UvA-DARE (Digital Academic Repository)

The position of small and medium-sized enterprises in European contract law

Loos, M.B.M.; Samoy, I.

Publication date

2014

Document Version

Submitted manuscript

[Link to publication](#)

Citation for published version (APA):

Loos, M. B. M., & Samoy, I. (Eds.) (2014). *The position of small and medium-sized enterprises in European contract law*. (Ius commune: European and comparative law series; No. 121). Intersentia.

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

The Position of Small and Medium Sized Enterprises in European Contract Law

Editors:
Marco B.M. Loos
Ilse Samoy

The Position of Small and Medium Sized Enterprises in European Contract Law

Marco B.M. Loos and Ilse Samoy (eds.)

The Position of Small and Medium Sized Enterprises in European Contract Law

Intersentia Publishing Ltd
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

ISBN 978-1-78068-194-8
D/2013/7849/121
NUR 822

© 2013 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

Cover image © ???

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

No part of this book may be reproduced in any form, by print, photocopy, microfilm or any other means, without written premission from the publisher.

CONTENTS

The position of Small and Medium Sized Enterprises in European Contract Law: An Introduction

1. Introduction: the development of a consumer policy	1
2. Protection of other parties lacking bargaining power?	2
3. Recognition of the position of weaker commercial parties in European B2B contract law	4
4. The Draft Common Frame of Reference and the proposal for a Common European Sales Law.....	7
5. A brief description of the papers in this book.....	8

Chapter 1. SMEs in the Common European Sales Law

Fernando Dias Simões	11
1. The importance of SMEs for the European Market	11
1.1. SMEs and transaction costs	11
1.2. SMEs as the weaker party	13
2. The personal scope of application of the Proposal	14
3. Does the Proposal protect the interests of SMEs?	17
3.1. The reduction of transaction costs.....	17
3.2. SMEs as the weaker party: from mandatory rules to standard contract terms.....	21
4. The development of ‘European model contract terms’	24
5. Final remarks	25

Chapter 2. Can the Common European Sales Law do without the definition of an SME?

Sonja Kruisinga.....	29
1. Introduction	29
2. Background of the Regulation on CESL	30
3. The definition of an SME in the Regulation on CESL	32
3.1. Defining an SME	32
3.2. Questions which were left unanswered concerning the definition of an SME.....	34

4. A comparison: the definitions of small and large enterprises in private law in the Netherlands.....	37
4.1. Large companies within the meaning of Article 6:235(1) of the Netherlands Civil Code.....	37
4.2. Large companies within the meaning of Articles 2:153 and 263 of the Netherlands Civil Code.....	39
5. Concluding remarks.....	41

Chapter 3. A Consumer Law for Professionals:

Radical Innovation or Consolidation of National Practices?

Pieter Brulez	43
1. Protecting the weaker party through detailed legislation.....	46
1.1. No detailed legislation specifically designed for B2B transactions.....	46
1.2. Extending the consumer notion.....	48
1.3. Criticism	52
2. Protection through general principles	54
2.1. Good faith, fair dealing and mutual cooperation	54
2.2. Good faith in the pre-contractual stage.....	58
2.3. Good faith in the contractual stage	62
3. P.CESL accepts procedural fairness and contextualization in a B2B context.....	70

Chapter 4. The CESL and its Unfair Terms Protection for SMEs

Josse Klijnsma	75
1. Introduction	75
2. The case for unfair terms protection for SMEs.....	76
2.1. An internal market argument	76
2.2. A weaker party protection argument	78
3. Unfair terms protection for SMEs in the CESL	79
3.1. Definition of the consumer and mixed contracts.....	80
3.2. The unfairness test of Article 86 CESL.....	81
4. An autonomous interpretation as the way forward?.....	82

Chapter 5. Unfair Terms in Contracts Between Businesses

A Comparative Overview in Light of the Common European Sales Law

Sander Van Loock.....	85
1. Introduction	85
2. SMEs as a novel concept in European contract law	87
2.1. Definition.....	88
2.2. Criticism	89
3. Theory of unfair contract terms	90
3.1. Benefits and risks of standard terms	90
3.2. Justification of judicial control	92
3.2.1. Abuse of bargaining power.....	92
3.2.2. Transaction costs.....	94

