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UNFAIR TERMS IN CONTRACTS CONCLUDED WITH CONSUMERS

(Communication from the Commission)

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I THE PROBLEM

1. In all the Community Member States, in both civil law and common law systems, the fundamental principle of contract law is that the parties to a contract are free to negotiate its terms. In those countries with a codified civil law system (France, Belgium, Luxembourg, Italy, Germany, Denmark, the Netherlands and Greece), the civil codes devised and drafted in the nineteenth century allow the contracting parties considerable freedom of negotiation. Generally, the rules they lay down form a framework leaving the contracting parties considerable scope to derogate from or supplement their provisions.

2. The position is very similar in the common law countries (United Kingdom and Ireland). The contracting parties are normally free to negotiate the terms of a contract, and each party, particularly the purchaser of goods, is responsible for ensuring that the contract concluded is not to his disadvantage (caveat emptor). Statute law has been used only to prevent flagrant abuses.

3. The emergence of a society of mass production, distribution and consumption has resulted in the increasing formalisation of contracts, and particularly in the development of standard form contracts. The use of standard terms is now widespread throughout the Community, and applies in the vast majority of contracts between suppliers and consumers. For example, contracts for the sale of consumer durables or for the supply of electricity, gas or water are, as a rule, subject to standard terms, drawn up in advance by the supplier. Many other examples could be cited.

4. In real economic terms, there are essentially only two types of transaction in which contract terms are not generally formulated in advance.

(a) atypical transactions relating to situations so far removed from the norm that standard terms are inappropriate;

(b) on-the-spot transactions which do not involve a substantial risk for the supplier, such as retail sales of foodstuffs, books or cosmetics.

5. Standard contract terms play an important part, not only in consumer contracts, but also in those between traders. This working paper is concerned only with consumer contracts, but it should be borne in mind that many of the arguments put forward apply equally well to other contracts, particularly those between small traders and their suppliers.

6. Although many of the details of the typical consumer contract - such as price, time of delivery and description of the goods - vary from contract to contract, the underlying legal framework - the supplier's standard business conditions - does not. The application of these conditions to his own contract may seriously prejudice the consumer's interests.

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7. Standard conditions may provide, for example, that stipulations as to time of delivery are purely indicative in character and have no binding force, so that the consumer is left without a remedy if the goods are not delivered within the time specified. Furthermore, the very fact that the consumer is permitted to stipulate a time may actually work to his detriment in such cases: for it may give him the impression that his stipulation is a term of the contract. If he had been told unequivocally that delivery times were not guaranteed and that there was, therefore, no point in his choosing a date, he might well have decided either not to make the contract with that supplier, or to try to negotiate on the basis that the standard condition in question should not apply and that the stipulation as to delivery time was a term of the contract.

8. Standard conditions may go so far as to purport to exclude the consumer's rights under the general law, sometimes offering him a more limited "warranty" in exchange. This situation, which may reasonably be described as an abuse of the principle of freedom of contract, has led to the adoption in a number of Member States of legislation designed to redress the balance in favour of the consumer: details are given below in section II of this paper.

9. A possible "self help" remedy has already been suggested at para 7 above: the consumer may try to make the contract on terms other than those proposed by the supplier. However, very few consumers will be sufficiently well-informed to do so; and those who try, for example, by striking out clauses to which they object, and stipulating that the general provisions of the law shall apply, may well find that the supplier refuses to do business except on his own standard conditions. Moreover, the consumer who then decided to try another supplier will almost inevitably find himself faced with that supplier's standard conditions.

10. There appear to be two main types of standard term contract which may cause problems for consumers. First, standard form contracts which, for the purposes of this discussion paper mean contracts prepared and printed in advance: only the name and address of the purchaser and details identifying the goods or services in question need be added in each individual case. The use of standard form contracts effectively excludes the possibility of real negotiation between the parties on the conditions governing the subject matter of the contract (although there may be negotiation on such matters as the price and the specifications of the goods). Secondly, contracts other than the above, whether or not in writing, made subject to the supplier's standard business conditions: typical examples are contracts for services such as dry-cleaning or transport, where a ticket or voucher is generally given, and written contracts for structural work on buildings. In these cases some of the terms may well be negotiated between the parties, but the standard conditions used by the supplier often purport to restrict or exclude the effect of such negotiation, as outlined under 7 above. In the case of oral contracts there is, from the consumer's point of view, the additional difficulty of proof.

