

Swedish Standard Contracts Law and the EC Directive on Contract Terms

Ulf Bernitz

Introduction

As a consequence of Sweden's admission as an EU member on 1 January 1995, a new Swedish Act on consumer contract terms has entered into force (*AVLK*, 1994:1512). The new Act, which replaced a 1971 law of the same title, was enacted to incorporate into Swedish law the 1993 EC Directive on unfair terms in consumer contracts, hereinafter referred to as the 'Contract Terms Directive'. The Act does not change the state of the law to any significant extent but it does introduce some new features and thus represents a further development of standard contracts law. The Act can also be seen as an example of how the EC's legal harmonisation efforts now affect central areas of civil law.

The purpose of this article is to address and, on some points, discuss the new state of the law from a Swedish perspective. It can be stated from the outset that in my opinion the Contract Terms Directive will, in the long term, probably have a greater impact on the development of domestic law in the Member States than was originally anticipated.

The Contract Terms Directive's Background, Adoption and Main Features

Within the EU,¹ a strengthening of consumer protection in the Member States has been of great interest ever since the mid-1970s. The primary means of achieving results has been to issue directives. These directives are directed to the Member States and prescribe that their national legislation have the contents necessary to fulfill the requirements stated in the directives. The Member States

¹ EU refers in this article to the European Union as a whole. EC is used to refer to that which exclusively concerns the European Community (the first pillar).

are obliged to ensure that their legislation, within the deadline prescribed in each directive, contains rules that fulfil the directive's specific requirements.

The EC's consumer protection directives were part of the '*acquis*' transferred to the EEA Treaty. Sweden had thus, already (at the time of the entry into force of the EEA Treaty on 1 January 1994) adapted its legislation to several consumer protection directives in the field of contract law. Thus, the new Consumer Credit Act of 1992 has been adapted to the EEC Directive on consumer credits (87/102/EEC) and the Home Sales Act was amended in order to adapt it to the EEC Directive on the same subject (85/577/EEC). The Act on Package Trips of 1992 was introduced for the specific purpose of implementing the EEC Directive in that area (90/314/EEC). Previously, the normative sources in this field were almost entirely standard contracts. The important Product Liability Act of 1992 is also to a great extent based on the EEC Directive on product liability (85/374/EEC).

Efforts have long been made within the EC to adopt a general Directive on consumer protection against unfair terms in standard agreements (the Unfair Terms Directive), mainly inspired by the 1976 German Standard Contracts Act, *AGB-Gesetz*. That Act has been of central importance in German civil law and is greatly based on such principles of assessment specific to standard contracts as had already been established in case law. The main provisions of *the AGB-Gesetz* apply generally to standard contracts, but the Act contains stricter rules for consumer contracts, mainly in the form of a black list of invalid contract clauses.

The Commission's work on the Contract Terms Directive began as early as the mid-1970s. A 'Consultation paper' (Green paper) published in 1984 came to be the object of extensive treatment both within the institutions of the EU and in interested circles elsewhere.² After many compromises, even in its final phase within the Council of Ministers, the Directive was adopted in the Spring of 1993 (93/13/EEC). An important factor in the final adoption of the Directive was probably the legal development taking place in the national legislation of many Member States, in the same direction as the Directive, which successively took place during the long period during which the Directive was under preparation. The Member States were supposed to have adapted their legislation to the Directive prior to 1 January 1995, but implementation has been delayed in several countries.

The legal basis for the EC Directive in question has been the Treaty of Rome's provisions on legal harmonisation (approximation of legislation), primarily Article 100a on the legal harmonisation required to establish the internal market. Since the Maastricht Treaty entered into force, the Treaty of Rome has also contained a separate Article on consumer protection and states that one task of the Community is to contribute to a high level of consumer protection (Article 129a). As to the means of achieving this goal, however, the Article refers to the aforementioned Article 100a. It is thus the establishment of the internal market, based on the free movement of goods, services, etc., which has given the legal basis for the Directive.

² Bulletin of the European Communities, Supplement 1/84.

The Contract Terms Directive has, as with the other consumer protection Directives mentioned here, mainly come about to increase the level of protection in the EU countries which have until now entirely or partially lacked such legislation; in this way, the Directive creates similar conditions for competition in this area. The actual state of the law has varied greatly among the various Member States. For a country like Italy, which has previously lacked extensive consumer legislation, implementation of the Contract Terms Directive is an important new feature.³ In Germany, which already has a well developed *AGB-Gesetz*, implementation of the Directive entails mainly technical problems of legislative co-ordination.⁴ England, for its part, has had the Unfair Contract Terms Act, but, this title notwithstanding, the Act has only covered exemption clauses.

