *a posteriori* control.

(7) **Contractual terms in the transport of goods and persons by air (Frere Cholmeley Bischoff Solicitors and Institut international du droit aérien et spatial at the University of Leiden)**

This 1997 study examines not only the contractual terms and conditions offered by 24 airline companies (of which 21 are based in the Member States) catering to the Union's airspace but also a series of texts adopted by the International Air Transport Association (IATA) in this field (Resolutions 724, 724a and 745) and to general terms and conditions of transport (notably Recommendation 1724).

The study revealed a significant number of terms which could be defined as unfair and which are mainly based on the IATA texts.

To eliminate unfair terms in this economic sector, the study argues that the Union should issue guidelines as to the application of Directive 93/13/EEC to the general terms and conditions of airline companies. These guidelines would concern not only the substance of the general terms and conditions but also the way in which they are communicated to passengers or clients.

b) Subsidies for simultaneous actions for injunctions in several Member States

(1) **Unfair terms in new technology contracts, coordinated by the Confédération syndicale du cadre de vie (F)**: This pilot project looks at the impact of Directive 93/13/EEC on contracts (mobile telephony and cable and satellite TV) offered to consumers in five Union Member States (Belgium, France, Spain, Italy and Portugal), the idea being to have offending contractual terms and conditions reviewed – either via negotiation or via the courts – so as to redress the balance between professionals and consumers but also to ward off future litigation. Certain positive results were obtained through negotiation. For example, some cable TV

operators undertook not to change their fees or the list of channels indicated in their subscriptions on a unilateral basis. They will alert subscribers to any change and allow them to cancel their contract. Another example: when the service is down for more than 48 hours, the operators will reimburse subscribers for the duration of the break; certain operators have agreed to return the deposit within one month, as against 60 days previously. Operators provide their subscribers with equipment (decoders, etc.). In the event of damage or theft of this equipment, they will no longer systematically require the subscriber to pay for the damage or repair the equipment, unless he is responsible for the damage or the theft can be imputed to him. Although the pilot project is continuing without Commission funding, four actions for injunctions are currently ongoing in France, Spain and Italy.

(2) **Joint action to eliminate unfair terms in car rental contracts, coordinated by EDOCUSA (E):**

Six consumer associations joined forces in this project, which was designed to examine the general terms and conditions offered by five leading car rental companies in six European countries and to eliminate any unfair terms found, either via negotiation or via litigation. To this end 21 standard form contracts were collected and analysed. Negotiations were mounted with a view to persuading the companies to bring their general terms and conditions into line with the national transposition laws. Since these negotiations were unfruitful, the consumer associations decided to sue. Subsequently a number of firms reacted and agreed to sign agreements with the associations with a view to modifying the offending terms in 1998.

(3) **Joint action to eliminate unfair terms in timeshare contracts, coordinated by Test Achats (BE); joint action to eliminate unfair terms in travel contracts, coordinated by EDIDECO (PT)**:

These two actions, organised by consumer associations in seven Member States (B, F, I, P, E, Lux and NL), are designed to identify unfair terms in standard form contracts in the field of package holidays and timeshare contracts, and to have them removed either via negotiation or via litigation. The actions are ongoing. According to the latest information received from the contractors, the outlook is good as regards the package holiday sector. However in the timeshare sector the recent transposition of Directive 94/47/EC in certain countries has led to the disappearance of certain players from the market, while others have spontaneously altered their general terms and conditions to bring them into line with the new national legislation. In these cases, the modified general terms and conditions will have to assessed anew.

ANNEX III – Statistics in the CLAB database

This section contains a number of graphs surveying the various data and results entered in CLAB up to now, which currently contains 7 649 cases.

The first set of graphs (1 to 7) simply describes the general data assembled in the base. The following graphs provide a more detailed analysis of the terms themselves (8 to 11) and of their paramount role in certain economic sectors (12.A to 15.B).

Graph 1 concerns the nature of the decision on the unfairness or otherwise of a contractual term. CLAB contains not only court judgments (though these predominate) but also administrative decisions, arbitration awards, out of court settlements, and sectoral self-regulatory systems in certain Member States.

Graph 2 concerns the nature of the action. It may be an individual suit (in which one of the contracting parties seeks redress), a preventative measure (notably actions for injunctions, recommendations and self-regulatory systems designed to eliminate the use of unfair terms) or a joint action (in certain Member States, consumer associations may join an individual suit to seek an injunction against the use of unfair terms).

Graph 3 contains a breakdown of the decisions by outcome (term found to be fair/unfair), including decisions which have not applied the national legislation governing unfair terms to specific cases, on grounds of their being *ultra vires*.

Graph 4 shows the types of contracts containing the contractual terms which were the subject of a decision: contracts of sale, rental, leasing and services. The latter, which make up the majority of contracts in the database, are further broken down into services relating to goods (repair, installation, maintenance, guarantees and after-sales service, etc.) and services not relating to goods (banking, insurance, credit, transport, electricity, gas, water, health, etc.).

Graph 5 concerns the nature of the parties. Most of the decisions concern contracts between a professional and a consumer (the notion of consumer either being taken over from the Directive, in the vast majority of cases, or based on national legislation, whose scope is sometimes wider than that of the European instrument). However, CLAB also contains a number of decisions on standard-form contracts concluded between professionals. The main reason for including these contracts is that the same solutions can be applied to consumer contracts.

Graph 6 shows the number of decisions handed down before and after the deadline for transposition of the Directive. Out of a total of 7 649 cases, approximately 3 000 decisions were made before 1 January 1995 (note that the first case dates back to 4 November 1931 – a judgment handed down by the Icelandic Supreme Court).

Graph 7 shows the number of actions brought as well as their nature (individual or preventative), with a breakdown by country (Member States of the European Union, plus Iceland and Norway). Hence, preventative actions predominate in Germany, Austria, France and the United Kingdom. Actions of this kind are far less common in Belgium and Spain and do not exist at all in Ireland and Luxembourg.

Graph 8 provides a breakdown of terms on the basis of whether or not they have been assessed in the light of the Annex to the Directive. Of the 7 649 cases inventoried,

4 497 (59%) were deemed to relate to one or other points in the Annex. This shows not only the importance of the list (and the need to develop it) but also the relevance of the general assessment criterion as to the unfairness of a given term for the remaining 3 152 cases (41%).

Graph 9 provides a breakdown of the 4 497 cases by each of the 17 points in the Annex (since certain contractual terms may relate to several points in the list, the total number of cases actually amounts to 5 274). The terms most frequently encountered concern point b (exclusion or limitation of the consumer's legal rights in the event of non-performance on the part of the professional), followed by point e (imposition of disproportionate penalties if the consumer fails to perform), point i (binding the consumer to terms that were not communicated to him before conclusion of the contract) and point q (excluding or hindering the consumer's right to take legal action or exercise any other legal remedy).

Graph 10 provides details as to the nature of the contractual terms considered as unfair.

- 2 443 terms, or 28% out of a total of 8 858, concern obligations imposed by the professional on the consumer. Of these:
  - 1 003 concern exclusions or limitations of rights,
  - 582 concern penalty clauses,
  - 296 prescribe special charges (mainly in contracts concerning commissions, bonds and brokerage),
  - 228 concern liability,
  - 156 concern warranties
  - 91 concern notification procedures imposed on consumers in the event of non-conformity of the good with the contract.