11. Standard contract terms have the advantage of saving time on negotiation and, from the consumer's point of view, ought strictly to provide greater legal certainty than non-standard terms, as they have been used in a large number of contracts and may even have been the subject of court decisions. In practice, however, the typical consumer, not being a lawyer, is very unlikely to be aware of this.

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12. In most cases, standard terms are drawn up by or on behalf of the supplier for use in his dealings with consumers. In some cases they are prepared by the company's legal department, or adapted from a model prepared by an independent legal adviser; in others, they are drawn up by a trade association for use by its members. The common feature of all these methods is that the standard terms are drawn up without the consumer's participation, so he is unable to assert his interests and ensure that they are reflected in the terms.

13. Many, if not most, consumers who enter into contracts made on standard terms do so in ignorance of their precise meaning. Frequently, although the contract stipulates that signature by the consumer indicates that he understands and accepts all its terms, the consumer has in practice no real opportunity to study the terms, for example, because they have not been communicated to him in advance, or because he has simply been advised that they are available on request or are to be found elsewhere. Moreover, even if the consumer has the opportunity to study the terms, he will probably be unaware of the precise legal significance of the language used, any may therefore be misled as to the contract's true meaning.

14. While the law generally ensures a certain equilibrium between the various interests involved, it is not the purpose or effect of standard terms to establish a fair balance. They are designed to reinforce the economic and legal position of the party who drew them up and uses them. The main purpose of the various clauses governing, for example, the terms of payment of the contract price or the obligations of the supplier in the event of non-delivery or faulty delivery, is to limit the supplier's contractual obligations and liabilities while adding to those of the consumer. Since the terms were designed, drawn up and applied unilaterally by the supplier, they improve his bargaining power. The result is that the consumer's position in negotiating and performing contracts with a supplier is further weakened. The reason for this is that the consumer is rarely in an economic position in relation to the supplier which enables him to impose contract terms on the supplier.

15. The widespread use of standard contract terms can thus be seen as calling into question the consensual basis of contract law. It was long believed that the provisions of the general law ensured an equitable balance between the parties to a contract, while parliament and the courts saw to it that this balance was maintained. Since the parties to a contract may in so many cases derogate from the law's provisions, however, the equitable balance which such laws might have guaranteed is almost never achieved, because suppliers use standard terms designed primarily to protect their own interests.

II THE SITUATION IN THE MEMBER STATES

16. General Observations

The principles of the law of contract were to a great extent laid down in the last century, and were devised for parties of approximately equal economic power. This was not an altogether realistic view of the typical contract even then: and it is clearly inappropriate today. Rather, however, than take an approach which would involve a general reform of the law of contract, at least insofar as it concerns consumer contracts, a number of Member States have in recent years enacted specific legislation

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dealing with particular types of contract between suppliers and consumers (for example, "doorstep" contracts, consumer credit and travel contracts). These laws frequently prohibit any derogation from their provisions.

17. Nevertheless, both approaches - general reform or partial reform by sector of the law of contract - require a considerable investment of time and effort. In a society of mass production and distribution any general reform may well have a major impact on the existing economic and legal structures and cause considerable confusion. While affording consumers a degree of protection, mandatory legislation is at the same time open to criticism as restricting business activity. This frequently leads to more general criticism of excessive legislation on the grounds that it restricts economic freedom and leads to the risk of higher unemployment following price rises, or to loss of competitiveness. Moreover, as it is difficult to evaluate precisely the full impact of new legislation on a given sector of the economy or production and distribution in general, it is not surprising that legislative action sometimes takes a very long time. For example, negotiations on the international convention on a Uniform Law on International Sale of Goods (ULIS) took over 20 years. The process is, admittedly, much faster at national level, but it is still apparent that the drafting and amendment of national legislation does not always keep pace with the need to maintain a balance between the interests of consumers and suppliers. This gap between economic reality and the legislative process is often increased by the fact that laws, being abstract and general in nature, cannot always take account of all aspects of economic activity. Their precise impact often appears in the interpretation they receive in court decisions, even when drafted in very narrow or precise terms.