For English law, a 'general clause' against unfair contract terms is truly novel, which many lawyers deem alien to common law and view with considerable scepticism on account of lack of foreseeability in legal implementation of such a clause.⁵

Sweden and the other Nordic countries are generally viewed in the rest of Europe as leaders in the field of consumer law. In the Nordic region, the view has generally been that there is not much need for the EC's consumer protection directives, including the Contract Terms Directive, and interest in these directives has thus been lukewarm. But once adopted, Sweden's adaptation of its national legislation to the directives has not given rise to any radical changes in the state of the law. This applies, as will be seen, generally even to the new Contract Terms Directive, but this Directive has in several important respects entailed a strengthening of consumer protection. There has not been any need for legislative amendments that would reduce consumer protection, since the directives in question are so-called minimum directives, which permit the Member States to apply stricter protective rules (provided that such rules are not inconsistent with the Treaty of Rome's general provisions on free movement, prohibitions on discrimination, etc., see Article 8 in the Contract Terms Directive).

The object of the Contract Terms Directive's rules is terms in standard contracts concluded between sellers/suppliers and consumers. No branch is exempted, and the Directive is expressly applicable to publicly owned businesses (Article 2(c)). On the other hand, exemption is made for contract terms which reflect mandatory statutory provision and the provisions or principles of international conventions, particularly in the transport area (Article 1(2)).

The main provision of the Directive is a 'general clause', according to which a contract term shall be deemed unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (Article 3(1)). To this general provision has been linked a special, so-called grey list of dubious contract terms which are ordinarily deemed to be unfair. The list takes the form of an appendix to the Directive. In other respects as well, the Directive contains

³ See e.g., Alpa & Delfino in *Consumer Law Journal*, 1994, p. 124 et seq.

⁴ On the problem of implementation, see among others, Heinrichs in *NJW (Neue Juristische Wochenschrift)* 1995 p. 153 et seq.

⁵ On the relationship between the Directive and English law, see Willet in *Consumer Law Journal* 1994 p. 114, et seq.

certain specifications of the assessment of unfairness and of the legal consequences thereof. The Directive establishes, *inter alia*, that the rule of ambiguity shall apply when interpreting the contract (Article 5). The specific provisions are addressed below.

Implementation in Sweden

The task of incorporating the Contract Terms Directive into Swedish law has clearly been difficult from the standpoint of legislative technique. Sweden's statutory provisions against unfair contract terms have mainly had the character of 'general clauses', whereas the text of the Directive is more detailed. The Swedish legislature has, in consultation with other Nordic countries, chosen to carry out this task through transformation, i.e. through amendments and additions to the existing domestic legislation in the area. An alternative would have been to put the Directive into force in Sweden in its present form by incorporation, mainly as a complement to our other legislation in this area. Since that solution was not chosen, the legislature has had to consider which Directive provisions were deemed to require direct expression in a Swedish statute text. A middle-of-the-road approach was ultimately chosen.

The chosen solution entails that the 1971 Act on Contract Terms in Consumer Relations is supplanted by a new law of the same title (the new AVLK). The new, expanded Contract Terms Act differs from the old one, *inter alia*, in that it contains both market law and purely civil law rules. In this way, the amendments which implementation of the Directive was deemed to necessitate have been consolidated in a single Act. The purely civil law rules are, however, limited to four sections without any systematic coherence. Otherwise, only a reference to the new Act has been included in section 36 of the Contracts Act (1994:1513) and minor procedural amendments have been made to the Market Court Act (1994:1514).

As will be addressed below, the Contract Terms Directive also affects the state of the law in cases where no legal amendments have been made, since Swedish law shall be interpreted in the light of applicable EC Directives.

The Directive and the new Swedish legislation encompasses, as indicated above, *consumer relations only*. As to the assessment of unfair terms in contracts between businessmen and the separate Contract Terms Act between Businessmen of 1984, no real change in the state of the law has occurred.

The new features of interest to Swedish law will now be presented.