Besides, many terms also concern various "positive" obligations (such as time limits and procedures imposed by the professional in the event of complaints: Clab AT 000012) and "negative" obligations (such as limitations on rights in respect of contracts for hire and contracts for the installation of moveables: Clab SE 000092 and Clab FR 000342).

- 1 380 (16%) concern waiving and limitation of the professional's liability (conformity of the goods delivered or the services provided, damage caused by the professional or third parties, delivery of goods or supply of services, etc.);
- 1 133 (13%) concern the presentation of the general terms and conditions (clarity, intelligibility) and their enforceability by the consumer (terms excluded or included by the professional during the lifetime of the contract);
- 787 (9%) concern the price and its payment (determination, alteration and procedures);

- 787 (9%) concern the termination of the contract (procedures, resolution, extension, withdrawal, etc.);

- 744 (8%) concern procedures for performance of the professional's obligations (characteristics of the products or services, conformity, delivery, etc.);

- 694 (8%) concern the conclusion of the contract (procedures, validity, form, etc.);

- 644 (7%) concern access to justice in the broad sense (courts having jurisdiction, remedies, applicable law, means of proof, etc.);

- 177 (2%) concern interpretation and changes to the contract (modifications, assignment, etc.);

- 69 (1%) concern attempts to circumvent the existing law.

Graph 11 shows the impact of terms deemed abusive with a breakdown by economic sector. The real estate and financial services sectors are the ones that generate most "jurisprudence" as regards unfair terms. The "other" sector includes miscellaneous types of economic activity such as contracts for subscriptions (newspapers, magazines, pay TV, etc.), repair and maintenance services (keys, locks, clothing. motor vehicles, etc.), manuring, catering trades, film development, lotteries and horse racing, warehousing contracts, parking services, au pair contracts, security systems, mobile telephony, etc.

The subsequent graphs scrutinise certain economic sectors in which unfair terms are most common, namely financial services (graphs 12A and 12B), insurance (graphs 13A and 13B), real estate (graphs 14A and 14B) and basic services (graphs 15A and 15B). The nature of the terms encountered (graph A) is shown for each economic sector, as well as the number of terms deemed abusive, with a breakdown by the different areas linked to the sector in question (graph B). For the "other" sectors, supplementary explanations are provided with a reference to some examples of concrete cases contained in the database.

Graphs 12A and 12B concern financial services (with a total of 1 200 unfair terms).

Graph 12A shows that the most frequently encountered unfair terms in financial services concern the obligations imposed on the consumer by the professional (37%), on conclusion of the contract (17%), on presentation and enforceability of the terms in question (10%), on price and payment thereof (9%), and on termination of the contract (8%). The least common unfair terms concern those designed to circumvent the law in force (2%) and those concerning the interpretation and modification of the contract (2%).

Graph 12B shows the abundance of unfair terms in operations linked to consumer credit (37% concerning credit for the purchase of moveables and 8% concerning mortgages). Unfair terms were also found in contracts concerning bank accounts (28%), credit cards and payment cards (9%), investments (2%), cheques (2%) and capital transfer (2%).

Under the rubric "other" (12%) we also find contracts concerning sureties (Clab DE 000004), contracts of guarantee (Clab SE 000043), operations concerning

promissory notes (Clab FI 000179), contracts for management of the recovery of bills of exchange (Clab ES 000341), contracts concerning savings books (Clab AU 000346), and notably contracts for the rental of strongboxes (Clab FR 000210) and financial leasing contracts (Clab BE 000477).

Graphs 13A and 13B concern insurance (502 unfair terms in all).

Graph 13A shows the abundance of unfair terms in areas linked to the obligations imposed on consumers (25%), the professional's liability (20%), the presentation and enforceability of terms (16%), procedures concerning performance of the professional's obligation (12%) and procedures for terminating the contract (10%). Finally, there are terms designed to circumvent the applicable law (1%) and terms concerning price and payment (3%).

Graph 13B shows the plethora of unfair terms in contracts for house insurance (21%), motor vehicles (21%), health (15%), liability (13%) and life (8%).

The rubric "others" (31%) includes numerous unfair terms encountered in other insurance policies, notably legal protection insurance (Clab DE 000102 and DE 000972) and holiday insurance (Clab SE 000189). Unfair terms have also been encountered in anti-theft insurance (Clab ES 000074), insurance of moveables other than motor vehicles (Clab IS 000021 and GR 000498), insurance of real estate other than housing (Clab FI 000196), transport insurance (Clab DE 000539), maritime insurance (Clab ES 000562), insurance against bad weather (Clab DK 000007), etc.

Graphs 14A and 14B concern real estate (1 336 unfair terms).

Graph 14A shows the frequency of unfair terms governing the obligations imposed by the professional on the consumer (29%), the presentation and enforceability of the contractual terms and conditions (12%), procedures concerning price and payment thereof (12%) and the professional's liability (12%). The least common unfair terms concern circumvention of the applicable law (1%) and terms interpreting and modifying the contract (2%).

Graph 14B concerns unfair terms in building contracts (31%), contracts of sale (16%), contracts for decoration work (10%), contracts for the provision of services by real estate agents (7%) and heating contracts (6%).

The rubric "other" (29%) covers many unfair terms encountered in real estate rental contracts (Clab DE 000017), lift maintenance contracts (Clab ES 000016) and contracts for the connection of alarm systems (Clab NO 00015). Other contractual conditions have been deemed unfair in timeshare contracts (Clab DE 000329), contracts for maintenance and upkeep (Clab GB 000056, BE 000320, DE 001156, FR 000479), contracts for the accommodation of elderly people (Clab FR 000229), etc.

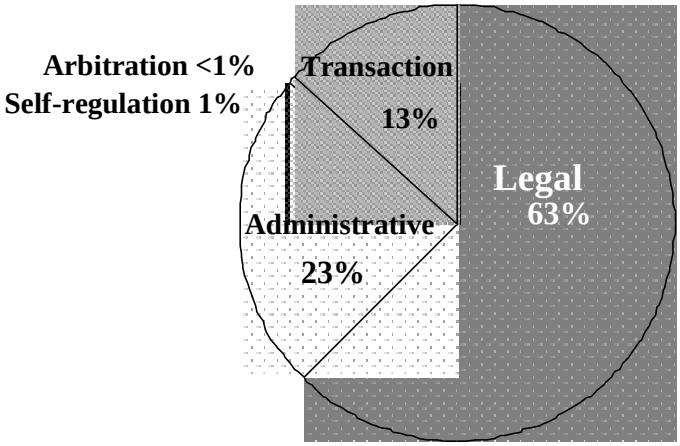
Graphs 15A and 15B concern general interest services (480 unfair terms).

Graph 15A highlights the profusion of unfair terms governing the obligations imposed on the consumer by the professional (28%), the presentation of the contractual conditions and their enforceability (15%). the price and payment (13%), termination of the contract (12%) and liability (11%).

