

Consumer Rights Directive

The Norwegian Consumer Ombudsman's view on chapter V in the proposal

The Norwegian Consumer Ombudsman (CO) worry about the consequences of full harmonisation of chapter V in the proposed Consumer Rights Directive. Full harmonisation of these provisions will affect the daily work of consumer protection authorities all over Europe. Total harmonisation means that today's minimum rights become tomorrow's maximum rights, and that present and future consumer rights are weakened.

1. Unfair contract terms

1.1 Threshold for considering a contract term to be unfair

Pursuant to Article 32 of the proposed Consumer Rights Directive, contract terms can be considered unfair provided the term "contrary to the requirement of good faith, [...] causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

The Norwegian rules on unfair contract terms, based on the Unfair Contract Terms Directive, 93/13/EC, are currently affording consumers greater protection than the proposed Directive. According to Article 22 in the Marketing Control Act (MCA), terms and conditions may be prohibited if they are deemed to be unfair to consumers and if general considerations call for such a prohibition¹.

The Norwegian Supreme Court (case 2006-01867 A) has stated that MCA Section 9a does not require a substantial imbalance for a term to be found unfair. However, the Court said it is not sufficient that the term could be more balanced.

The constant development in consumer contracts makes a general clause that supplies the provisions in Annex II and III of the Directive necessary. However, the proposed threshold will lead to a reduction of the protection afforded to Norwegian, and probably consumers in many other Member States. Fully harmonising the provisions will make today's minimum rights become tomorrow's maximum rights and the decision on necessary level of protection will not be taken by the authorities closest to the consumer problems.

These consequences can be illustrated through the examples below, where we have had a closer look at cases where the Norwegian Consumer Ombudsman has deemed contract terms to be unfair in accordance MCA Section 22 and assess how these cases might be solved under the proposed Directive.

2. Examples

2.1 Non-interoperability (iTunes)

In cooperation with consumer authorities from Member States, the Norwegian Consumer Ombudsman initiated infringement procedures against iTunes Music Store (iTunes) for non-compliance with the MCA.

The iTunes ToS stated that music downloaded from iTunes could only be accessed and played on iTunes authorized products (The iTunes programme or Apple products, e.g. the iPod). iTunes used technology (a type of Digital Rights Management called FairPlay) to make it a difficult and

¹ When determining whether the terms and conditions of a contract are unfair, emphasis shall be placed on the balance between the rights and obligations of the parties and on whether the contractual relationship is clearly defined or not. It is the overall balance of the contract which is assessed. Even though the individual term cannot be deemed unfair, the totality of all the contract terms can be found unfair and in breach of Section 22.

cumbersome process to play songs downloaded from iTunes on competitors players, for instance from Creative. Both the term in the ToS and the technology used to enforce this term was deemed unfair under the Norwegian MCA.

The practise of tying a consumer to one particular vendor through contract or technology is neither unfair per se nor presumed unfair according to the proposed Directive. Consequently, the term would have to cause a significant imbalance to be prohibited. It could be argued that using technology and contract terms that ties consumers into purchasing products from one particular company, cause a significant imbalance in the contract. However, I would be hesitant to pursue such a big case, against such a big company, under the proposed Directive because of the increased threshold of considering a term unfair.

2.2 Name change on airline tickets and check in time (SAS)

The Consumer Ombudsmen in Sweden, Denmark and Norway jointly initiated negotiations with the Scandinavian air carrier SAS in 2001 because the airline's Conditions of Carriage (CoC) was not in accordance with Scandinavian unfair contract terms legislation. There were a number of terms in SAS' CoC that was considered unfair.

SAS' CoC did not allow passengers to change names on purchased tickets. The term was considered unfair under the Norwegian MCA because it did not allow consumers to limit their loss in case the consumers were unable to travel. Any costs incurred by the airline because of the name change could be recovered through an administration fee. This term is neither considered unfair in all circumstances nor presumed unfair according to the Directive. Consequently, it must be established that the term causes a significant imbalance to the parties' rights and obligations for it to be considered unfair under the proposed Directive. Whether denying consumers a right to change names on airline tickets causes a significant imbalance, is questionable.

According to the CoC, SAS would not be liable for any loss or expense incurred due to passengers' non-compliance with the applicable check-in deadline. This term was deemed unfair under Norwegian law as it exempted SAS from all liability even in cases when SAS caused the passengers failure to check-in at the right time, for instance if SAS organised the entire trip without ensuring sufficient time for transfers to connecting flights. Under the proposed Directive, the said term would neither be considered unfair in all circumstances nor presumed unfair according to the Annexes. It could be argued that the term causes a significant imbalance to the parties' rights and obligations; however, this is not clear.