The Concept of Standard Contract

Swedish legislation has thus far lacked any definition of standard contract. In my book *Standardavtalsrätt*⁶ (Standard Contract Law), I have defined standard con-

⁶ Bernitz, *Standardavtalsrätt*, 6 ed., Stockholm 1993. See in English, Bernitz, *Consumer Protection and Standard Contracts*, 17 Scandinavian Studies in Law (1973) p. 13 et seq. and Bernitz, *Valuation of Legislative Attempts on Unfair Terms in Consumer Contracts in Sweden* in Bourgoignie (ed), *Unfair Terms in Consumer Contracts*, Centre de Droit de la Consommation in Louvain-la-Neuve, 1983 p. 201 et seq.

tracts as contracts which, in whole or in part, are concluded according to previously drafted standardised terms intended to similarly apply in a large number of concrete contractual situations of a given type, in which at least one of the parties finds himself. In practice, it can be difficult to draw a clear line between standard contracts and standard terms, on the one hand, and individually negotiated contracts or contract terms, on the other. Moreover, the use of modern computer technology has not seldom entailed that both types have a similar appearance.

The Contract Terms Directive, in its final form, does, however, contain such a definition (Article 3), whose main sections have been incorporated into the new *AVLK* (sections 10 and 12). This definition entails that a standard term is a *contract term which has not been individually negotiated*. Linked to this definition is a burden of proof rule which entails that a seller or supplier who claims that a standard term has been individually negotiated has the burden of proving such a claim.

The definition is close to that which had previously been deemed to apply in Sweden, although we have lacked any clear burden of proof rule. It should be noted that the same contract can very often contain both standard terms and individually negotiated terms, the latter of which can, for example, govern the price or purchased quantity. The definition may now be viewed as fundamental to what should be characterised as a standard contract.

The Ambiguity Rule

The ambiguity rule as a principle for contractual interpretation is very familiar and has had special significance when interpreting unilaterally drafted standard contracts. The ambiguity rule, *in dubio contra stipulatorem*, which has its roots in Roman law, plays an important part in English and American case law and is incorporated in statute law in, *inter alia*, the French and Italian civil laws (Article 1162 and Article 1370, respectively) and in the German *AGB-Gesetz* (section 5).

Not surprisingly, the rule is contained in the Contract Terms Directive. Article 5 states: 'Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail'. It is also set forth in an introductory sentence of Article 5 that where written terms in a standard contract are offered to a consumer, such terms must always be drafted in plain and intelligible language. The ambiguity rule has now been established through section 10 *AVLK*. If a standard contract term is unclear, then in a dispute between a seller or supplier and a consumer, the term shall be interpreted to the benefit of the consumer. It appears in the Act's declaration of legislative purpose that the Act is also to apply to oral terms and situations where circumstances other than the wording itself give rise to ambiguity.

Through this legal amendment, the ambiguity rule has become a statutorily established principle of contractual interpretation in Swedish law, notwithstanding that it only applies to consumer contracts. This is of great interest both practically and in principle, since Swedish law has previously lacked such statute-based principles of contractual interpretation. The new statutory rule is thus the

only one of its kind. This raises the question of what significance should now be attached to the ambiguity rule in Swedish contract law, especially with respect to consumer contracts.

In my book 'Standard Contract Law', I have opined, mainly on the basis of Supreme Court case law of recent decades, that the rule of ambiguity has been applied in Sweden as a general principle of interpretation but that it has (thus far) had a relatively limited (from an international perspective) use in our contract law, i.e., mainly as an interpretation alternative used in doubtful cases.⁷ It should be mentioned that Jan Hellner has recently questioned the value of the ambiguity rule as a principle of interpretation; in this context, he considers that the assessment I give here, in my opinion a cautious one, of the ambiguity rule's place in Swedish law thus far, is to acknowledge the rule too great a place. Hellner recommends that the courts, in interpreting standard contracts, should instead apply a teleological interpretation which seeks to find an appropriate rule based on an overall assessment, in which consideration of the weaker party's interests should be one part of a general weighing of interests.⁸

Regardless of how the ambiguity rule's scope and suitability have been viewed in the legal literature, it is clear that the Contract Terms Directive sees the rule as an important source of consumer protection. This is indicated not least in the Directive's preamble, which is to be a guide to interpretation. It is set forth there that the contracts in question shall be drafted in clear and intelligible language, that the consumer shall have a real possibility of examining all contract terms and that, where doubt exists, the interpretation which is most favourable to the consumer shall apply. It is in that spirit that the ambiguity rule shall now be applied by Swedish courts and this clearly entails that the rule, as far as consumer contracts are concerned, will acquire a stronger position in Swedish law than was generally considered to be the case previously. The ambiguity rule can no longer, whatever the individual commentator may think personally, be viewed solely as one principle of contractual interpretation among others, where it would be open to the courts to make a more or less discretionary assessment of the appropriateness of applying the rule.