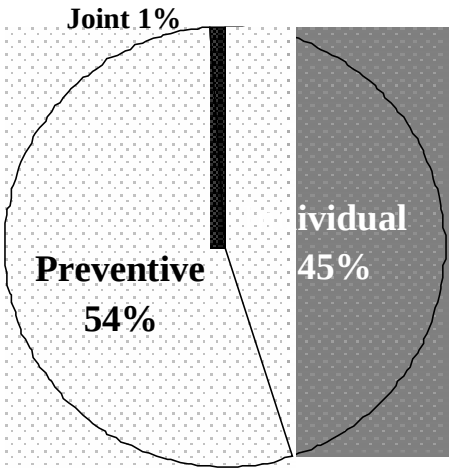
Graph 15B concerns unfair terms in telephone services (31%), water supply (13%), gas (11%), electricity (8%) and postal services (1%), subsectors in which such terms are quite frequently encountered.

The heading "other" (37%) covers numerous unfair terms in cable link-up contracts (Clab DE 000648), Internet services (Clab AT 000655) and heating installation (Clab DE 000601). Besides, unfair terms are also to be found in funeral services (Clab BE 000305), household waste disposal services (Clab DE 001528), installation of cables and gas burners (Clab DE 000431 and DE 000519), etc.

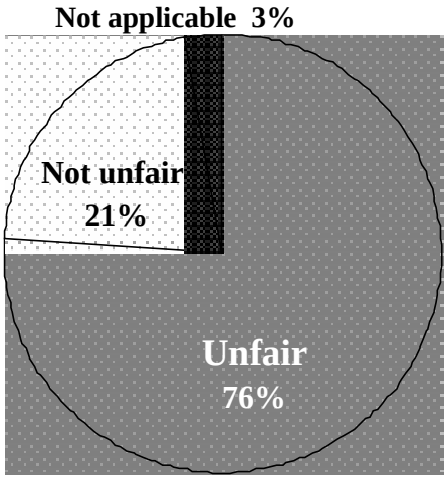
1. Nature of the decision



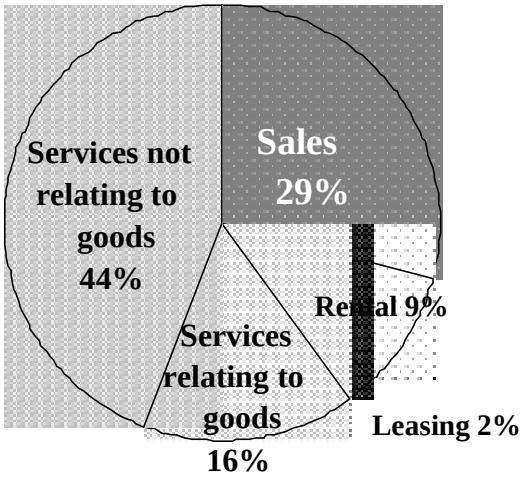
2. Type of action



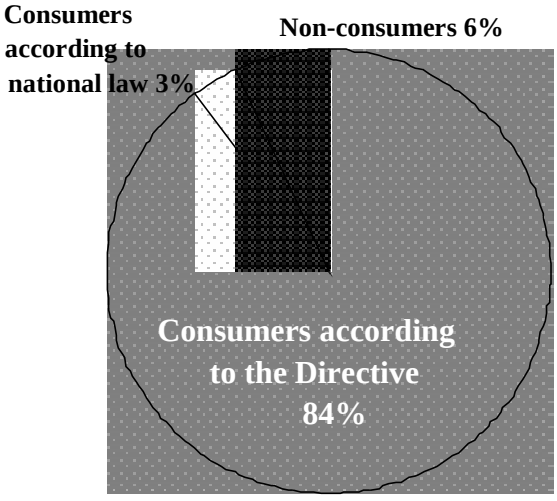
3. Assessment



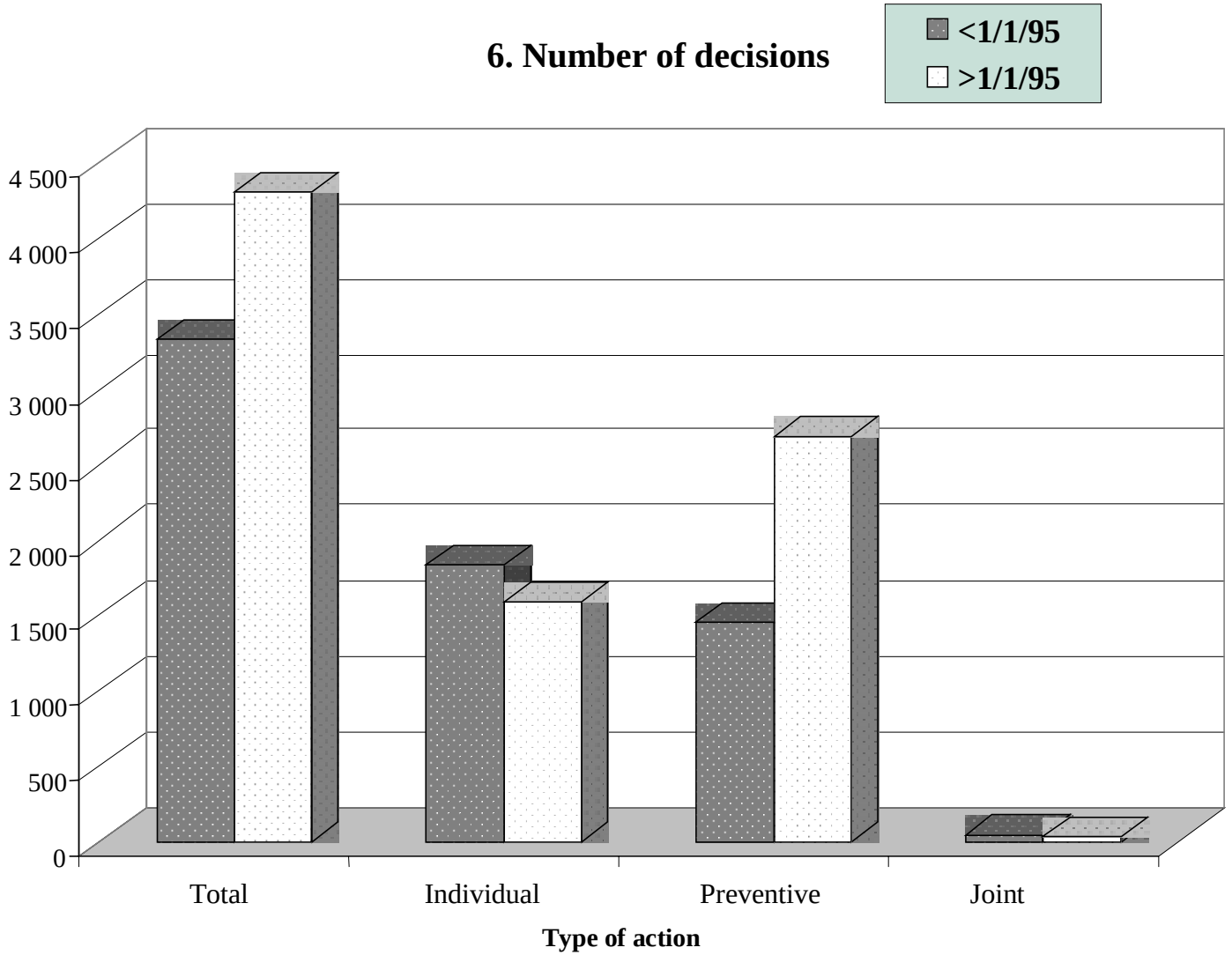
4. Type of contract

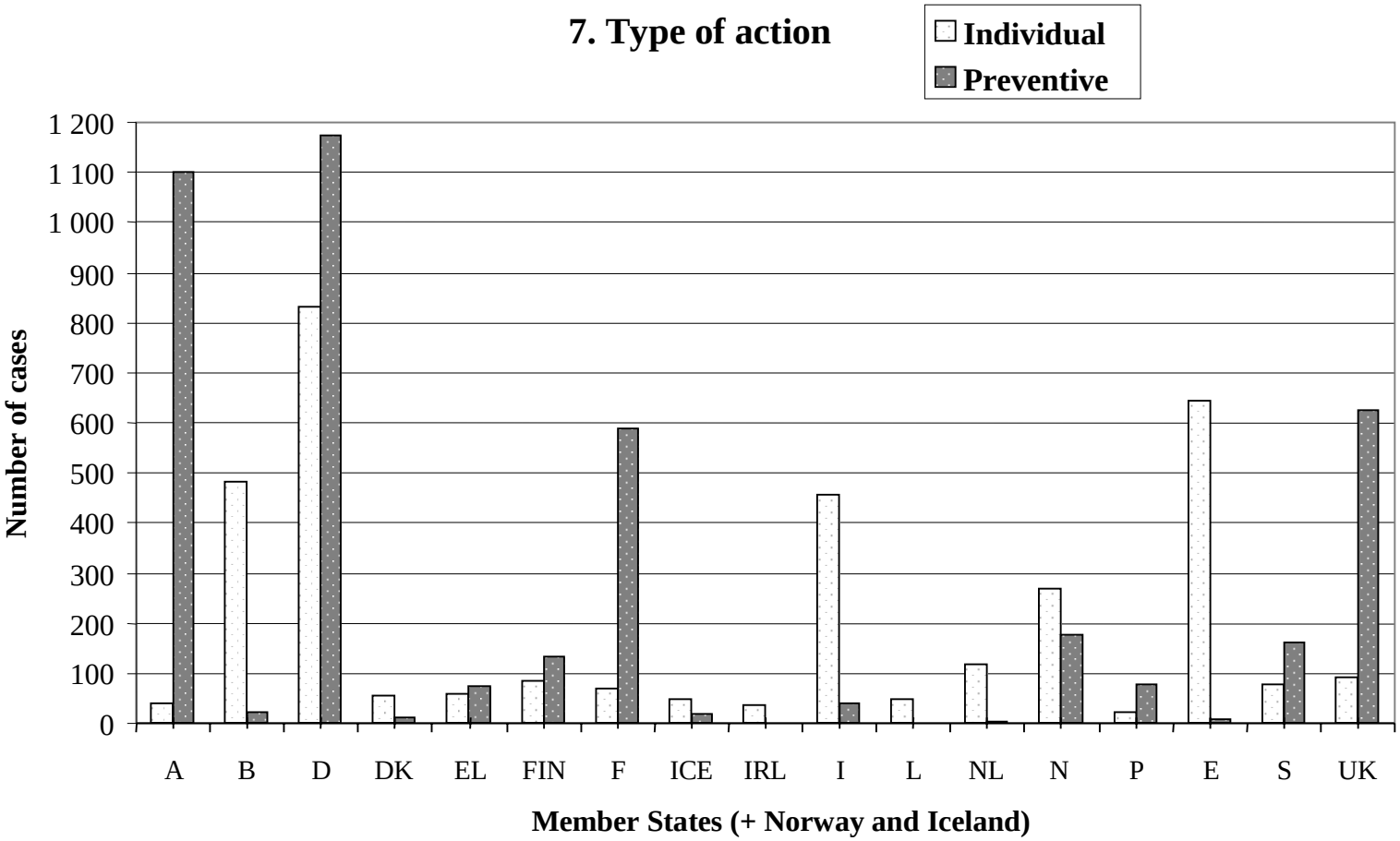


5. Nature of the parties

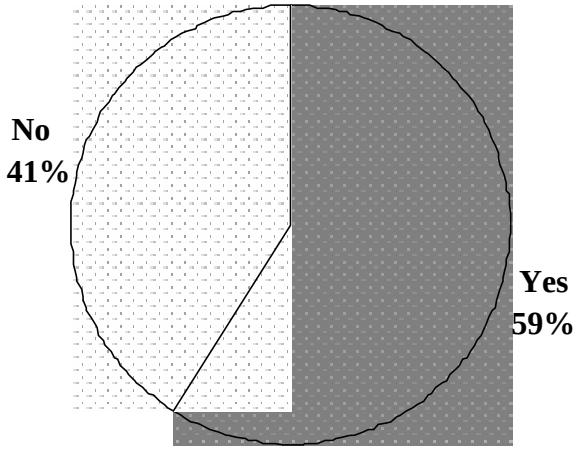


