

The consumer as the “weak” party to a contract

- ⇒ *Is it correct to assert that the consumer is protected as the “weak” contracting party?*
- ⇒ *Does it make sense to talk about the “weak” contracting party?*

1. The Unfair Terms Directive protects the consumer.
2. The consumer is protected as it is – evidently – considered as being the “**weak**” party.
3. Also craftsmen and “small” businesses are “**weak**” (as opposed to a [“large”] business).
4. The Unfair Terms Directive should be also applied to the craftsmen and to “small” businesses, as they are “**weak**” as opposed to “large” businesses.

Court of Rome – October 19, 1999

- ⇒ *Is the claimant to be classified as a “consumer” under the Unfair Terms-Directive?*
- ⇒ *Is the “consumer” protected due to his “weakness”?*
- ⇒ *Is there a general class of “weak” contracting parties?*
- ⇒ *Should the answer to the previous question be in the affirmative, how can he be identified?*

a.) ... the concept of consumer for the purposes of the legislation at issue is therefore that of the “party presumed to be weak” in the determination of the contents of the contract, ... as such, it does not depend neither on adverse personal circumstances in socio-economic terms, nor on the type of activity carried on by such party, ... since it may indeed involve [...] an entrepreneur or a business.

... on the other hand, it is decisive that he acts for purposes outside” any business or professional activity; which [...] means not in the course of his business. This interpretation is supported [...] by the definition of the opposite party to the consumer, namely the business, which is the party “using the contract in the course of its business or professional activity”.

The preferred view [...] bases the investigation not on the use of the goods or services [...] in the course of the professional or business activity of the customer, but rather on the use of the contract itself, in order to verify whether or not the conclusion of contracts of the same type as that under examination falls within the scope of the aforementioned activity; ... if the conclusion of such a contract is an act in the course of business or not by the buyer of the goods or services, as it is for the other party ...

... it is known that the legislation governing unfair terms rests on the presumption that the natural person contracting “not in the course of his business” with a business is in a typical situation of weakness, ... such natural person deserves particular protection in order to offset the imbalance in the power to determine the content of the contract which characterises that situation.

However, if the law presumes that also a party operating in the course of his business [...] may be in such a situation of weakness ... when contracting with another party who, as himself, operates in the course of his business in the specific area to which the contract relates, it appears evident that the distinguishing feature between the two is as follows: that for one [...] the conclusion of a contract of that type amounts to an act in the course of business, whilst for the other [...] it is an act falling outside his trade or business...

... both are occasional contract partners, who normally do not have the force to conduct a negotiation of individual clauses of the contract ... nor sufficient motivation [...] to invest time, energy and money [...] in a study of the various clauses drawn up by the other party.

... party protected as not acting in the course of his business or professional activity (\cong *sociological concept*)

... on the other hand, it is *decisive* that he “acts for purposes outside” any business or professional activity; which [...] means *not in the course of his business*. ... this interpretation is supported [...] by the definition of the opposite party to the consumer, namely the business, which is the party “using the contract in the course of its business or professional activity”.

The preferred view [...] bases the investigation *not* on the use of the goods or services [...] in the course of the professional or business activity of the customer, but rather on the use of the contract itself, in order to verify whether or not the conclusion of contracts of the same type as that under examination falls within the scope of the aforementioned activity; ... *if the conclusion of such a contract is an act in the course of business or not by the buyer of the goods or services, as it is for the other party ...*

... party protected on the grounds that he did not draw up the contract (\cong *concept of “agreer”*)

a.) ... the concept of consumer for the purposes of the legislation at issue is therefore that of the “party presumed to be weak” in the determination of the contents of the contract, ... as such, it does not depend neither on *adverse personal circumstances in socio-economic terms*, nor on *the type of activity carried on by such party*, ... since it may indeed involve [...] an *entrepreneur or a business*.

... party protected as less “expert” (\cong *concept of experience*)

... party protected as not acting in the course of his professional or business activity (\cong *sociological concept*)

... it is known that the legislation governing unfair terms rests on the presumption that the natural person contracting “**not in the course of his business**” with a business is in a typical *situation of weakness*, ...

... party protected as **less “expert”** (\cong *concept of experience*)

... when contracting with another party which, as itself, operates in the course of his business in the specific area to which the contract relates, it appears evident that the distinguishing feature between the two is as follows: that for one [...] the conclusion of a **contract of that type** amounts to an act in the course of his business, whilst for the other [...] it is **an act extraneous** to it ...