4. Conceptual analysis of unfair terms.....	96
4.1. European Union: Unfair Contract Terms Directive, DCFR and CESL	96
4.1.1. Unfair Contract Terms Directive	96
4.1.2. DCFR	97
4.1.3. CESL.....	97
4.2. Germany	98
4.2.1. Standard terms	98
4.2.2. Individually negotiated terms (<i>im Einzelnen ausgehandelt</i>)	101
4.3. The Netherlands.....	103
4.4. France.....	103
4.5. Belgium	105
4.6. United Kingdom	106
4.7. Conclusion.....	107
5. Judicial control.....	108
5.1. European Union: Unfair Contract Terms Directive, DCFR and CESL	108
5.1.1. Unfair Contract Terms Directive	108
5.1.2. DCFR	109
5.1.3. CESL.....	110
5.2. Germany	111
5.2.1. Content of the judicial control	111
5.2.2. Differentiations.....	114
5.2.3. <i>Indizwirkung</i>	115
5.2.4. Criticism	116
5.3. The Netherlands.....	119
5.4. France.....	122
5.4.1. Consumer law and B2B contracts.....	122
5.4.2. Modern developments and perspectives	124
5.5. Belgium	127
5.5.1. B2C contracts.....	127
5.5.2. B2B contracts	127
5.6. United Kingdom	130
5.6.1. Reasonableness test.....	131
5.6.2. Dealing as consumer	133
5.6.3. Recommendations of the Law Commissions.....	134
5.7. Conclusion.....	135
6. Conclusion.....	137

Chapter 6. Harmonisation of Rules on Business-to-Business Marketing Practices: A Critical Analysis of the MCAD Report

B. Keirsbilck.....	139
1. The current European law on unfair commercial practices	139
1.1. UCPD	139
1.2. MCAD	143
1.3. Critical analysis of the dualistic approach.....	144
1.4. Consultation on the MCAD	145
2. Possible options for the further harmonisation of rules on business-to-business practices	146
2.1. Minor revision of the MCAD	147
2.2. Substantial revision of the MCAD so as to mirror the UCPD	153
2.3. Substantial revision of the UCPD so as to integrate the MCAD.....	153
2.4. Maintaining the status quo.....	159
3. Conclusion and epilogue on the need and desirability of harmonisation of rules concerning unfair business-to-business trading practices	159

THE POSITION OF SMALL AND MEDIUM SIZED ENTERPRISES IN EUROPEAN CONTRACT LAW: AN INTRODUCTION

Marco B.M. Loos and Ilse Samoy

1. Introduction: the development of a consumer policy

In 1975 the European Council accepted the first Consumer Policy Programme.¹ As was mentioned in the introduction to a previous book in this series,² European consumer law was justified as being a measure to improve the quality of the life of the peoples of the Member States of (then) the European Economic Community. According to the 1975 Consumer Policy Programme the consumer was entitled, among other things, to protection of his economic interests and to redress. With regard to the protection of the consumer's economic interests, it was noted that the consumer needed to be protected against the abuse of power by the seller, in particular against one-sided standard contracts, against the unfair exclusion of essential rights in contracts and harsh conditions of credit, against demands for payment for unsolicited goods and high-pressure selling methods, as well as against damage to his economic interests caused by defective products or unsatisfactory services. Moreover, the presentation, advertising and promotion of goods and services, including financial services, should not be designed to mislead, either directly or indirectly, the person to whom they are offered or by whom they have been requested. Information provided by a producer, seller or service provider should be accurate, and the consumer should be offered an adequate choice between different goods available to him.³ As regards the right of redress, the European Commission stated that if damage or injury resulted from defective goods or unsatisfactory services, the consumer should receive advice and help in order to file complaints, and that swift, effective and inexpensive procedures were needed in order to

¹ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, *OJ C* 1975, 92/2.

² M.B.M. Loos and A.L.M. Keirse, 'The Optional Instrument and the Consumer Rights Directive: Alternative ways to a new *Ius Commune* in contract law – Introduction', in M.B.M. Loos and A.L.M. Keirse (eds.), *Alternative Ways to Ius Commune, in particular in Private Law*, Cambridge/Antwerp/Portland, Intersentia, 2012, pp. 1–4.

³ *OJ C* 1975, 92/2, no. 19.

allow the consumer proper redress.⁴ The right of redress mentioned in the 1975 Consumer Policy Programme therefore reflects what is more commonly referred to as the matter of access to justice. Therefore, the consumer policy program in this respect was justified by the notion that consumers lack equal bargaining power and are entitled to bring their claims in front of a court or tribunal.