6. Number of decisions

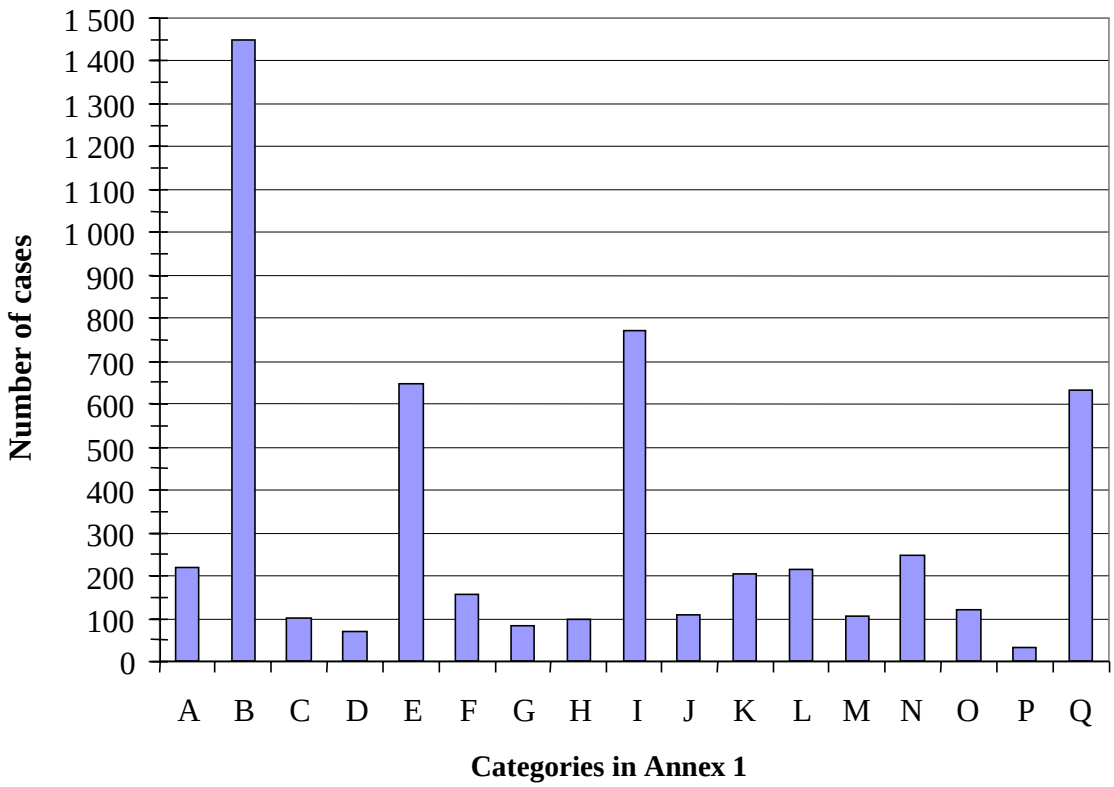



7. Type of action
Individual
Preventive
1 200
1 100
1 000
900
800
700
600
500
400
300
200
100
0
Number of cases
A
B
D
DK
EL
FIN
F
ICE
IRL
I
L
NL
N
P
E
S
UK
Member States (+ Norway and Iceland)

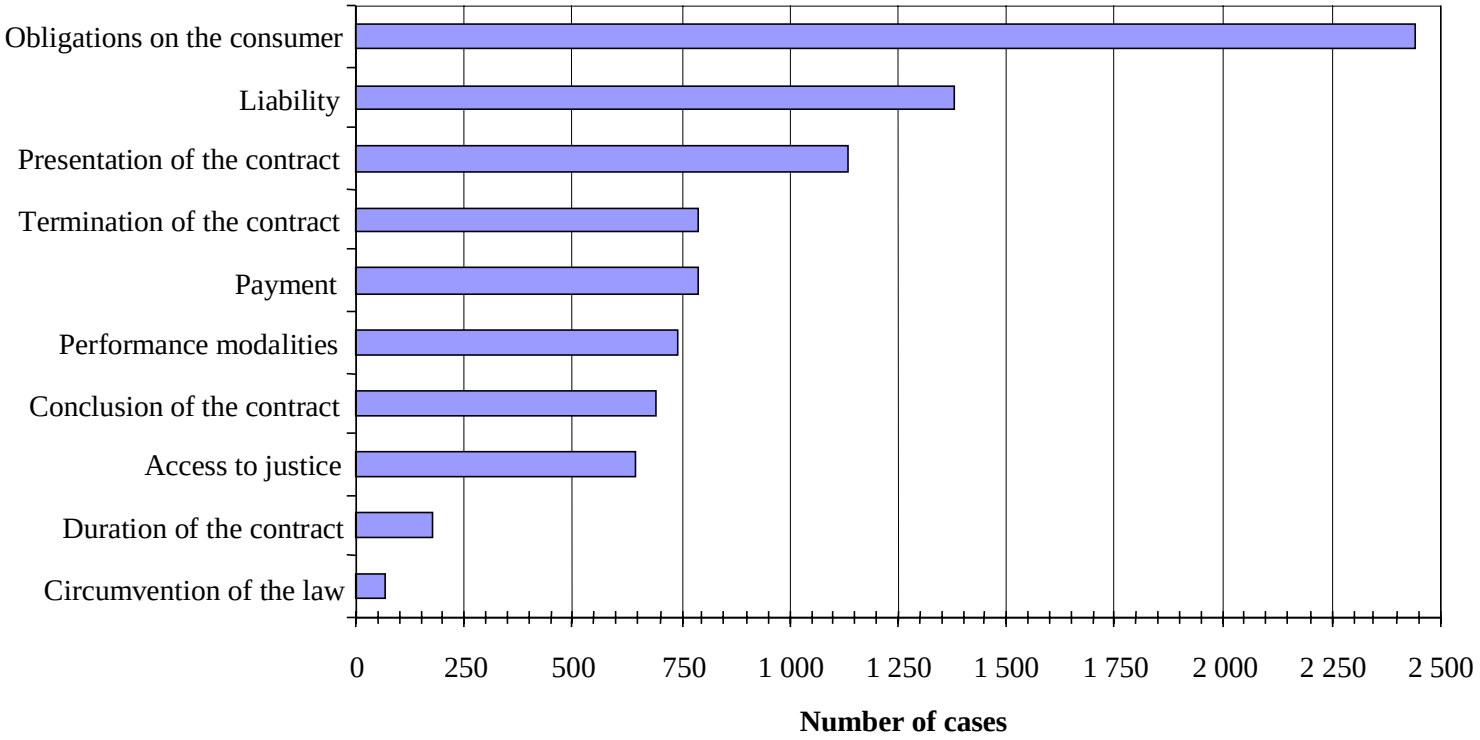
8. Terms coming within the scope of Annex 1 of the Directive



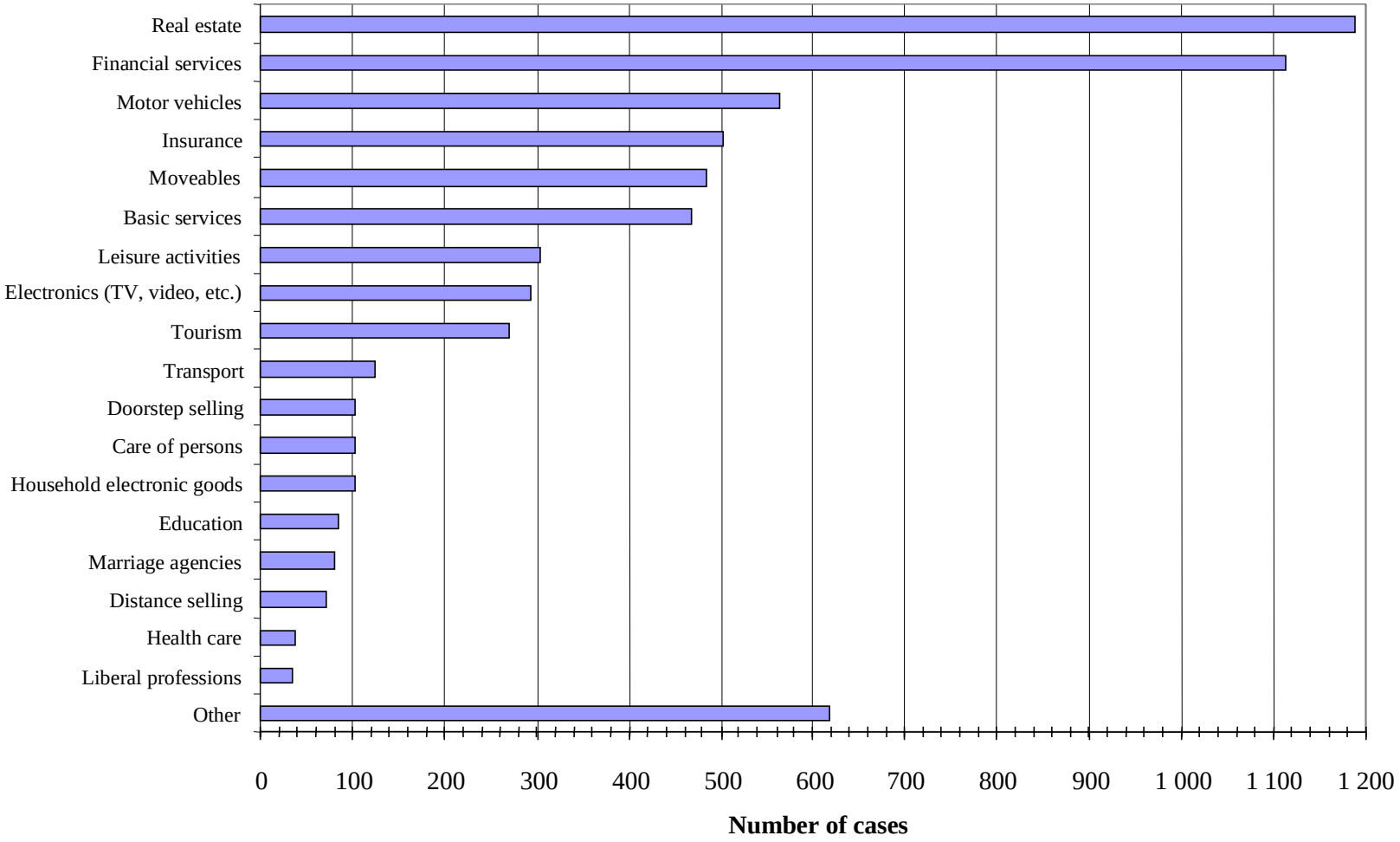
9. Annex 1 of the Directive – breakdown by categories