... both are occasional contract parties, who normally do not have the force to conduct a negotiation of individual clauses of the contract ... nor sufficient motivation [...] to invest time, energy and money [...] in a study of the various *clauses drawn up by the other party*.

... party protected on the grounds that **he did not draw up the contract** (\cong *concept of “agreer”*)

... deserves particular protection in order to offset the imbalance in the **power to determine the content of the contract** which characterises that situation. However, if the law presumes that also a party operating in the course of his business [...] may be in such a situation of weakness ...

Various concepts of the weaker party have been proposed by legal scholars:

... party protected as not acting in the course of his professional or business activity
(\cong *sociological concept*)

... party protected on the grounds that they did not draw up the contract (\cong *concept of "agreer"*)

... party protected as less "expert" (\cong *concept of experience*)

... party protected as deserving protection in economic terms
(\cong *"economic" concept*)

... party protected as less "organised"
(\cong *concept of "organisation"*)

... party protected as he needs the good/service
(\cong *concept of need*)

... party protected on the grounds that it desires the service ("impulse")
(\cong *concept of "desire"*)

... party protected as – maybe – suffering from a headache
(\cong *"health" concept*)

... } Consequence:
each time a **court scrutiny of the contract** is admissible!

The concept of **consumer** under the Unfair Terms-Directive requires:

- 1.) the acting for purposes which are outside one's business or professional activity (\cong consumer);
- 2.) the entering into a contract drawn up by a party acting in the course of his professional or business activity.

“Descriptive concept” v “normative concept”

Normative concept

“there is always a need for an **assessment** in order to apply a **normative concept**”.

Example: *Concepts such as “diligence of a reasonable man” or “good faith” require an assessment as to whether the prerequisites for his application have been met.*

Example: *When determining whether the prerequisites for the application of the concept of a “minor” have been met (Art. 2 of the Italian Civil Code), it is not necessary for the interpreting body to make an **assessment**, since the prerequisites are laid down therein “in descriptive terms, stating that [...] any person under age 18 is a minor”.*

N.B.:

The concept of minor is thus “reduced to descriptive terms”. Precisely, due to its “**reducibility to descriptive terms**”, it is not a **normative concept**.

Descriptive concept

by contrast, there is no need for an **assessment** for **descriptive concepts**.

In cases involving **normative concepts** his “*normative scope [...] must be determined on a case by case basis through assessment*”. Precisely for this reason, **normative concepts** of this kind are considered to require supplementary **assessment** (“**wertausfüllungsbedürftig**”), as a particularly high degree of indeterminacy is inherent in such **assessment** (Karl Engisch, *Einführung in das juristische Denken*, 10th ed., Stuttgart, 2005).

At times the same concept can be understood in theoretical terms both as a **descriptive concept** as well as a **normative concept**.

Let's consider the concept of the "**weak contracting party**".

In a judgment concerning **standard trade terms** (Art. 1341 ff. ICC), the Italian Supreme Court (*Corte di Cassazione*, judgment of June 12, 1998, nr. 5860) ruled the term not to be binding due to the missing *specific approval in writing*.

The clause was claimed to be not binding due to the fact that the (*general*) written approval of a pre-drafted form does not "*draw the attention of the* **weak contracting party** *on the onerous nature of the clause*".

The concept of **weak contracting party** is regarded as synonymous with that of contractual partner of the drafter of standard trade terms.

The concept of a *weak contracting party* is a **descriptive concept!**

The Court is not therefore charged with making an **assessment** as to *who* is to be classified as the **weak contracting party**. This concept is in fact "reduced to descriptive terms".

In our case, the specific approval in writing of standard trade terms listed in Art. 1341, paragraph 2, Italian Civil Code, which the Court of Cassation – evidently – considers to ground a situation of "**weakness** by the other party."

N.B.:

Is it correct to assert that the **weak contracting party** is protected solely and exclusively if the concept of “weakness” is understood as a **descriptive concept**.

⇒ *Why is this distinction important? What substantive implications flow from it?*

A concept of “weakness” understood as a **normative concept** is not compatible with the principle of **freedom of contract/contractual autonomy**.

... a court scrutiny would be admissible on the basis of any **“diversity”** whatsoever between the contracting parties, taken as an indicator of **“weakness”**.