18. To sum up:

- overall or specific legislative action, whether national or international, takes considerable time to prepare and implement;

- the fact that it is abstract and does not specifically deal with all aspects of economic activity means that it cannot cover every situation in which there is an imbalance between the rights and obligations of the contracting parties;

- the economic situation evolves so rapidly that it cannot be accurately and permanently reflected in legislation.

19. In seeking a solution to the problems raised by contract terms drawn up unilaterally, Member States have generally introduced a number of measures adopting where appropriate mandatory provisions governing certain types of contract or economic activity. The measures given as examples below are in many cases concurrent with and supplemented by other provisions.

20. To mitigate some of the consequences of standard contract terms, a general provision may be incorporated in the law laying down the principle that contract terms must not be unfair. Provisions of this kind are to be found in the following laws:

- the Danish law of 1974 on marketing practices which requires general compliance with fair commercial practice;

- the Luxembourg law of 25 August 1983 on the legal protection of the consumer;

- the German law of 9 December 1976 on general conditions of business (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen) which lays down that a contract term drawn up by one party and placing the other at a disadvantage is void if it is in bad faith;

- the French law of 1978 on consumer protection and information providing for the banning, limiting or regulating of contract terms which "appear to have been imposed on the consumer as a result of the other party's abuse of his economic power, giving that party an excessive advantage": such terms are void.

21. A number of legal systems have a black list of clauses which are regarded as prejudicial to the interests of consumers; the penalties for using such clauses vary:

- the British Unfair Contract Terms Act, 1977, renders void clauses restricting liability for economic loss, unless the supplier can satisfy a court that they are reasonable in the circumstances; the Consumer Transaction (Restrictions on Statements) Order, 1976 (made under the Fair Trading Act, 1973) makes it a criminal offence to display certain statements, such as "no refund" notices, which purport to limit a consumer's rights under the general law of contract;

- the Irish Sale of Goods and Supply of Services Act, 1980, contains very similar provisions;

- the German law of 1976 on general conditions lays down a list of prohibited terms and distinguishes between those cases in which some latitude is allowed in assessing whether or not a term is unfair and other cases where it is not;

- the Luxembourg law of 25 August 1983 lists 20 clauses which are deemed unfair.

22. Regardless of whether or not legal provisions are adopted governing the content of contract terms, a better balance between the interests of suppliers and consumers can be achieved by negotiations on the drafting of standard terms.

- The Danish law of 1974 on marketing practices entrusts the consumer Ombudsman with the task of promoting compliance with fair commercial practice. To this end, he negotiates standard contract terms with suppliers or their trade associations.

- In the Netherlands in particular, but also in Belgium, France and Germany (automobile sector), consumer associations have negotiated standard contract terms with the representatives of given industrial or commercial sectors in an attempt to reach a compromise between the different interests involved. It appears that, with the exception of the automobile sector in Germany, these initiatives have been only moderately successful, partly because there are no legal constraints in the event of a breakdown in negotiations, partly because suppliers are in many cases unwilling to participate.

23. Some national laws have introduced specific checks on unfair contract terms:

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- the German law of 1976 entitles consumer associations and certain other bodies to bring actions to put an end to the use of standard contract terms which conflict with the provisions of the law (a similar rule appears in the Dutch draft law);

- the French law of 1978 set up a commission on unfair terms to examine contract terms and determine whether they were likely "to create an obvious imbalance between the rights and obligations of the parties, to the consumer's detriment". The Commission makes recommendations, where appropriate, and sends them to the government. It is for the government to decide whether the recommendations should be published.

24. Another approach would be to require prior authorization to be obtained in cases involving standard contract terms. A number of States have adopted this approach for the insurance sector. However, the large number of different standard contracts - in Germany alone, there are some 1,400 standard life assurance contracts and 1,500 standard accident insurance contracts - would seem at first sight to rule out any wider use of this approach.

25. There have been proposals to allow the public authorities to draw up standard terms or a standard contract for a given economic sector (See, for example, the Netherlands draft civil code and the Luxembourg law of 25 August 1983. A similar proposal has been made in France in respect of travel contracts.) However, because of the lengthy procedure involved, requiring thorough consultation with the relevant interest groups, this approach would not seem at first sight to be likely to produce results more quickly than the legislative or rule-making approach.

The current legislative position in the Member States

26. Belgium

There is no general law on unfair contract terms. Specific legislation governs only a few types of contract (transport, travel and insurance contracts).