In Article 5 of the Directive text, the ambiguity rule is preceded by a first sentence which sets forth that written contract terms must always be drafted in plain and intelligible language. This view has not been included in the Swedish statute text, since it has been deemed to only constitute a point of departure for the ambiguity rule and lacks any sanction of its own. I, for my part, am sceptical about this 'free' implementation technique. In reality, the requirement that standard terms be in plain and intelligible language should be seen as the principal rule, and the provision that the interpretation that is most favourable to the consumer should apply where doubt exists as to its meaning, should be seen as a sanction intended to promote increased clarity at the contract drafting stage.

As regards contract terms between businessmen, the state of the law remains unchanged. In such cases the ambiguity rule can be applied as previously, i.e.,

⁷ Bernitz, *Standardavtalsrätt*, 6 ed p. 50.

⁸ Hellner, *Tolkning av standardavtal* (Interpretation of standard form contracts), Jussens Vener, Oslo 1994 p. 266 et seq. Hellner is former professor of insurance law at Stockholm University and the main author of the general clause of the Contract Act, see *infra*.

usually with some caution. The fact that the rule of ambiguity has now been so clearly established in the area of consumer contracts may, however, very likely result in increased application of the rule when interpreting standard contracts in other areas, where there is also usually imbalance between the parties, e.g., in relation to small businessmen.

The Assessment of Unfair Terms

The central purpose of the Contract Terms Directive is that the Member States ensure that unfair terms do not appear in contracts which sellers or suppliers conclude with consumers. According to the 'general clause', which is the Directive's main rule, a term shall be deemed unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (Article 3 (1)). The assessment of unfairness is stated more specifically in Article 4, which states, *inter alia*, that the assessment should not be based on the price or 'the main subject of the contract'. In this respect, the Directive has a narrower scope than section 36 of the Contracts Act, which can clearly apply even to adjust payment for a contracted performance.⁹

For countries which have previously lacked any such 'general clause', mainly the United Kingdom, the Directive's 'general clause' is, as already mentioned above, a very important new feature. For Sweden and other Nordic countries, who already have had a general clause in section 36 of their Contracts Acts for many years, the situation is different. The Directive's rules on assessment of unfairness have been deemed to come within the scope of section 36 of the Contracts Act, and have not thus been deemed to require any statutory amendment. As to the possibility of adjusting payment, it has been considered in this context that the Member States may provide consumers with a better protection than the Directive. In applying section 36 of the Contracts Act, it should, however, be observed that the Directive rule limits the assessment of unfairness to the non-existence of a significant imbalance in the parties' rights and obligations.

⁹ The general clause in section 36 of the Swedish Contracts Act has been in force since 1976. It has the following wording in English translation: 'A contract term may be adjusted or held unenforceable if the term is unreasonable with respect to the contract's contents, circumstances at the formation of the contract, subsequent events or other circumstances. If the term is of such significance that it shall otherwise be enforceable in accordance with its original terms, the contract may also be adjusted in other respects or held unenforceable in its entirety. With respect to the application of the first paragraph, special consideration shall be given to the need for protection of consumers and others who assume an inferior position in the contract relationship. The first and second paragraphs shall be given similar application to terms in other legal relationships than that of contract.' See on section 36, i.e., Bernitz, *The Small Businessman and § 36 of the Swedish Contracts Act in Law and the Weaker Party*. An Anglo-Swedish Comparative Study (gen. ed. S. Anderman et al), Professional Books 1989, Vol IV, p. 169 et seq.

The Grey List

Appended to the Directive is a so-called *grey list* of ordinarily unfair contract terms which in 17 points (a-q) encompass various types of contract clauses. The Directive proposal was long based on a black list as in German law, i.e., the clauses should be viewed as unfair *per se*. Such was the case as late as the Commission's final Directive proposal of 1990.¹⁰ It was not, however, possible to obtain sufficient support for such a solution during the Council deliberations. The critics pointed to, *inter alia*, various special situations where it would be justified to use a clause included on the list.