From 1975 onwards, consumer policy and consumer protection measures have been on the political agenda. Until the 1992 Maastricht Treaty came into force,⁵ consumer policy measures could only be taken with a view on the improvement of the internal market, as there was no other specific legal basis that could be relied on.⁶ It may be doubted whether measures taken in the area of consumer protection in the 1980s actually contributed to the improvement of the internal market – in particular, it is hard to see how the 1985 Doorstep Selling Directive⁷ could make a serious impact on cross-border trade.⁸ This suggests that it was not so much the improvement of the internal market, but the European legislator's political desire to award protection to a particular type of buyers – consumers – which was the basis of the European directives in the area of consumer law.

2. Protection of other parties lacking bargaining power?

The flexible approach to the matter of competence in the years until the mid-1980s suggests that the aim of improving the internal market could also constitute a valid legal basis for the European legislator to award protection to other parties that lack bargaining power or have difficulty in getting access to justice. Yet the political will to expand such measures to non-consumers on a structural basis at that time was missing at the European level. Moreover, when the European Commission argued in favour of a broad interpretation of consumer protection rules to also protect small businesses that find themselves in a similar position as an ordinary consumer – in this case, where small businesses were canvassed in a similar fashion as consumers and therefore were equally unprepared for the attempts of the other trader to persuade them to contract with that trader – in the famous *Di Pinto* case the European Court of Justice denied such protection, as a normally well-informed trader simply could not be considered to be in a similar position to a consumer since he may be expected of his legal position and his interests.⁹ Moreover, in 2001,¹⁰ the Court confirmed that only natural persons could qualify as

⁴ OJ C 1975, 92/2, no. 32.

⁵ OJ C 1992, 191/1. The treaty came into force on 1 November 1993.

⁶ Since then, the treaties do contain such specific legal basis; see currently Article 12 of the Treaty on the Function of the European Union (TFEU).

⁷ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 1985, 372/31.

⁸ See Loos/Keirse 2012, pp. 7–8.

⁹ See ECJ 14 March 1991, case C-361/89, [1991] ECR p. I-1206 (Criminal case against Patrice di Pinto), nos. 17 (for the position of the European Commission) and 18 (for the decision of the Court).

¹⁰ See ECJ 22 November 2001, joint cases C-541/99 and C-542/99, [2001] ECR p. I-9057 (*Cape Snc v Idealservice Srl* and *Idealservice MN RE Sas v OMAI Srl*).

consumers within the sense of European legislation and that legal persons for that reason cannot invoke the protection of the Unfair Terms Directive.¹¹ Nevertheless, as the protection of non-consumers is outside the scope of the European consumer protection directives, Member States are free to award similar protection to such non-consumers if they see the need to do so, as the Court of Justice considered explicitly in the *Di Pinto* case.¹² In some cases Member States indeed do so.¹³

If European law does provide a legal basis, and national law already in some cases extends consumer protection rules to non-consumers, one could argue that it is only a matter of time until such extension will occur on a European scale as well. However, there is a pragmatic reason *not* to award non-consumers similar protection as consumers: how should one distinguish between those businesses that are worthy of similar protection as consumers, and those that are not? In 2006, Hondius argued that even though legislators have tried, no convincing criteria have been found to draw the line between these categories.¹⁴ However, he points to two separate developments that could offer some hope for small businesses. Firstly, he argues that consumer protection claims have often served as a catalyst in reforming the law in general, especially contract law.¹⁵ This has proved to be true in particular with regard to the Consumer Sales Directive,¹⁶ which has led to a major reform of German contract law, and to a lesser extent also with regard to the Package Travel Directive,¹⁷ which (through the case law of the Court of Justice)¹⁸ has led to the introduction of compensation of pain and suffering in Member States' legislation. Secondly, Hondius points to the fact that where in a Member State specific consumer protection rules are accompanied by an open clause that is also applicable in the case of a B2B contract, the consumer protection rules may play a (secondary) role when interpreting that open clause.¹⁹

¹¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ L* 1993, 95/29.

¹² See no ECJ 14 March 1991, case C-361/89, [1991] ECR p. I-1206 (Criminal case against Patrice di Pinto), nos. 21–22.

¹³ See E.H. Hondius, 'The notion of consumer: European Union versus Member States', *Sydney Law Review* 2006, 96.

¹⁴ Cf. Hondius 2006, pp. 95–96.

¹⁵ Hondius 2006, p. 96.

¹⁶ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ L* 1999, 171/12.