A draft law amending the Law on commercial practices of 14.7.1971 was tabled in 1977. The draft contains a general provision on contracts concluded with consumers laying down that any onerous clause causing an excessive imbalance between the rights and obligations of the parties, to the consumer's detriment, is void. A sample list of nine types of clause regarded as onerous within the meaning of the law is added. The use of certain clauses may be made obligatory, or prohibited, by Royal decree. Actions to put an end to infringements may be brought in the event of non-compliance with such decrees.

27. France

The Law of 10 January 1978 provides for the prohibition or regulation, by decree, of certain clauses which "appear to have been imposed on the consumer as a result of the other party's abuse of his economic position, giving that party an excessive advantage". A commission on unfair terms, consisting of representatives of consumer and trade interests, judges, lawyers and civil servants, was given the task of examining models of agreements normally used by suppliers and may recommend the deletion or amendment of clauses found to be unfair. The minister responsible may make these recommendations public.

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The commission has to date published three annual reports on its activity, for the years 1978, 1979 and 1980. In these reports, the Commission gives a broad outline of its recommendations, ten of which have been made public - for example, No. 80-03 of 8 August 1980, recommending that terms allowing the supplier, but not the consumer, a "cooling off" period after the contract has been made should be eliminated from contracts as being unfair. The reports also mention the Commission's opinions on draft standard form contracts.

The commission would like its work, particularly its recommendations, to receive broader publicity. It emphasizes that nearly all its studies have been adopted unanimously by its members. It regrets that this consensus has not yet been given practical implementation. Although some contract terms have been found to be void, in accordance with legal provisions, they continue to be used and consumers may be led to believe they are bound by them. The commission therefore proposes that criminal penalties should be laid down for those who continue to use these terms in contracts.

The commission also proposes a number of legislative reforms, aimed at improving contract practices.

Since the entry into force of the Law of 10.1.1978, only one decree has been issued to prohibit or regulate the use of unfair terms (Decree of 24.3.1978). This decree prohibits three types of contract term, including terms giving the supplier the right to alter the price originally agreed, and provided that, in certain circumstances, the purchaser must be informed of his strict legal rights. The commission would like to see further decrees issued and practical proposals made.

28. Luxembourg

The Law of 25 August 1983 on the legal protection of the consumer lays down that "in contracts concluded between a professional supplier of durable or non-durable consumer goods or services and a private end consumer, any clause or combination of clauses which leads to an imbalance in the rights and obligations laid down in the contract to the detriment of the consumer is unfair and as such shall be deemed null and void". The text also gives a limitative list of 20 unfair clauses.

"The chairman of the court of first instance of the applicant's place of residence may, at the request of any individual, professional group or consumers' association represented on the Prices Commission, declare that a clause or combination of clauses is unfair within the meaning of Articles 1 and 2 and that such clause or combination of clauses shall be deemed null and void. The action shall be brought and judged in accordance with the procedure for matters of special urgency".

The text provides for the posting and publication of the decision and a penal fine, and allows the individuals, professional groups and consumers' associations referred to above to claim damages before the criminal courts in relation to acts which are detrimental to their individual or collective interests.

29. Italy

The Italian Civil Code of 1942 contains three Articles (1341, 1342 and 1370) on the interpretation of standard contracts and restricting their use. There are no specific checks on unfair terms outside the normal system of judicial control.

30. The Netherlands

A draft law on terms in standard contracts, which will form part of the new civil code, was laid before Parliament in the summer of 1981. It includes a general provision to the effect that contract terms shall not be unfavourable to the consumer and two lists: a black list of terms which are always void and a grey list of terms which may be void, depending on their context. The draft law also allows consumer organisations to go to court to request the banning of particular terms.

31. Denmark

A law of 1975 amending the law on contracts of 1917 introduced a general provision whereby a contract may be set aside in whole or in part where it would be unreasonable (urimelig) or contrary to fair commercial practice to allow it to remain.

The law of 14 June 1974 on Marketing Practices established the office of Consumer Ombudsman, whose duty is to ensure compliance with fair commercial practice and includes the supervision of all contract terms, not merely those in consumer contracts.

In recent years a number of laws have been enacted for the protection of consumers in the field of financial transactions: the Interest on Overdue Payments Act (No. 638 of 21 December 1977); the Consumer Contracts Act (no. 139 of 29 March 1978); and the law (No. 147 of 4 April 1979) amending the Sale of Goods Act, 1906.