The solution chosen entails that the list is to be seen as a guide. The clauses are not always to be viewed as unfair but are presumed to be so. They should thus be viewed as unfair unless there are special circumstances in the individual contractual situation which can justify the use of the contract clause. The true character of the list is not, however, fully expressed in the Swedish statutory text of the *AVLK* which merely refers to contract terms which 'can be deemed' unfair. This expression is too weak, at least from the view point of general usage. It appears that our statutory language, as it is now framed according to various language instructions, lacks any term capable of covering that which is actually intended.

In case law, however, the point of departure should be that the clause types contained on the list are to be considered as unfair in consumer contracts, unless there are special reasons for a contrary standpoint. Such contracts situations concern mainly those which appear atypical in relation to the considerations behind the type of clause placed on the list. What may be concerned are clauses, which special circumstances may justify as regards a particular type of contract, and maybe even contracts in which the party who is formally deemed a consumer who is not in need of the protection which forms the basis of the Directive's rules, such as contractor agreements and work performed on exclusive homes and boats, where a well-to-do consumer may be an equal (or even superior) contracting party in relation to a small businessman. The scope of the foregoing is, however, substantially limited to individually negotiated contract terms which, as indicated above, fall outside the scope of the Directive.

In short, the list contains the following types of terms. Note that various details found in the text of the Directive are not included below.

- a) Disclaimer of legal liability when the consumer suffers personal injury.
- b) Limitation of the consumer's legal rights in the event of the seller's or supplier's contractual breach, including the option of offsetting a debt owed to the seller or supplier against a claim which the consumer may have against him- or her.
- c) Binding the consumer to the contract whereas the seller or supplier is only bound if he or she so chooses.
- d) Unilateral forfeiture of advance payments.

¹⁰ COM(90) 322 final - SYN 285.

- e) Disproportionately high compensation claims in the event of non-payment.
- f) Unilateral right to discretionary dissolution of the contract; right of the seller or supplier to retain sums paid for services when he or she him or herself dissolves the contract.
- g) Terminating a contract of indeterminate duration without reasonable notice.
- h) Automatically extending a contract with fixed duration.
- i) Binding the consumer without his or her having an opportunity to acquaint him- or herself with the contract terms.
- j) Unilateral alteration of contract terms without a valid reason.
- k) Unilateral alteration of the characteristics of a product or service without a valid reason.
- l) Determining or increasing the price at the time of delivery without giving the consumer the corresponding right to cancel the contract.
- m) Giving the seller or supplier the exclusive right to determine whether the goods or services supplied are in conformity with the contract or the right to interpret the contract.
- n) Limitation of powers of the seller's or supplier's agents or making the latter's commitments subject to compliance with a particular formality.
- o) A unilateral obligation for the consumer to fulfill all of his or her obligations.
- p) Giving the seller or supplier the right to transfer his or her rights and obligations under the contract which can reduce the guarantees for the consumer.
- q) Limiting the consumer's right to go to court (*inter alia*, by means of an arbitration clause); contract terms which limit the consumer's access to evidence or imposing on him or her a burden of proof which, according to the applicable law, should lie with another party to the contract.

Certain exceptions have been made from terms 'g', 'j' and 'l' for financial services. An exception has also been made for clearly described price index clauses (point 2 on the list).¹¹

As stated by Willett,¹² the contract terms appearing on the list can be grouped into various main categories. One such main category consists of terms which are improperly balanced because they grant the seller or supplier a *unilateral* right to determine important circumstances for the contractual relationship or the right to breach the contract. This concerns terms 'f', 'g', 'j', 'k' and 'm'. Another main type consists of contract terms that *lack proportionality* between the consumer's and the seller's or supplier's obligations. This concerns terms 'c', 'd'

¹¹ The preamble also contains a reservation for insurance contracts. Clauses which define the insurance's scope and the insurer's liability were not deemed to be appropriate objects of the assessment of unfairness, since they are linked to premium rates.

¹² Willett, Directive on Unfair Terms in Consumer Contracts in Consumer Law Journal 1994 p. 114 et seq. at p. 119 et seq.

and 'o'. A third category encompasses terms which place *an unfairly one-sided burden* on the consumer. This concerns terms 'e', 'h' and 'i'. Another main type consists of *extensive exemption clauses*. This covers terms 'a' and 'b'.

Generally speaking, these types of terms are well known from earlier Swedish case law under section 36 of the Contracts Act and the previously applicable Contract Terms Act for Consumer Relations.