¹⁷ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, *OJ L* 1990, 158/59.

¹⁸ See ECJ 12 March 2002, case C-168/00, [2002] ECR, p. I-2631 (*Simone Leitner v TUI Deutschland GmbH & Co. KG*).

¹⁹ Cf. Hondius 2006, p. 96, referring to the so-called *Indizwirkung* or *Reflexwirkung* of the black and grey lists of terms that are deemed or presumed to be unfair in consumer contracts in Germany and The Netherlands.

3. Recognition of the position of weaker commercial parties in European B2B contract law

As well as consumer law, however, European business-to-SME contract law is slowly developing. The notion of SME, an acronym for small and medium-sized enterprises, is defined in the Annex to Commission Recommendation 2003/361/EC.²⁰ In Article 2 of the Annex, a division is made between microenterprises, small enterprises and medium-sized enterprises. Medium-sized enterprises are in fact pretty large companies employing fewer than 250 persons and having an annual turnover not exceeding €50 million and/or an annual balance sheet total not exceeding €43 million. On the other hand, microenterprises employ fewer than 10 persons and have an annual turnover and/or annual balance sheet of no more than €2 million. Between these two extremes, small enterprises employ fewer than 50 persons and have an annual turnover and/or an annual balance sheet of no more than €10 million.

Attempts to protect SMEs have been undertaken through two different schemes: on the one hand, sector-specific legislation could protect specific categories of SMEs, often alongside consumers. On the other hand, generic measures may be taken to protect *all* businesses.

The first example of the first kind is the 1986 Commercial Agency Directive (which obviously does not protect consumers).²¹ The preamble to this Directive makes clear that the existing differences in national laws concerning commercial agency not only substantially affect the conditions of competition and the carrying on of that activity within the European Union Community, but that these differences are also 'detrimental both to the protection available to commercial agents vis-a-vis their principals and to the security of commercial transactions'.²² This indicates that even though the Court of Justice in 1991 denied small businesses the same protection as consumers in the circumstances that have led to the enactment of the Doorstep Selling Directive on the basis of the assumption that businesses are supposed to look after their own interests, the European legislator had already recognised that commercial parties may very well be in a weak position relative to their contractual counterpart and that for that reason they may be worthy of legal protection.

A second example is offered by the 1990 Package Travel Directive,²³ where the notion of consumer in Article 2(4) is defined in such broad terms that some business travellers also

²⁰ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC, OJ L 2003, 124/36.

²¹ Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L 1986, 382/17 (Commercial Agency Directive).

²² See in contrast no. 2 in the preamble to the Commercial Agency Directive.

²³ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 1990, 158/59.

fall within the protective scope of the Directive. Similarly, the scope of the 2004 Denied Boarding Regulation²⁴ is not restricted to consumers, but protects all air passengers.²⁵

Another example is offered by the legislation in the energy sector. The 2003 Directives on the internal market for energy and natural gas²⁶ require Member States to take appropriate measures to protect final customers and to ensure high levels of consumer protection, and, in particular, to ensure that there are adequate safeguards to protect vulnerable customers, including appropriate measures to help them avoid disconnection.²⁷ Final customers are customers purchasing electricity or natural gas for their own use and include both consumers and businesses. According to the Annex to both Directives, standard terms in the contract between the energy provider and the final customer must be fair. Similar provisions have been included in the Third Energy Directives that have replaced these Directives.

Until recently, the second scheme of protection, which is made available to all businesses, was exemplified only by the 2000 Late Payment Directive,²⁸ and its successor, the 2011 Late Payments Directive.²⁹ In its proposal for the 2000 Late Payment Directive, the European Commission recognised the specific position of SMEs. While late payment of contractual debts may lead to cash-flow difficulties, undermine profitability and damage competitiveness of all businesses, the European Commission indicated that the damaging effects on SMEs are particularly severe. According to the Commission, the differences in payment practices within Europe are striking, with on average debtors in southern European countries taking three times as long to pay their bills as debtors in Nordic countries. The differences in payment times and the problems of late payments affect the competitiveness of businesses and deter them from engaging in cross-border trade, the Commission indicated.³⁰ Moreover, the European Commission suggested that the enactment of the Late Payment Directive should not be restricted to the private sector as in many countries the public sector is one of the worst payers, and that apart from setting

²⁴ Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, *OJ L* 2004, 46/1.

²⁵ Cf. Hondius 2006, p. 96.