Example: *Accordingly, going by the view criticised, it would be sufficient to argue that a contracting party, is, for instance, stronger” as a judo “black belt”, whilst the other is “weaker” since he does not practice martial arts in order to justify court scrutiny of the contract.*

→ the distinction at issue is **arbitrary** at least as much as that which identifies the weakness of the consumer as having less “experience”, “organisation” etc.

The absurdity of this view is confirmed by the fact that a decision regarding the weakness of one party compared to the other will be impossible where there is more than one reference parameter!

~~**Example:** *Tom has less experience in the conclusion of contracts of the type at issue, but is however “superior” to (stronger than) Bill in terms of financial resources.*~~

There is therefore a risk of **contrasting indications!!!**

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“weak” is understood as a **descriptive concept**.

3. Also craftsmen and “small” businesses are “weak” (as opposed to a [“large”] business).



“weak” is understood as a **normative concept**.

4. The Unfair Terms Directive should be also applied to the craftsmen and to the small business as they are “weak” as opposed to a (“large”) business (**application by analogy**).



There is no way to have an **application by analogy** in the absence of a *gap* !

“The consumer is protected as they are ‘weak’.



cannot be accepted if “weak” is understood as a **normative concept**.

“The consumer is protected as they are ‘weak’.



If “weaker” is understood as a **descriptive concept**, it takes on the function of a **mere verbal summary** of the content of the law!

“The consumer is protected as they are ‘nice’.

Court of Justice of the European Union, 20 January 2005 - Case C-464/01

Facts

According to the documents in the main proceedings **Mr. Gruber**, a farmer, owned a farm building constructed around a square (‘Vierkanthof’), situated in Upper Austria, close to the German border. **The area of the farm building used for residential purposes was slightly more than 60% of the total floor area of the building.**



“The Court held that only contracts concluded outside and independently of any trade or professional activity or purpose, **solely for the purpose of satisfying an individual’s own needs in terms of private consumption**, are covered by the special rules laid down by the Convention to protect the consumer as the party **deemed to be the weaker party**. Such protection is unwarranted in the case of contracts for the purpose of a trade or professional activity.”

N.B.:

Somebody acting within his trade or profession is «**strong**», and – hence – does not need protection. On the contrary, somebody acting for purposes outside his trade and profession is deemed to be «**weak**» and, thus, deserves to be protected.



Descriptive concept!

“In that regard, it is already **clearly apparent** from the purpose of Art. 13 to 15 of the Brussels Convention, namely to properly protect **the person who is presumed to be in a weaker position** than the other party to the contract, **that the benefit of those provisions cannot**, as a matter of principle, be relied on by a person who concludes a contract for a purpose which is **partly concerned with his trade or profession and is therefore only partly outside it**.

⇒ Why is it «clearly apparent»? The ECJ is «begging the question», i.e. assuming the conclusion of the argument at issue! ⇒ **Normative concept!** ⇒ «presumed» to be ...

“It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role [...]”. inasmuch as a contract is entered into for the person’s trade or professional purposes, **he must be deemed to be on an equal footing with the other party to the contract**, so that the special protection reserved by the Brussels Convention for consumers is not justified in such a case”.

⇒ Why does a «negligible role» make a difference? ⇒ **Normative concept!**

*“That is in no way altered by the fact that the contract at issue also has a **private purpose**, and it remains relevant whatever the relationship between the private and professional use of the goods or service concerned, and even though the **private use is predominant, as long as the proportion of the professional usage is not negligible**”.*

⇒ *Why does the fact that a «private use is predominant» not make any difference?*



Normative concept!

*“Accordingly, where a contract has a **dual purpose**, it is not necessary that the purpose of the goods or services for professional purposes be **predominant** for Art. 13 to 15 Brussels Convention not to be applicable. That interpretation is supported by the fact that the definition of the notion of consumer in the first paragraph of Art. 13 Brussels Convention is worded in clearly restrictive terms, using a **negative** turn of phrase (‘contract concluded [...] for a purpose [...] outside [the] trade or profession’)”.*

The conclusion the ECJ draws rests on an assumption (i.e. that the predominance of a private use does not make any difference for the extension of the scope of application of Art. 13 Brussels Convention) which has been assumed without any proof ... , as – according to the ECJ – it is «clearly apparent»!

*“Moreover, the definition of a contract concluded by a consumer must be **strictly interpreted** as it constitutes a derogation from the basic rule of jurisdiction laid down in the first paragraph of Art. 2, and confers exceptional jurisdiction on the courts of the claimant’s domicile”.*

This statement deserves to be shared!