In Sweden, it has not been deemed necessary in order to implement the Directive to compile a list of ordinarily unfair contract terms in the statutory text; instead, the list has only been referred to (*infra*) in the legislative materials accompanying the new *AVLK*. The assessment of the various types of clauses is, however, addressed in some detail in the legislative materials in connection with a presentation of relevant Swedish case law. This must be viewed as a vivid example of so-called legislation through *travaux préparatoires*.

It must be questioned whether such implementation through preparatory legislative material is acceptable from the standpoint of EU law. The EU Court did not consider, it may be noted, in a case where the Commission brought suit against Denmark for breach of the Treaty of Rome on account of inadequate implementation of the equal pay Directive, that an acceptable implementation had been made through the technique of inserted statements in the legislative materials.¹³ The Court referred in this context, *inter alia*, to considerations of legal certainty and the importance of legislation being clear to Community nationals. Even if it can be rejoined that the list is no more than a guiding appendix, the argument for clarity is of considerable weight in a case like this. At the very least, the chosen technique of implementation is, in my view, open to serious question.

The consequence of the list of ordinarily unfair contract terms not being included in the Swedish statute can readily be that the list is unnoticed in connection with contract drafting, client counselling and judicial decisions. This would be unfortunate. Although the list is not by any means intended to be exhaustive and should thus not be made the basis of any *e contrario* reasoning, it provides increased clarity and stability to the assessment of unfairness, mainly in connection with section 36 of the Contracts Act.

The reasons stated in the Government Bill for not including a list in the statute text, i.e., difficulties in clarifying its legal status and its non-exhaustive character, hardly appear convincing. It should have been possible to let the list be an appendix to the new *AVLK* in the same manner that it was in relation to the Directive. No doubt, such an appendix would have constituted a novel approach in the area of legislative technique, but such an argument does not appear to have much weight in connection with the implementation of EEC law, which has after all in many other and more central contexts required new approaches within Swedish legislation.

Under the general clause in section 36 of the Contracts Act, unfair contract terms may be adjusted or simply disregarded. The courts have been given considerable freedom of action in handling this sanction, and in case law, the courts have often used adjustment to alter unfair features of contract terms so as to be able to assess them as fair. This latitude granted to the courts has, at least in re-

¹³ Case 143/83, *Commission v. Denmark*, (1985) European Court Reports (cit. ECR) 427.

cent decades, been viewed as an important legal principle within Swedish contract law.

The Contract Terms Directive (Article 6 (1)) is, however, based on a stricter, less flexible approach, entailing that unfair contract terms should be disregarded if the contract can continue to exist without the term in question. The courts may, instead of the unfair term, apply terms provided by supplementary contract rules. For the seller or supplier, this usually amounts to a stricter rule than adjustment of a contract term so that the term falls below the 'threshold of unfairness'. Since the Directive's rules on this point are clear, it has been deemed necessary to limit, for the sake of consumer contracts, the possibility of adjustment under section 36 of the Contracts Act in accordance with the Directive. This has occurred through a special statutory rule. Its application presupposes that the contract term has not been the object of individual negotiation, that it is unfair and that the consumer requests that the rest of the contract shall remain unchanged. To avoid alteration of the general section 36 of the Contracts Act, the rule has been placed in section 11(3) *AVLK*. Even if such a placement is well justified, the result is not especially good from the standpoint of lucidity and coordination of legal rules.

Under the Directive (*e contrario* conclusion from Article 4 (1)), when assessing the question whether a contract term is to be deemed unfair, circumstances may not be considered which occurred after conclusion of the contract and which entail that the term is to be deemed fair. This differs from that which has thus far applied in Sweden and has given rise to a separate provision in section 11(2) *AVLK*. On the other hand, one may continue, in making an assessment of unfairness, to consider circumstances that occurred after conclusion of the contract when this would be to the advantage of the consumer. This rule too is intended to ensure realisation of the underlying objective of consumer protection.

The Market Law Rules

The system of a market law control, through a Consumer Ombudsman, of unfair contract terms in standard contracts in the consumer area is specific to the Nordic countries.