The Consumer Ombudsman is empowered by the Marketing Practices Act to negotiate with suppliers or trade associations to end the use of unfair contract terms and other objectionable commercial practices. This procedure has worked well in practice.

The Consumer Ombudsman's decisions under the Act cannot be challenged before any other administrative body; this gives him effective autonomy in deciding which practices are to be regarded as being in conflict with the Act's provisions.

The Ombudsman cannot ban practices: if suppliers do not accept his recommendations, he may bring an action before the Maritime and Commercial Court in Copenhagen which may declare the practices to be void.

32. Federal Republic of Germany

The law on general conditions of business of 9 December 1976 introduced a general provision governing terms drawn up in advance by one party, banning those which are contrary to good faith (Treu und Glauben) and which place the other party (not necessarily a consumer) at a disadvantage. The law includes two lists of terms deemed to be contrary to these principles: one of terms which are void under all circumstances, such as terms purporting to shift the burden of proof from the supplier onto the consumer; the other of terms whose validity depends on their context (Bewertungsspielraum), such as those allowing the supplier an unusually long time to perform the contract. Trade associations and consumers may bring actions before the ordinary courts to prevent the use of such terms.

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33. United Kingdom

The Sale of Goods Act, 1979, provides that contracts with consumers for the supply of goods shall contain terms requiring, for example, that goods shall correspond with their description and be fit for their purpose. The contracting parties may not derogate from these provisions.

The Unfair Contract Terms Act, 1977 aims to render ineffective contract terms which limit liability for negligence in the event of death or personal injury. Where economic loss is involved, any clause which purports to limit the liability of one party is void if it does not satisfy the test of reasonableness set out in the Act. The ordinary courts are responsible for applying these provisions. To date, however, the superior courts have not had the opportunity to rule on their scope.

The Fair Trading Act, 1973, gives the Director General of Fair Trading certain powers to examine commercial practices in use and to make appropriate recommendations to the Government. Where appropriate, he may also apply to the courts to obtain a declaration from a supplier that the latter will cease an objectionable commercial practice. Finally, the Director General may encourage the elimination of certain contract terms through codes of conduct negotiated between his office and trade associations. Twenty one codes exist at present.

34. Ireland

There are no specific laws governing general conditions of sale and delivery. The Consumer Information Act, 1978, set up the office of Director of Consumer Affairs, one of whose tasks is to examine commercial practices relating to the provision of information on goods or services to members of the public. He may, where appropriate, request that misleading practices be discontinued and obtain a court order to this effect if necessary. It appears that the Director's work has not so far included any examination of unfair terms in contracts used by suppliers.

The Sale of Goods and Supply of Services Act, 1980, prohibits exemption clauses excluding certain specific rights which the Act confers on consumers. Many of the Act's provisions are broadly similar to those in the British Unfair Contract Terms Act, 1977 and Sale of Goods Act, 1979.

35. Greece

There is no legislation dealing with the specific problem of unfair contract terms, nor is it planned to introduce any in the near future.

III THE POSITION AT COMMUNITY LEVEL

36. Paragraph 30 of the Community's second programme for a consumer protection and information policy, referring to the question of unfair contract terms, stated that:

> "the Commission considers that the first step should be to draft a discussion paper in which it will set out all the problems which this subject involves and the various options open with a view to harmonizing those aspects of competition which may be affected by discrepancies in this area".

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37. Background

It is clearly desirable that, as far as possible, consumers throughout the Community should enjoy a high standard of protection against unfair contract terms. This aim has not yet been achieved: in those Member States whose legislation does not deal with the problem, there is little incentive for suppliers to decide spontaneously to abandon the use of such terms. The Council, in its Resolutions of 14 April 1975 (1) and 19 May 1981 (2) (adopting the preliminary and second programmes respectively), declared that:

> "the improvement of the quality of life is one of the tasks of the Community and as such implies protecting the health, safety and economic interests of the consumer".

The fulfilment of this task requires that regional disparities be eliminated as far as possible in raising the standard of living, in order to promote the harmonious development of economic activities in the Community. This indicates that Community action will be necessary.

