

### Art. 34, paragraph 3, Consumer Code - *Verification of the unenforceability of terms*



Terms that reproduce legal provisions or that are reproductions of legal provisions or implementations of principles contained in international conventions to which all member states of the European Union or the European Union are parties, are not unfair.

This is **absolutely obvious!**

- The purpose of the EU-Directive is to sanction the drafting of a contractual term favourable to the business: if the business drafting the contract in advance inserts terms that reproduce legal provisions, such terms – by definition – do not introduce any «**significant imbalance**» of rights and duties (**Art. 33 Consumer Code**).
- Otherwise, legal provisions would end up being considered unfair. This would lead to the absurd result of considering statutory provisions themselves as «unfair», de facto denying the **impartial function** which falls to the law.

### Art. 34, paragraph 4, Consumer Code - *Assessment of the unfairness of terms*



Terms or parts of terms which have been individually negotiated are not unfair.

⇒ *Why is this provision important?*

It makes it clear that the consumer is **not** protected as an «inherently weak» subject.

⇒ *What does this provision explicit?*

The consumer is, in fact, any subject **not** acting within the sphere of his trade or professional activity. The «weakness» is inherent in entering into a contract **drafted in advance** by a business.

**Example:** A jurisdiction clause providing for the competence of the Court where the business has its registered office is binding if it is approved by the consumer following (exhaustive) **negotiations**.



### **Art. 36, paragraph 2, Consumer Code – Nullity of protection**

Even if individually negotiated, terms which have the following subject matter or effect are **void**:

- 1.) terms which exempt from or limit the liability of the business in case of the **death of or damage to the person** of the consumer resulting from an action or an omission on the part of the business;
- 2.) terms which **exclude** or **limit** the claims of the consumer towards the business or towards another party in case of **total or partial non-performance**;
- 3.) terms which provide for the consumer's **total acceptance** of terms that he could not have learned **before entering into the contract**.

so-called  
**“black”  
list**

### **Art. 33, paragraph 3, Consumer Code - Assessment of the unfairness of terms**

Terms are considered unfair until proved otherwise if their subject matter or effect is: 1.) ... .. 20) ... .

so-called **“grey” list**

### **Art. 36, paragraph 3, Consumer Code – Nullity of protection**

The nullity will have effect solely for the benefit of the consumer. A Court will have to state the nullity **on its own motion**.

### **Art. 36, paragraph 5, Consumer Code – Nullity of protection**

Any term providing for the application to the contract of provisions of a non-EU-member country is void whenever it results in the non-application of the provisions of this Title, provided the contract has a **closer connection** with the territory of any EU-member country.

## Art. 37 Consumer Code – *Enjoining action*



Associations that represent consumers and businesses [...] may sue a business [...] that uses standard trade terms and petition the court to enjoin the use of standard trade terms determined to be unfair pursuant to this Title.

The standing to sue is granted to those who, because of their collective nature, have an interest in promoting a **judgment of unfairness**.

The protection given by the Unfair Terms-Directive would be worthless, if each time, a **judgment of unfairness** towards every single business making use of the same (unfair) terms were necessary.

**“standard trade terms”**  
(Art. 1341 CC)



**“Unfair terms”**



All parties

Exclusively contractual relationships between businesses and consumers

Only standard trade terms

Also contracts that have been unilaterally drafted in advance for individual use

Formal check (double signature)

Substantial check  
(scrutiny of the **regulatory balance** of the contract)



### *Terms to which these Regulations apply*

4. - (1) These Regulations apply in relation to unfair terms in contracts concluded between a **seller** or a **supplier** and a **consumer**.
- (2) These Regulations do **not** apply to contractual terms which **reflect**:
- (a) **mandatory statutory or regulatory provisions** (including such provisions under the law of any Member State or in Community legislation having effect in the United Kingdom without further enactment);
  - (b) the provisions or principles of international conventions to which the Member States or the Community are party.

### *Assessment of unfair terms*

6. - (2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall **not** relate:
- (a) to the definition of the **main subject matter** of the contract, or
  - (b) to the **adequacy of the price or remuneration**, as against the goods or services supplied in exchange.

### *Unfair Terms*

5. - (2) A term shall always be regarded as not having been individually negotiated where it has been **drafted in advance** and the consumer **has therefore not been able to influence the substance of the term**.

### *Effect of unfair term*

8. - (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall **not** be **binding** on the consumer.
- (2) The contract shall continue to bind the parties if it is capable of **continuing its existence** **without** the unfair term.

**N.B.:**

Whilst the Italian **Consumer Code** provides for the **nullity** of so-called “**black list**”-terms, according to English law such **unfair** terms are **not** binding.

## **INDICATIVE AND NON-EXHAUSTIVE LIST OF TERMS WHICH MAY BE REGARDED AS UNFAIR**



1. Terms which have the object or effect of:

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the **death of a consumer or personal injury** to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of **total or partial non-performance or inadequate performance** by the seller or supplier of any of the contractual obligations;
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation **depends on his own will** alone; ...

### ***Injunctions to prevent continued use of unfair terms***



12. - (1) The Director or, subject to paragraph (2), any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to the Director or that body to be **using, or recommending use** of, an **unfair term drawn up for general use** in contracts concluded with consumers.

## 1. 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.**

Wishing to replace the roof tiles of his farm building, Mr. Gruber became aware of advertising brochures sent out with the local periodical distributed to households.

Bay Wa, a German DIY-market offered tiles for sale in its building materials department in Pocking, in Germany.