This is a system of collective control by a government body on behalf of the general consumer interest. The Consumer Ombudsman acts against contract terms deemed to be unfair by negotiations with undertakings or, if necessary, by legal action in the Market Court. In the rest of Western Europe, it is generally considered to be a task for private consumer organisations to act on behalf of the collectivity of consumers against unfair terms in standard contracts. The effectiveness of this system probably varies, but it clearly plays an important part in Germany (*Verbandsklage*). The Contract Terms Directive prescribes in Article 7(2) that there shall be a right of action for such organisations. The Directive has, however, a rather vague content. It requires that the court and administrative bodies of the Member States shall have 'adequate and effective means' to prevent the continued use of unfair contract terms in consumer contracts (Article 7(1), cf. the preamble's last sentence). There have not been any obstacles pre-

venting Sweden and the other Nordic countries from retaining the previous Consumer Ombudsman model in this area.

The principles and the methods of market law control and assessment have been transferred with only small changes from the 1971 Act on Contract Terms in Consumer Relations to the new *AVLK*. The new market law 'general clause' in section 3 of the 1994 *AVLK* does not differ in substance from the previously applicable law and the case law which developed continues to apply. In making the assessment of unfairness, the Market Court usually, taking as its point of departure a statement in the legislative materials, gives special consideration to whether a contract term entails such an uneven burden with respect to the parties' contractual rights and obligations, viewed from the standpoint of optional rules, that an average and reasonable balance between the parties is not apparent in the case. This principle of assessment is, as appears, very close to that which is stated in the Directive's 'general clause' in Article 3(1). The Consumer Ombudsman and the Market Court shall, of course, henceforth consider the above-mentioned grey list of ordinarily unfair clauses, but this contains, as appeared above, few new features in relation to Swedish practice.

One novel feature under the new Act is that it is now possible for the Consumer Ombudsman and the Market Court to intervene against contract terms applied by banks and insurance companies. This modification has been justified by the contents of the Directive, which is, with certain exceptions, applicable within these sectors as well. The statutory change may prove to be significant. As an explanation as to why this possibility did not exist previously, reference has been made to the Swedish Finance Inspection's general supervisory powers under bank and insurance company laws. This control activity, which, generally speaking, probably had limited significance with respect to assessing the contents of contract terms, has not, however, included any form of judicial scrutiny of unfair terms. This is an important change - not least of importance in principle, since the special position of bank and insurance activities is now eliminated in this regard. The other main market laws, the Competition Act and the Marketing Practices Act, have already previously been fully applicable to the bank and insurance areas.

The Market Court can according to the new Act, just as previously, only issue prospective prohibitions, usually accompanied by a fine for non-compliance. An interesting new feature is that prohibitions can be addressed directly to a conglomeration of businessmen, such as a branch organisation, who uses or recommends an unfair term (section 3(3) *AVLK*). This change too has its background in the requirement of the Contract Terms Directive and appears to be well justified.

The legislature has not desired, in connection with implementation of the Directive, to make any other changes in the system within standard contract law. The goal has evidently been to make the least change possible. Although the purely civil law rules and the market law rules on consumer protection against unfair terms have been systematically consolidated in a single law, no change has been made in the bifurcated nature of the present system. Procedural and sanction systems under, on the one hand, section 36 Contracts Act, and the purely civil law rules of *AVLK* and, on the other hand, the market law rules in *AVLK* are intended, just as previously, to run parallel to each other.

Concluding Remarks

The contents and significance of the Contract Terms Directive, viewed against the background of the already existing consumer-protective standard contract law in the Nordic countries, has been judged rather negatively in an article by Thomas Wilhelmsson.¹⁴ His basic view is that the Directive has been framed much too cautiously, *inter alia*, because it pursues the underlying idea that rules that support consumers restore a balance between the contractual parties instead of directly proceeding from social protection objectives. This would not least apply to the assessment of fairness under the Directive, which Wilhelmsson considers to run the risk of being too abstract and static. According to Wilhelmsson, Finnish law would in any case allow freer and more socially influenced considerations.

I, for my part, do not subscribe to this criticism. In essence, the purposes underlying section 36 of the Contracts Act and the market law system of rules governing the area of contract terms correspond to the purposes embraced by the Directive. To the extent that the legislature desires to accommodate specific social protective purposes, this should really be achieved through mandatory legislation directly tailored to the specific problem area. On the contrary, the Directive and its implementation in Swedish law has in certain respects entailed a consolidation and strengthening of consumer protection in the area of standard contract law. As previously indicated, the significance of the Directive for Swedish law will probably be greater than has thus far been assumed.