38. Cross frontier transactions offer a good example of the need for such action. One of the main aims of the European Community Treaties is to establish and operate a common market with an external customs frontier and a single internal market. A common market implies that consumers shall be able to make their purchases in the place where they can obtain the most favourable terms. While the customs union has not yet been fully implemented and the harmonization of fiscal, monetary and technical measures is still incomplete, it is clear nevertheless that a large number of consumers purchase goods and - to a growing extent - services outside their country of residence. This is particularly true in the case of Member States with a common frontier, but it is also an everyday occurrence in Member States separated by a stretch of water.

39. The question therefore arises whether the existence of a genuine internal market requires that rules providing the same protection to consumers in respect of guarantees and after-sales service - including protection against unfair contract terms - be largely harmonized. Such a move could be a direct benefit to consumers. (It would also avoid distortions of competition within the common market of the type envisaged in Commission Decision of 23 October 1978 (OJ No. L 322, p. 36 - Zanussi.)

However, one might argue that transparency concerning contract terms is sufficient to protect the consumer intending to purchase in another Member State. Whether such a transparency is feasible to the extent necessary to draw the attention of foreigners to specific elements of the legislation of the country of purchase on unfair contract terms, is another question to be discussed.

40. Different national standards also mean that, in practice, the same standard form contracts cannot be used throughout the Community : yet a Community-wide system would help to spread the cost of consumer protection more fairly among the Community's suppliers, and would thus help in reinforcing the development of a single internal market.

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(1) OJ No. C 92, 25.4.1975, p. 1
(2) OJ No. C 133, 3.6.1981, p. 1

41. It is hardly surprising, in the light of what has been said above, that both Community programmes should have clearly brought out the importance of the problem of consumer protection in the field of standard contract terms. Under the heading "Protection of the economic interests of consumers", the following principle is laid down:

> "Purchasers of goods or services should be protected against the abuse of power by the seller, in particular against one-sided standard contracts, the unfair exclusion of essential rights in contracts, harsh conditions of credit, demands for payment for unsolicited goods and against high-pressure selling methods". (1)

42. Paras 24 and 25 of the preliminary programme included as "priorities":

> "to protect consumers from unfair commercial practices, for example in the following areas:
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> - terms of contracts;
> - conditions in guarantees, particularly for consumer durables ....
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> To this end, the Commission will:
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> - collate the measures already taken by the Member States and the studies already made or being made by international organizations;
> - submit all appropriate proposals to the Council".

Para 18 laid down that "this kind of protection should be ensured by laws and regulations which are either harmonized at Community level or adopted directly at that level".

43. In 1977, the Consumers' Consultative Committee gave its opinion on the question of unfair terms in contracts with consumers. This opinion (doc. ENV/240/77 - CCC/48/77 Rev. 1) may be summed up as follows:

(a) The terms of contracts concluded with consumers must be lawful, equitable and easy to understand. Moreover, their wording and form must be harmonized.

(b) It was proposed to create an official body authorized to:

- issue prior authorizations for the use of standard terms in fields where the consumer is particularly vulnerable (for example, insurance, credit, housing);
- adopt, following negotiations with interested circles, legislation on standard terms that may be used;
- prohibit the use of certain unfair terms.

This body would therefore be entrusted with the task of preventing the use of unfair terms in contracts concluded with consumers.

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(1) Preliminary programme: para 19(i) - OJ No. C 92, 25.4.1975, p.6
Second programme: para 28(1) - OJ No. C 133, 3.6.1981, p.7

(c) It was considered desirable to draw up a Community list of unfair terms whose use was to be prohibited.

(d) Tables should be drawn up setting out consumers' fundamental rights in connection with those transactions considered as being of greatest importance. These rights should not be capable of being waived.

(e) Joint negotiations between consumer and trade associations were considered viable only as a supplementary measure.

(f) It was considered essential to define the concept of "unfair term". A term should, in particular, be considered unfair if it conferred an advantage on a trader or deprived consumers of a right so that there was no reasonable balance between the parties.

(g) Community action should not be restricted to standard terms but should extend also to expressly negotiated terms.

(h) It should be the rule that the use of an unfair term constitutes an offence.

(i) Specific rules governing disputes should be adopted.

44. The Commission has not proceeded with work in this field since 1977, owing to commitments in other areas and lack of staff. Meanwhile, the European Parliament, in its Resolution on the second programme, has called for a directive on unfair contract terms. (1)

45. Article 5 of the Convention on the law applicable to contractual obligations of 19 June 1980 (2) provides a definition of a consumer contract which could be used in Community action on unfair contract terms:

> "a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object".