²⁶ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ L* 2003, 176/37, and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *OJ L* 2003, 176/57, commonly referred to together as the Second Energy Directives.

²⁷ See Article 3(5) of Directive 2003/53/EC and Article 3(3) of Directive 2003/54/EC.

²⁸ Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, *OJ L* 2000, 200/35.

²⁹ Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), *OJ L* 2011, 48/1.

³⁰ See the Explanatory Memorandum to the European Commission's Proposal for a European Parliament and Council Directive combating late payment in commercial transactions of 25 March 1998, COM (1998) 126 final, p. 2.

a bad example for other economic operators, 'there is an imbalance between the parties' as many SMEs are dependent on public contracts and may fear losing their only or main client if they insist on speedy payment. The Commission continues its argument by saying that '[b]ecause of their respective bargaining positions and the public sector's own rules regarding payments conditions which do not allow or encourage negotiations on payments conditions, firms cannot genuinely negotiate with the public sector.'³¹ Although the final wording of the 2000 Late Payment Directive does not expressly reflect the idea that some businesses need to be protected because of their weak bargaining position, this element can clearly be identified as underlying the 2000 Late Payment Directive. The protection of SMEs as creditors is even explicitly addressed in Article 3 of the Directive, which grants creditors the right to claim interest if the payment period has elapsed and determines the interest rate. Obviously, the parties may derogate from these provisions. However, Article 3(3) of this Directive introduces the notion that such contractual derogations may be considered grossly unfair, taking into account all circumstances of the case including good commercial practice and the nature of the product. The Member States are required to provide that in the case of such a grossly unfair term, the term is either unenforceable or will give rise to a claim for damages, and the court will either have to replace the term by the statutory (default) rules or determine different conditions that are fair.³² Article 3 (3) of the 2000 Late Payment Directive thus introduces the notion that a contractual term in a commercial contract may be unenforceable due to its grossly unfair nature. Whereas the scope of the provisions is restricted to interest clauses in B2B contracts, it could be seen as a first indication that the European legislator is opening up the possibility of unfair terms legislation for B2B contracts in order to protect SMEs' weak bargaining position from exploitation by stronger parties.

The 2011 Late Payments Directive goes a step further in this direction. Article 7 of this Directive, entitled 'Unfair contractual terms and practices' requires, in its first paragraph, that Member States provide that a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is either unenforceable or gives rise to a claim for damages if it is grossly unfair to the creditor. This provision indicates that the Directive also provides protection against grossly unfair commercial practices that harm SMEs as creditors. Moreover, paragraphs (2) and (3) even black list and grey list certain contractual terms and commercial practices, indicating that contractual terms or practices that exclude interest for late payment deemed to be grossly unfair, and contractual terms or practices excluding compensation for the creditor's own recovery costs, are or are presumed to be grossly unfair. With regard to these terms, the protection in the 2011 Late Payments Directive goes even further than the protection in the Unfair Terms Directive, which merely contains in its Annex an indicative list of terms that *may* be considered unfair within the meaning of that Directive.

³¹ Explanatory Memorandum, p. 5.

³² Article 3(4) adds that, in the interests of creditors and of competitors, Member States have to provide for adequate and effective means to prevent the continued use of such grossly unfair terms.

4. The Draft Common Frame of Reference and the proposal for a Common European Sales Law

Whereas the provisions on the protection of SMEs against unfair terms in the 2000 and 2011 Late Payments Directives are restricted to contractual terms relating to payments, the Draft Common Frame of Reference (DCFR) again goes a step further. In the Introduction to the Outline Edition published in 2009, it is remarked that the use of standard contract terms leads to new forms of inequality that need to be addressed and that such problems can also occur in contracts between businesses, particularly when one party is a small business that lacks bargaining power. For that reason, the DCFR – following the example of Member States such as Germany and the Netherlands – extends the protection against unfair terms to contracts of all types.³³ However, the fact that a different text is introduced for the wording of the unfairness test for B2B contracts using the wording of the 2000 Late Payment Directive instead of the wording of the Unfair Terms Directive suggests that for B2B contracts a more restrictive approach to the unfairness test has been taken.³⁴ In addition to the unfairness test for contract *terms*, Article II.-7:207 DCFR introduces protection for weaker parties, including businesses, from unfair exploitation by the stronger party by construing the exploitation as a defect of consent allowing the exploited party to invalidate the contract as a whole.³⁵

The Proposal for a Common European Sales Law draws upon the text of the DCFR and introduces rules on unfair contract terms in B2B contracts into hard law. According to Article 86 CESL, a contract term in a contract between traders is unfair if it forms part of not individually negotiated terms and if it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing. Like the DCFR, the difference in wording seems to indicate that the fairness test for terms in B2B contracts is less stringent than in B2C contracts. Moreover, the CESL offers further protection for weaker parties in general. Pursuant to Article 51 CESL, a party (consumer or trader) that was unfairly exploited can avoid the contract.