The foregoing has revealed itself on two levels; through legislative amendments already made and through a likely long-term influence. The important features have already been addressed. Here we may note the newly adopted definition of the concept of standard contract with an accompanying rule on the burden of proof, legislative introduction of the ambiguity rule, the emergence of a grey list of ordinarily unfair clauses in standard contracts, the new view on adjustment of unfair contract terms and the bank and insurance area's placement under the market law system for control of unfair terms in standard contracts.

The emergence of the grey list and the reduced possibilities of applying adjustment ought to result in a more clause-oriented application of section 36 Contracts Act in consumer relations; that which Germany usually calls *Fallgruppenbildung*. This would in my opinion be a welcome advantage. In the case law thus far, the courts, including the Swedish Supreme Court, have usually applied an individualised assessment, which to a great extent takes account of circumstances in the individual case. This has resulted in inadequate foreseeability and probably a certain lack of efficacy in the legal system in this area. Only with regard to one type of clause, arbitration clauses, can relatively clear, general principles of assessment thus far be said to have developed on the basis of the Supreme Court's application of section 36 of the Contracts Act. A general observation in this context is that the rather substantial legal development which occurred through case law, which took place during the first ten-year period after

¹⁴ Wilhelmsson in *Journal of Consumer Policy* 1993 p. 435 et seq. See the same author, *Social Contract Law and European Integration*, Aldershot 1995. Wilhelmsson holds the position of professor of private law (Swedish language) at the Helsinki University.

introduction of section 36 of the Contracts Act (up to 1985), appears to have since come to a halt.

Through adoption of the new Contract Terms Act for consumer relations, the state of the law has gained increased stability. The old Contract Terms Act of 1971 was the result of a short ministerial memorandum and had a rather loose framework as regarded delimitation and the applicable principles of assessment. The new Act, with its background in the Directive, shows that it is now established that within the general framework of contract law, there has developed and should be applied partially different assessment principles for standard contracts, especially in the consumer area. This is a view which the author of this article has asserted ever since the early 1970s but which was perhaps not always accepted.

Even if the new law is limited to consumer contracts, this will have a certain significance for the application of laws extrinsic to this particular area. As regards interpretation and the assessment of unfairness of standard contracts in other areas, where there is a clear imbalance in the bargaining power of the parties such that one of the parties assumes an inferior position, the Directive should and the new Act could be used analogously and as a source of comparison.

More important in the long term than these new legislative features, although in themselves important, is probably that consumer-protective standard contract law no longer consists of internal Swedish law alone (and its Nordic counterparts) but is instead based on European law.

Courts and authorities in the EU countries are obliged to interpret national law in the light of the contents and purposes of EC Directives. This principle, ultimately based on the principle of solidarity in Article 5 of the Treaty of Rome, has been confirmed by the EC Court in numerous judgments. Based on the first judgment, where the principle was clearly enunciated, it is often called the *von Colson* principle.¹⁵ Even national legislation, whose language has not been altered, shall hereinafter be interpreted and applied against the background of the rules of the Directive.

Both section 36 of the Contracts Act and the new *AVLK* shall thus be interpreted in the light of the Contract Terms Directive and its preamble. Older statements in the legislative materials and case law, unless consistent with the Directive, must give way and should generally be treated with caution. In cases of uncertainty as to the meaning of the Directive, Swedish courts, as with other EU countries, may request a preliminary ruling from the EC Court under Article 177 of the Treaty of Rome. On that basis, case law at the European level can be expected to develop in the area of unfair contract terms. There is already an embryo to such a development in connection with other consumer protection directives. Via harmonisation directives on unfair contract terms and related questions as well as the case law of the EC Court, there will probably be a successive development of an essentially common European contract law within this central sector, even if it is difficult to predict today how far or fast this development will proceed.

¹⁵ Case 14/83, *von Colson & Kamann v. Land Nordrhein-Westfalen*, (1984) ECR 1891.

This can in turn be seen in a very large, possible future perspective. The European Parliament spoke in 1989 in favour of creating a common European Civil Code for the EU countries.¹⁶ This great project has many enthusiastic supporters in Europe, not least in Germany, and several studies are already under way.¹⁷ If and to what extent this will eventually be realised is difficult to judge. In all likelihood, this will be achieved through a gradual process. The adoption of an EC Directive in an area as central as unfair contract terms can in this context be seen as a significant step along the way, notwithstanding that the Directive is limited in scope to consumer contracts.

¹⁶ Official Journal of the European Communities 1989, No. C 158/400.

¹⁷ See e.g., *Towards a European Civil Code*, Eds. Hartkamp, et al., Nijmegen 1994.