46. The Council of Europe has also been active in this area: Resolution No. 76(47), containing a Recommendation on unfair contract terms, was adopted by the Committee of Ministers on 16 November 1976.

47. Opportunities for action at Community level

In view of the situation in the Member States, of which six possess specific legislation on unfair contract terms and another proposes to adopt legislation in the near future (see paras. 26 to 35 above), action at Community level should aim at ensuring that consumers throughout the Community enjoy a similar high degree of protection against unfair contract terms: not only would this be of direct benefit to consumers, but it would remove one factor contributing to the distortion of competition within the Community. (See para 39 above.)

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(1) OJ No. C 291, 10.11.1980, p.35

(2) OJ No. L 266, 9.10.1980, p.1

48. Any action to be taken at Community level must, of course, proceed with caution. National legislation dealing with unfair contract terms is fairly recent, and it is therefore understandable that Member States may be reluctant to abandon their chosen approach to the problem in favour of a Community scheme. Certainly they will wish to evaluate carefully the operation in practice of their own national legislation before making such a decision.

However, experience seems to suggest that a start could be made in evaluating the operation of national legislation: in France, for example, a number of annual reports on the operation of the law of 1978 have already been published, as outlined under para 27 above. The Commission cannot, therefore, accept that the problem can be set aside indefinitely: for the reasons set out under 37 to 40 above, Community action against unfair contract terms is essential if the interests of consumers are to be protected at the same high level throughout the EEC.

49. For Community action to be taken, a number of questions must be answered:

Should action be taken to deal with all unfair terms or with unfair standard terms only? Should it be further limited to unfair terms in standard form contracts?

(a) Arguments in favour of dealing with all unfair terms

(i) The majority of Member States which have approached the problem do not distinguish between standard and non-standard terms.

(ii) It may be difficult to define the precise scope of action limited to standard terms: would it, for example, include non-standard contracts containing a single standard term?

(iii) From the strict legal point of view, there is no difference between standard and non-standard terms.

(b) Arguments in favour of dealing with standard terms only

(i) The vast majority of transactions involving consumers are either governed by standard terms or fall within the category of on-the-spot transactions, described above in para 4(b), to which, since neither party stipulates any terms, the law's general provisions apply. It is, moreover, scarcely possible to imagine a supplier drawing up a completely new contract, not containing or governed by any standard terms, for every transaction with a consumer. Such behaviour would be extremely time-consuming and would be economically justifiable only in the case of transactions involving large sums of money: and consumers in such cases are almost always legally represented.

(ii) There is a greater tendency for standard terms to favour the supplier at the expense of the consumer. Since these terms have been drawn up by, or, more usually, for the supplier, without the consumer's participation, it is not surprising that they tend to be biased firmly towards the supplier. Such terms are more likely, therefore, to be unfair.

(c) Arguments in favour of limiting action to unfair terms in standard term contracts

A Community system for dealing with unfair terms should presumably include some kind of "watchdog" or "pre-vetting" arrangement, whereby the fairness of contract terms may be checked in advance and unfair terms eliminated. It is clear that only a few terms will be unfair in all conceivable circumstances: in the majority of cases, fairness will depend on the context. If, therefore, the "watchdog" system is to be of any real use, and to include checking of terms whose fairness depends on their context, it must necessarily be limited to standard form contracts only.

50. Is it necessary to draw up a list of unfair terms or should there rather be a single clause defining "unfairness"?

To answer this question it is necessary to examine commercial practice. Standard contract terms are designed to be used in numberous individual cases, so that a contract made with any given individual consumer may almost be said to be "mass-produced".

However, the number of standard terms used is extremely high: for example, the German Federal Justice Ministry has estimated that some 200,000 to 300,000 standard terms are in use in Germany. These contracts all vary according to the goods or services offered to the consumer. They are constantly being revised and brought up to date so as to serve the best interests of their "manufacturers".