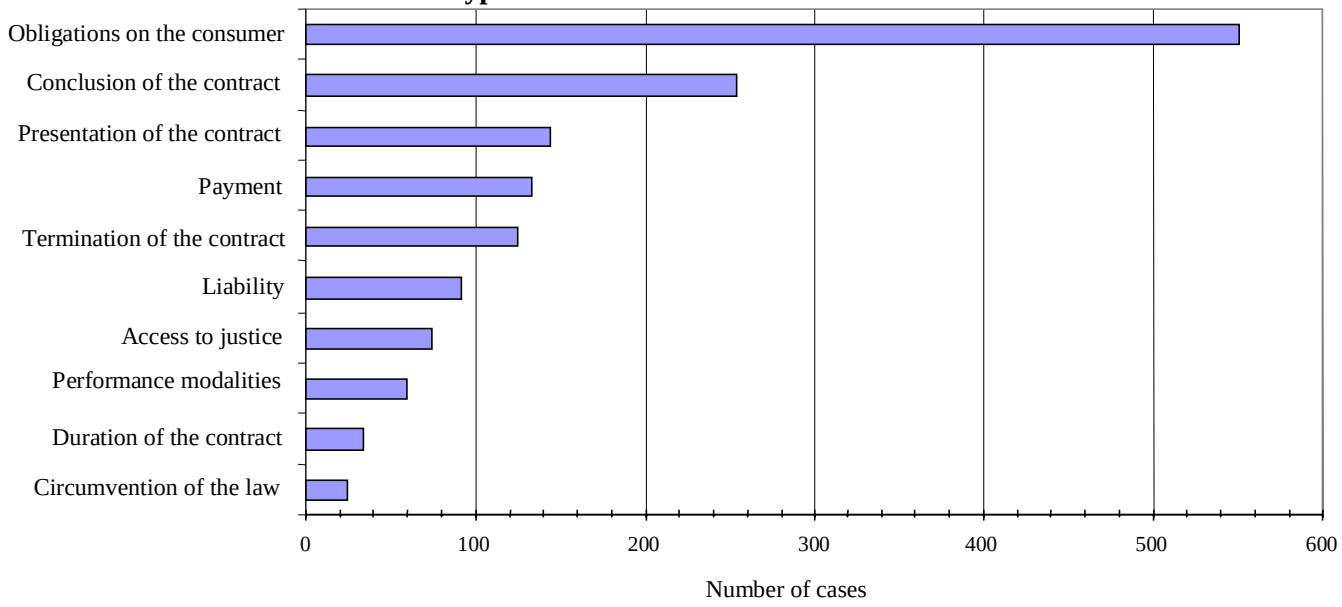
10. Types of unfair terms



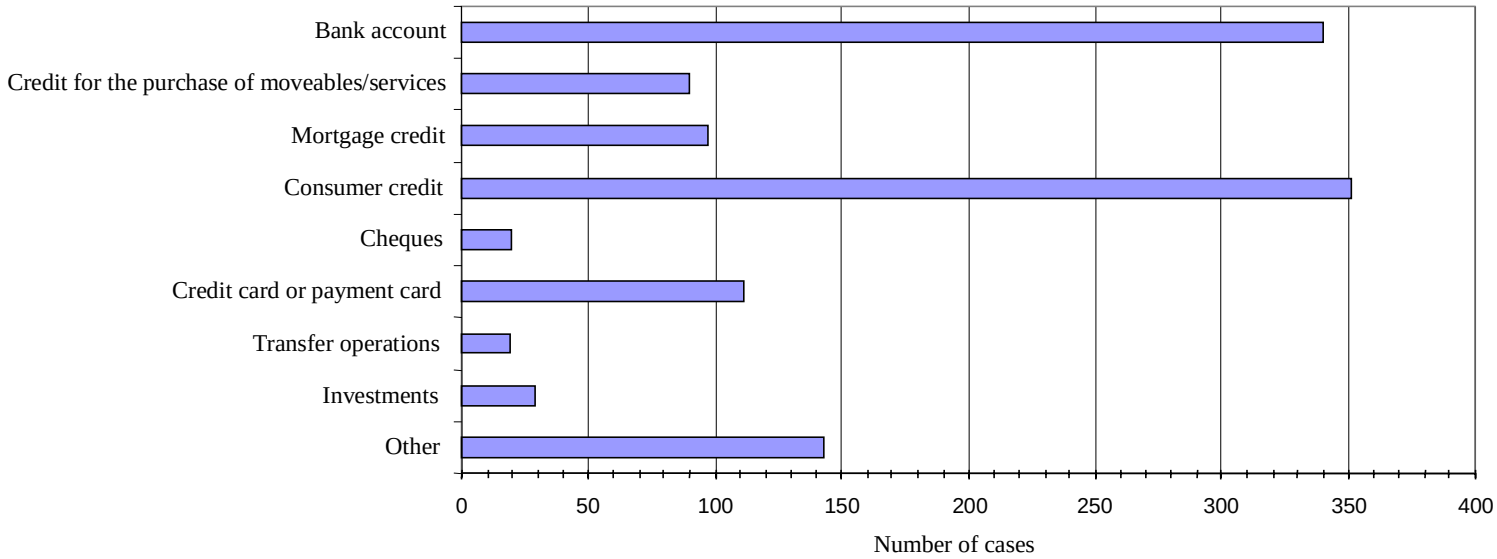
11. Unfair terms by economic sector



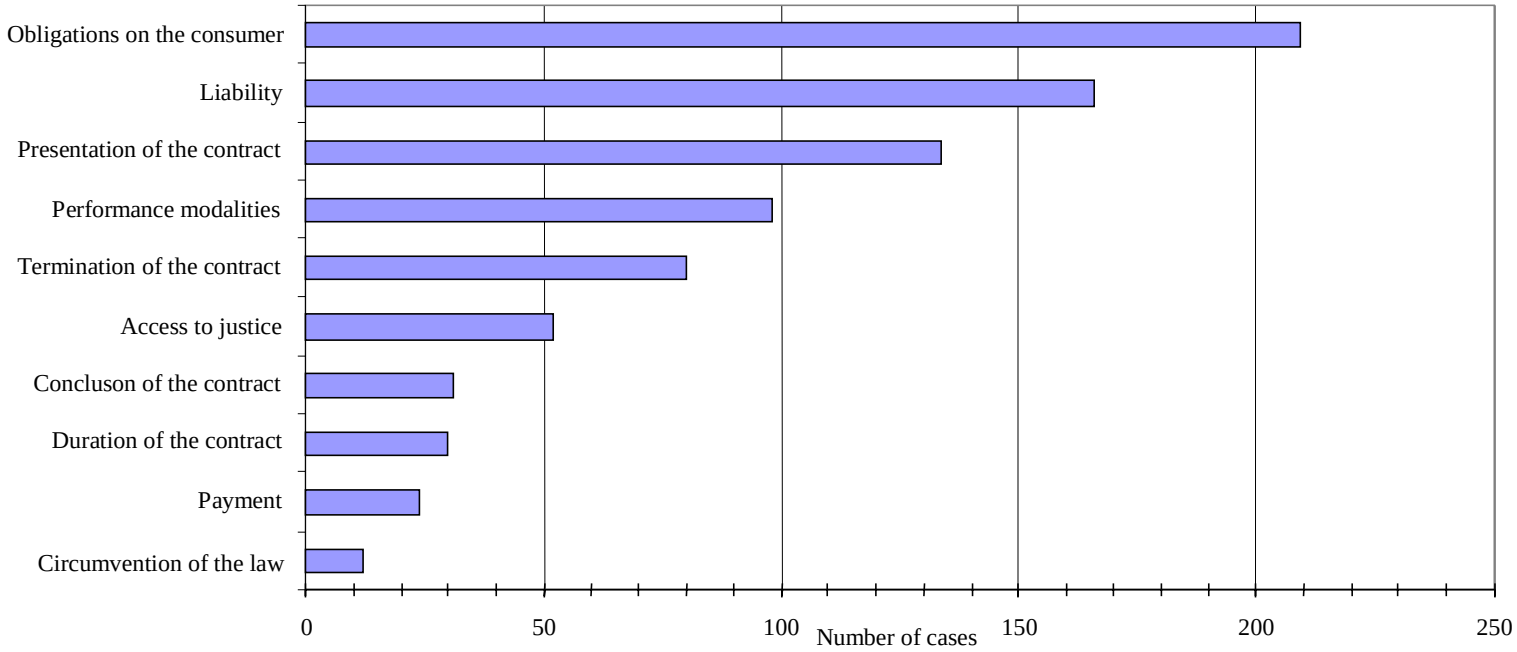
