

TRANSPARENCY PRINCIPLE UNDER THE DIRECTIVE ON UNFAIR TERMS IN CONSUMER CONTRACTS

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Key words

Transparency principle, clear and intelligible language, Unfair Contract Terms Directive

1. Legal theoretical background

The consumer is a weaker party to the contract; he has less bargaining power, information and knowledge. As a result, it is easy for big suppliers to set terms to the detriment of the consumer, and the consumer has practically no chance to alter them. It is the case when particularly standard form contracts are concerned which are widely used nowadays.

Standard form contracts are usually drafted by lawyers who tend to use legal jargon as a means of setting precise terms. These terms are sometimes not comprehensible for laymen as they do not grasp the specifics of legal language. Given this situation, the Council of the European Union adopted the Directive on Unfair Terms in Consumer Contracts which seeks both to prevent the use of unfair terms and to ensure that all terms are written in plain and intelligible language.

2. Scope of application and the criteria of transparency principle

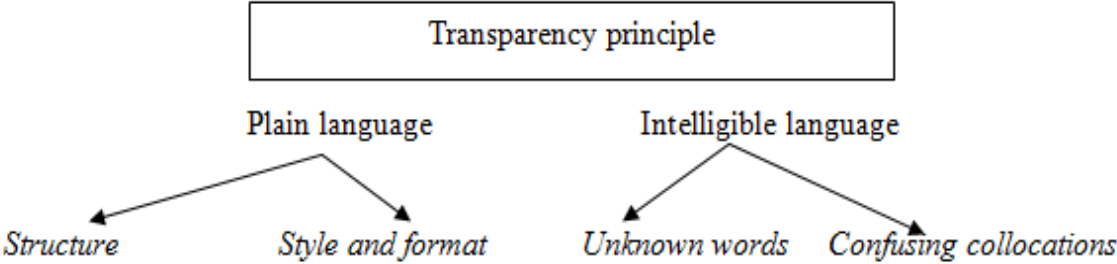
The Directive does neither relate to all contractors nor to all contracts. The scope of the application of the Directive is limited both subjectively and objectively. The Directive applies only to consumer contracts where terms were not individually negotiated and are in writing.

Consumer contracts are contracts between a supplier and a consumer. The Directive therefore relate not only to terms for general use but also to terms which are drafted for a single use.

Transparency principle requires the terms to be formulated in “plain” and “intelligible” language. The aim of the principle is to ensure that the consumer will have a real opportunity to comprehend the terms arising out of the contract. The requirements of “plain” and “intelligible” complement and overlap each other. The criterion “plain” refers more to the formal requirements of drafted terms, whereas intelligibility relates more to the linguistic aspects of formulated terms (substantive requirements).

Formal requirements are met if the contract is well-arranged. The structure and the style and format of a contract should be adapted to comply with the transparency principle. The structure means chiefly the proportionate length of a contract and the division of terms into sections according to the subject matter. The style and format is meant to include the size of font and the choice of colour scheme.

Contractual terms are drafted in intelligible language if their substance is comprehensible to the consumer. To comply with the transparency principle, the supplier has to avoid the use of confusing collocations and terms which could be unknown to the consumer. In this respect, terms should be formulated in ordinary language and the supplier should not use legal jargon, extensive definitions, words borrowed from other languages, etc.



Picture 1: Scheme of Transparency principle

3. Benchmark of the average consumer

Transparency principle should ensure that terms are plain and intelligible not only to lawyers but mainly to laymen. The criteria “plain” and “intelligible” are assessed by reference to the

average consumer. To determine the substance of the benchmark it is necessary to define the average consumer. Generally speaking, there are two main concepts of the consumer. The first is of the weak consumer who is neither informed nor observant. The second conception was developed through the case-law of the European Court of Justice and presumes the consumer who is reasonably well informed and reasonably observant and circumspect. The objective of the Directive is not to protect all consumers. The clauses do not have to be comprehensible to every consumer. The Directive is silent on the guidelines how to define the average consumer. However, given the objective of the Directive, it is to be assumed that the conception developed by the ECJ will apply.

4. Consequences of intransparency and final remarks

The Directive states that in case of any doubts about the meaning of a term, the interpretation most favourable to the consumer will prevail. The *contra proferentem* rule is the only explicitly provided legal consequence of the incorporation of intransparent terms. The rule applies only in individual litigations where there is usually an interest to uphold the term with the most advantageous meaning. In collective litigations, where any person with legitimate interest in protecting consumers' rights takes legal action to prevent the use of unfair terms drawn up for general use, the rule is not applicable as it can cause a failure to win the case. It is suggested that in case of collective litigation, the court has to take into account the least favourable interpretation of the term to assure that the term will be considered to be unfair. It is not excluded that even in individual litigation the intransparent clause will be held unfair. This can happen only if the term, given the most favourable interpretation, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The use of transparent terms is crucial for the protection of consumers. The consumers should have a real opportunity to examine all terms and to grasp their nature. To achieve the aim of the Directive, it is necessary to inform the consumers of their rights, and that bodies with legitimate interest in protecting the consumers' rights take more active approach to run information campaign on their rights and to pursue all legal means to prevent the use of unfair terms.

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