It is generally agreed - by suppliers as well as consumers - that contracts should not contain unfair terms, or unfair combinations of terms: a general clause defining unfairness should therefore be the more acceptable solution. It is, in contrast, extremely difficult in any given contract to isolate an unfair term or combination, as each term depends for its significance on its context, and an assessment of the value of a general clause defining unfairness, as compared with a list of unfair terms, is therefore particularly difficult. It ought to be possible to agree on terms which should never appear in a contract with a consumer - for example, a term excluding the supplier's liability even in cases of deliberate or negligent misconduct. Clearly, however, a list of unfair terms would not be very long, given that it is difficult to imagine many terms which would be unfair in all conceivable circumstances.

51. Should a "watchdog" system for unfair terms be set up?

For the reasons indicated above, such a system appears necessary, so as to allow monitoring of developments in the standard terms area and the elimination of terms found to be unfair.

It will not be easy to find a common denominator for the very different "watchdog" systems in use in the various Member States. It is unlikely that all Member States will be able to agree on the introduction of the Danish or British type of system. Such a system, however, would appear the most promising, given the resistance by trade interests to any attempt to solve the unfair terms problem by a prescriptive list or penal sanctions.

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It would not seem possible to entrust the task of attacking unfair terms to consumer and trade associations alone, as any such action taken by them would necessarily be limited to the case in question. Moreover, such an arrangement would lack the "generalising" effect which could be achieved by examination of standard terms in a whole industrial sector and negotiation with the relevant trade associations, leading to a general review of the standard terms used in that sector.

52. In conclusion, and in the light of what has been said above, two main courses of action seem possible.

First, a directive - the normal method of establishing common standards throughout the Community - might be drawn up.
Given the fact that national approaches to the problem of unfair terms are so different, this could be a cumbersome approach. However, it might be worthwhile discussing the possibilities for agreeing on a directive or any other form of Community legislation laying down a basic framework of rules to be followed and allowing a very wide discretion to Member States authorities as to how these rules should be implemented.

In this context it might be worthwhile to discuss in depth the possible contents of provisions such as :

(a) a general provision defining unfairness, for example, by providing that terms conferring an undue advantage on the party using them should be void. However, such a provision would not necessarily lead to the elimination of unfair terms in practice, as it would have to be decided, by a court or some administrative body, whether any given term was unfair within the meaning of the definition. Unless some system of pre-vetting, of the kind outlined in paragraph 51 above, were introduced, the consumer would in practice have to sue, or be sued by, the supplier in order to establish the fairness or unfairness of the term;

(b) a black list of unfair, and therefore void, terms would have the advantage that unfair terms in contracts could quickly be identified. However, as pointed out in paragraph 50, such a list would necessarily be fairly short, as few terms would be unfair in all conceivable circomstances. It might include, for example : terms purporting to oust the jurisdiction of the courts; terms restricting the supplier's liability for negligence, or in case of the death of or personal injury to the consumer; terms allowing the supplier, but not the consumer, a "cooling-off" period after the contract's entry into force;

(c) provisions dealing with possible control and enforcement procedures because, even with a black list, the problem of enforcement would remain. Experience in the Member States shows that, even where the use of a void term or representation has been made a criminal offence (as in the United Kingdom and Ireland), traders may, through ignorance or malice, continue to make use of it.

These difficulties could be solved in the case of standard form contracts if there were a requirement that their terms should be approved in advance, as suggested in paragraph 51.

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53. As an alternative to or in parallel with a directive it might to be possible to achieve some positive results by non-legislative action. For example, discussions might be promoted between consumer organisations and trade and industry representatives in various economic sectors, under the auspices of a public supervisory authority, with a view to ending the use of unfair terms in contracts involving those sectors. This would be the equivalent at Community level of the procedures operated successfully in Denmark by the Consumer Ombudsman and in the United Kingdom by the Director General of Fair Trading (described in paragraphs 31 and 33 respectively). Extending such experiences to the Community would nevertheless be a major innovation and would require very thorough preparatory work. Attention could, as a start, be focussed on products and services which are broadly similar throughout the Community, such as motor vehicles, bicycles, electrical domestic appliances, radios and television sets, cameras and travel. The aim should be to establish an agreed definition of unfairness for each sector, on the basis of which it might be possible to draw up a list of unfair terms which should not appear in consumer contracts. It might also be possible to regulate the presentation of standard form contracts, so that their terms could more easily be compared by consumers.

54. The aim of this document is to promote discussion on the issues raised by unfair terms in contracts concluded with consumers. The Commission of the European Communities invites comments from those interested in this matter, with a view to the preparation of action at Community level.