12A. Type of unfair terms in the financial services sector



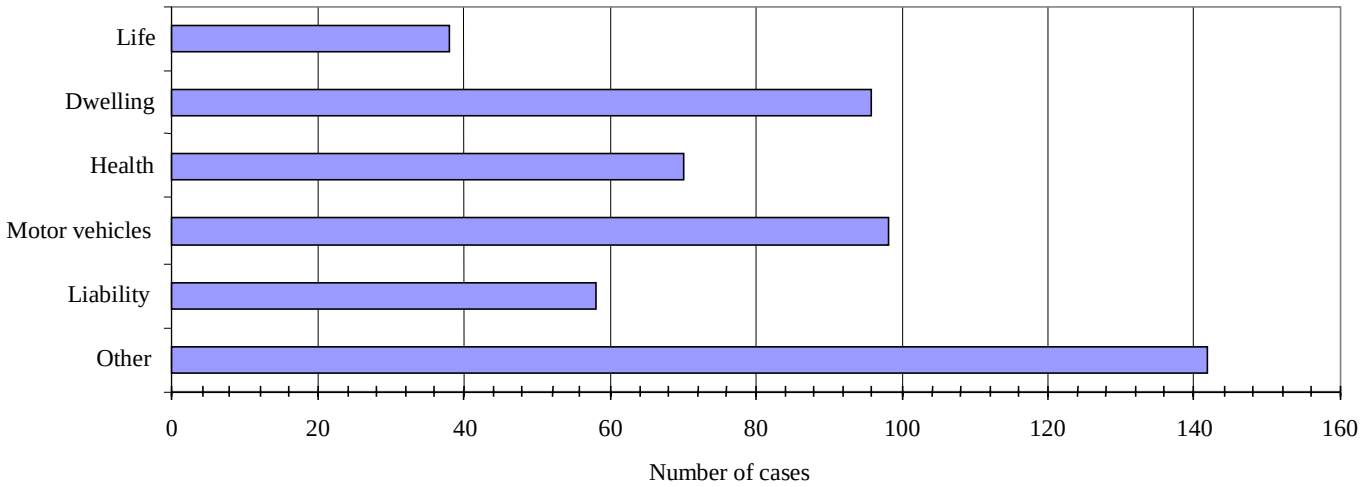
12B. Unfair terms by type of financial service



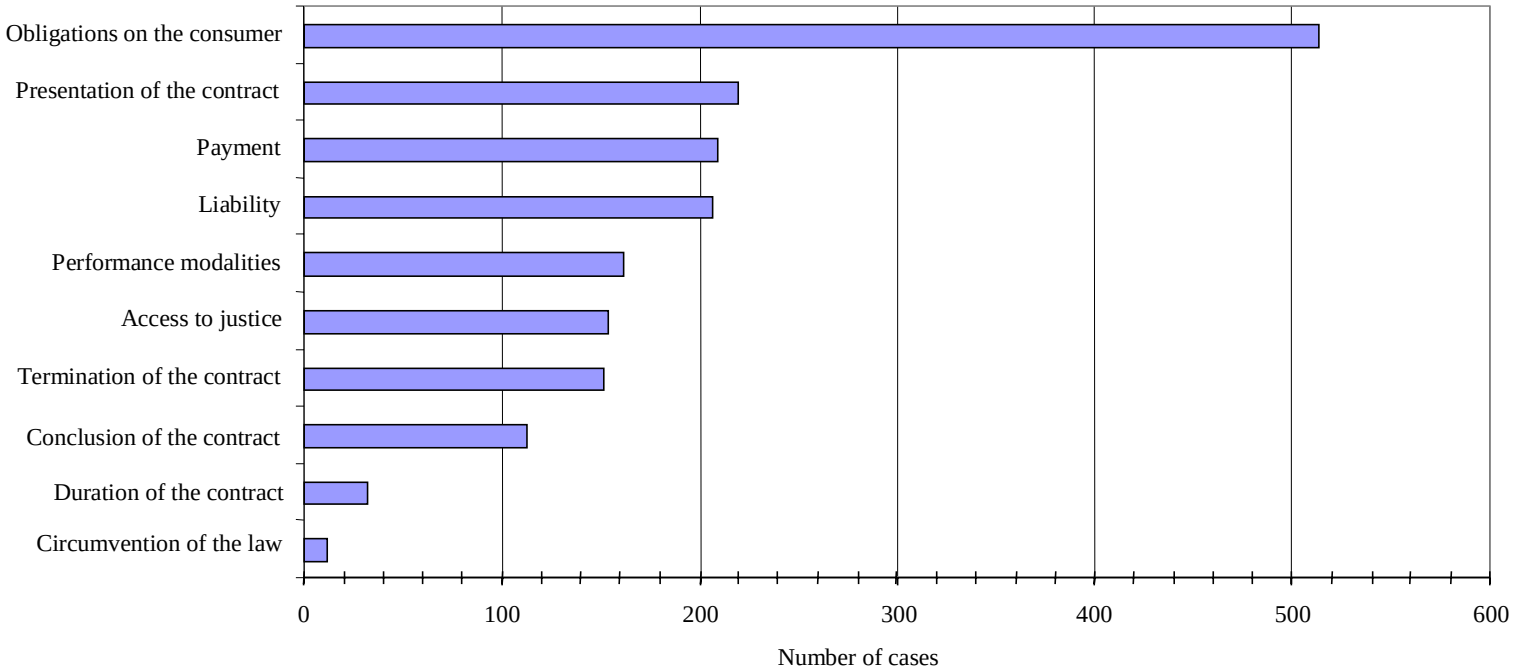
13A. Type of unfair term in the insurance sector