The tiles purchased by Mr. Gruber **Bay Wa's** did not feature in those brochures.



**Mr. Gruber** considered that the tiles delivered by **Bay Wa** to tile the roof of his farm building showed significant variations in colour despite the warranty that the colour would be uniform. As a result the roof would have to be re-tiled. Mr. Gruber therefore decided to bring proceedings on the basis of the warranty together with a claim for damages.



**Art. 2 Brussels Convention** (of 27 September 1968 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters)

*“Subject to the provisions of this Convention, **persons domiciled in a Contracting State** shall, whatever their nationality, **be sued in the courts of that State.***

*Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.”*

**Art. 14 Brussels Convention**

A **consumer** may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or **in the courts of the Contracting State in which he is himself domiciled.**

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.



## **2. First-Instance Judgment**

By judgment of 29 November 2000, the Landesgericht (Regional Court) Steyr dismissed **Bay Wa**'s objection of lack of jurisdiction and ruled that it was competent to hear the dispute.

Where a contract has a **dual purpose**, the **predominant purpose**, whether private or business, must be ascertained.

Since the dividing line between private and business supplies is difficult to distinguish in the case of agricultural enterprises, the court found that the seller had had no way of ascertaining objectively whether one or other purpose predominated at the time when the contract was concluded so that, **given the uncertainty, the contract was to be regarded as a consumer contract.**

### 3. Second-Instance Judgment

The Oberlandesgericht Linz, by judgment of 1 February 2001, upheld **Bay Wa**'s appeal, and dismissed **Mr. Gruber**'s claim on the ground that the **Austrian courts do not have jurisdiction** to hear the dispute: for there to be a consumer contract within the meaning of Art. 13 Brussels Convention the contract must constitute an act attributable to a purpose outside the trade or profession of the person concerned.

On the basis of the facts which could be objectively ascertained by **Bay Wa**, the supply at issue had at least **essentially a business purpose**. The purchase of tiles by a farmer to tile the roof of his farm building is, *prima facie*, connected with his agricultural business.

### 4. Austrian High Court (*Oberster Gerichtshof*)

A **preliminary ruling** is a decision of the European Court of Justice (ECJ) on the interpretation of European Union law, made at the request of a court or tribunal of a European Union Member State.

Preliminary rulings are final determinations of Union law in question by the EU courts. The final decision remains with the referring court to be decided after it received the preliminary ruling.

⇒ *Where the purposes of a contract are partly private, does the status of “consumer” for the purposes of Article 13 of the Convention depend on which of the private and the trade or professional purposes is **predominant**, and **what criteria are to be applied** in determining which of the private and the trade or professional purposes predominates?*

⇒ ***In case of doubt**, is a contract which may be attributed both to private and to trade or professional activity to be regarded as a consumer contract?*

## 5. European Court of Justice

*“The Court has repeatedly held that the special rules introduced by the provisions of Title II, Section 4, of the Brussels Convention, [...] serve to ensure adequate protection for the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other commercial party to the contract, who must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled [...].”*

The CJEU apparently introduces **two** distinct concepts ... which «explain» the «weakness» of the consumer: **1.)** economic weakness and **2.)** legal training

- ⇒ *What happens if a party is economically weaker whilst the other is more experienced in legal matters?*
- ⇒ *Is B. Gates asking for legal advice a consumer? Or a lawyer buying a car for private purposes?*
- ⇒ *What is the relationship between **economic weakness** and acting for purposes outside one's trade or profession?*
- ⇒ *What is the relationship between **legal expertise** and the acting for purposes outside one's trade or profession?*

*“The Court has concluded that those provisions only cover private final consumers, not engaged in trade or professional activities, **as the benefit of those provisions must not be extended to persons for whom special protection is not justified [...].”***

“The Court has concluded that those provisions only cover private final consumers, not engaged in trade or professional activities, **as the benefit of those provisions must not be extended to persons for whom special protection is not justified [...].**”

**This is obvious!** At the same time it is a *petitio principii*, or “begging the question”: it is committed “when a proposition which requires proof is assumed without proof”!

According to the ECJ, ... the protection should not be extended to those who do not deserve to be protected. The question rather is: Who is protected? Why is he protected? Can/should that protection be extended also to other persons?

“the Court stated in that respect that the concept of ‘consumer’ for the purposes of Art. 13, first paragraph, and Art. 14, first paragraph, Brussels Convention must be **strictly construed**, reference being made to the position of the person concerned in a particular contract, having regard to **the nature and aim of that contract** and **not to the subjective situation** of the person concerned, since the same person may be regarded as a consumer in relation to certain supplies and as an economic operator in relation to others.”

It confirms the inconsistency: indeed, if one is «**economically superior**» or has «**legal training**» he always is in such position, irrespective of the nature and the aim of the contract!

“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.”

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⇒ What happens if the person acting for «private consumption» is **not** the «weaker» party?

**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.

“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» related to the reasons for the (non-)extension of Art. 13 Brussels Convention in the case of a so-called «dual purpose».

“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? ⇒ What does that mean?

*“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?*

*“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! Notwithstanding the above, the questions to be addressed are:*

*⇒ What sense does it make to refer to contractual «weakness»? What does it consist in?*

*⇒ Can the concept of «weakness» be used in Contract law? Is it compatible with the principle of freedom of contract?*

## *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 the “small” business as they are **“weak”** as opposed to a (“large”) business.

## *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?*