2.3 Unclear terms on consumer's rights regarding lack of conformity (Dansommer)

Dansommer AS is a company renting out holiday apartments to consumers. The CO, and later the Marketing Council (MC-case 1/02), deemed the company's contract terms to be imbalanced and unfair due to lack of clear provisions about the consumer's right regarding lack of conformity. The contract provided a provision citing that the consumer were in title to remedies according to law in such cases. In terms of clarity, the Marketing Council found that this was not sufficient. The company's rights were given extensive attention in the contract. The consumer's rights were expressed in one sentence; not giving clear information about what these rights consist of.

The practise is neither unfair per se, nor presumed unfair according to the proposed Directive and would have to cause a significant imbalance to be prohibited. It could be argued that not clearly stating the rights consumer's have according to law regarding lack of conformity cause a significant imbalance in the contract. However, this is questionable as long as the contract is de facto citing the consumer's right to use remedies according to law.

2.4 Pre payment for place in day-care centre (Barnehagegruppen)

The company Barnehagegruppen demanded pre-payment of 7.500,- NOK (approximately 950 Euros) to be awarded a place in their day-care centre. The pre-payment was not secured and was not interest bearing for the consumers. The CO, and later also the Marketing Council and the Court of Appeal (case 2005-183288), deemed the contract term to be imbalanced and unfair according to the MCA.

Under the proposed Directive, the said term would neither be considered unfair in all circumstances nor presumed unfair according to the Annexes. It could be argued that the term causes a significant imbalance to the parties' rights and obligations. However, this is not clear, and the higher threshold would likely make it more difficult to reach such a result under the proposed directive.

2.5 Lock-in period on mobile phones

The CO has, with the mobile companies in Norway, negotiated a maximum 1 year lock-in period for the sale of mobile phones with a contract. The Marketing Council stated in the NetCom GSM AS case (MC-case 6/98), that a 3 year lock-in period was unfair and in breach with the MCA. In later practice, the CO practice reached the point of view that the lock-in period should never exceed 12 months, and that the fine for breaking the contractual obligations should be adjusted according to the time under the contract. Providers have challenged the view, but today no Norwegian providers exceed the 12 month lock-in time. It could be questioned if the CO would have been able to reach the same result in these negotiations under the proposed Directive, as such lock-in time would have to cause a significant imbalance to the parties' rights and obligations to be deemed unfair.

Conclusion:

If the new Directive is adopted in its current wording, the Consumer Ombudsman could lose the strong legislative support to negotiate properly balanced standard-form contracts and with companies such as the once mentioned in the example above. The proposal will probably lessen the ability for the Consumer Ombudsman to reach balanced compromises when negotiating with businesses. The increased threshold for finding a term unfair and the full harmonisation of these provisions could therefore have negative impacts on the Consumer Ombudsman's, and other European Consumer Authorities ability to combat unfair contract terms.

3. Effects of unfair contract terms

It is proposed in Article 37 that contract terms which are unfair according to the Directive shall not be binding in accordance with national law. The proposed wording is not clear and needs to be specified. In the Nordic countries, and presumably in many other Member States, unfair contract terms according to marketing law is not necessarily deemed as unfair in general contract law, and thus not binding for the consumers. Making unfair contract terms automatically not binding for consumers is likely to raise the threshold for what is to be deemed to cause a significant imbalance even higher.

4. Uncertain consequences for general contract law

Total harmonisation of unfair contract terms will also encroach indirectly on all national consumer legislation in a manner where an overview of the consequences will be difficult to obtain. When determining whether the terms and conditions of a contract are unfair according to the MCA, emphasis is placed on how corresponding conditions are regulated by law.

The question is to what extent terms contrary to national compulsory law still will be perceived as unfair when rules concerning unfair contract terms are totally harmonised.

As an example, in the case against Dansommer (mentioned above), there was also a question about a contract term that limited the liability for both the house owner and the trader for noise problems. Since the houses for rent were located in all Scandinavian countries, the CO, and later the Market Council, found the term to be unfair as it did not comply with mandatory rules in Sweden and Denmark (Norway did not have any specific rules).

According to the grey list's point 1 a), contract terms are presumed to be unfair if they "exclude or limit the legal rights of the consumer". The question is whether this applies to all national legislation, or whether it just applies to legislation that is a result of Community law.

If it applies to all national legislation there will be different level of protection in different Member States, one of the main arguments for full harmonisation will thus disappear. If point 1 a) only applies to other Community law, as recital 46 might indicate, this will affect national contract law in a far too invasive manner to be defended, cf. the example of Dansommer cited above.

Conclusion:

The proposed Directive is not proportional if it totally harmonises the consumer's rights in relation to unfair contract terms in all areas of life, including construction of housing on real estate, to promote cross-border trade.