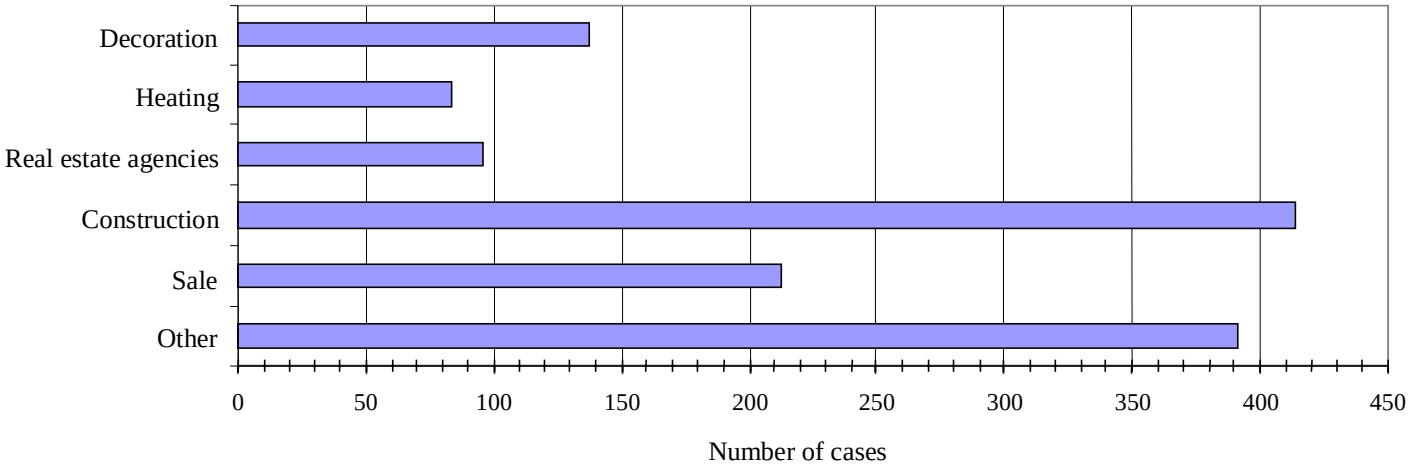
13B. Unfair terms by type of insurance



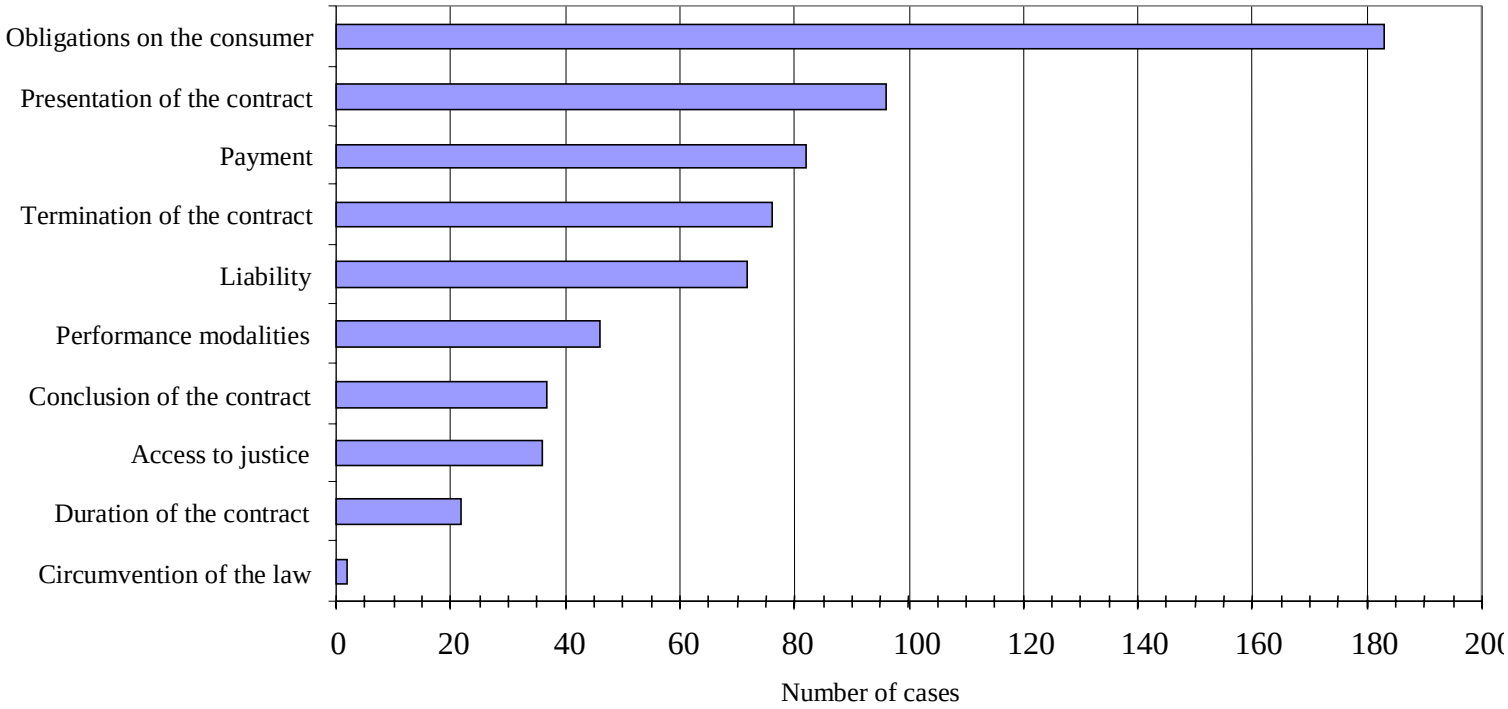
14A. Type of unfair term in the real estate sector



14B. Unfair terms – real estate



15A. Type of unfair term in the basic services sector



15B. Unfair terms by type of basic service