The personal scope of the CESL is limited. According to the first paragraph of Article 7 of the proposed Regulation, it is only applicable if the seller of goods or the supplier of digital content is a trader. Where all the parties to a contract are traders, the CESL can only be used if at least one of those parties is an SME. The second paragraph of Article 7 reiterates the definition of SME as it is found in the Annex to Commission

³³ Cf. C. von Bar, E. Clive, H. Schulte-Nölke et al. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Outline Edition*, Munich, Sellier, 2009, Introduction, no. 10.

³⁴ See Articles II.-9:403 DCFR for consumer contracts and II.-9:405 DCFR for commercial contracts (whereas Article II.-9:404 DCFR introduces a third, intermediate, test for contracts between non-business parties).

³⁵ In doing so, the DCFR has taken over, in a different wording, the provision of Article 4:109 of the *Principles of European Contract Law* on excessive benefit or unfair advantage.

Recommendation 2003/361/EC.³⁶ An SME is a trader which employs fewer than 250 persons and has an annual turnover not exceeding €50 million or an annual balance sheet total not exceeding €43 million. Member States can, however, decide to make the CESL also available for all B2B contracts, even if none of the businesses is an SME.

5. A brief description of the papers in this book

This introduction made clear that the position of SMEs, under the CESL in particular and European contract law in general, deserves particular attention. Therefore, the contract law research programme of the Ius Commune Research School (www.iuscommune.eu) chose the topic as theme of the workshop contract law during the 17th Ius Commune Conference in Amsterdam on 29 and 30 November 2012. The workshop focused on the contractual relations of SMEs with other SMEs (SME2SME), consumers (SME2C and C2SME) and larger companies (B2SME and SME2B). The general research question was: 'Is there a need for a kind of "consumer law for professionals"?' This book is the result of the fruitful collaboration within the research programme.

In the first chapter, Fernando Dias Simões discusses the concept of SME in the CESL. He finds that the definition of SME which is used in the CESL creates uncertainty and that it would therefore be preferable to extend the concept of consumer. He raises doubts as to whether the introduction of the CESL will significantly reduce the transactions costs of cross-border business, as the Commission asserts. Sonja Kruisinga raises in the second chapter the question of whether the CESL can do without the definition of an SME altogether. She discusses the uncertainties relating to the definition of SME in the CESL and compares it with the definition of small and large enterprises in Dutch private law. She concludes that the restriction to SMEs in the Regulation on the CESL should be deleted or (at least) one Member State should use its option to extend the CESL to larger businesses. The third chapter, written by Pieter Brulez, is devoted to the role which general contract law rules can play in protecting weaker parties. In his comparative discussion, he underscores the benefits of applying open norms in protecting weaker parties as this allows for contextualisation and a concrete assessment of which party is the weaker one.

Josse Klijnsma considers in the fourth chapter the unfair terms protection for SMEs in the CESL. He discusses the potential rationales for a fairness control on unfair contract terms: an internal market element and a weaker party protection argument. This renders him sceptical about the different fairness tests for terms in B2C and B2B contracts, as neither of the potential rationales can justify such a distinction. In the fifth chapter, Sander Van Loock takes the rules on the protection against unfair contract terms in B2B contracts in the CESL as a starting point to embark on a functional comparative analysis of such rules in Germany, the Netherlands, Belgium, France and the United Kingdom. He criticises the CESL's restriction to SMEs and favours a general norm against unfair

³⁶ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, *OJ L* 2003, 124/36.

contract terms in B2B contracts as such an open norm offers the possibility of taking into account the position of SMEs. Bert Keirsbilck assesses in the last chapter the possible options for the further harmonisation of rules on business-to-business practices. He gives a critical analysis of the dualistic approach underlying the current European law of unfair commercial practices. He ends with the broader issue of the need and desirability of harmonisation of rules concerning unfair B2B trading practices. He advocates the extension of the scope of the Unfair Contract Terms Directive to cover terms in B2B contracts and to amend the scope of the Directive on Unfair B2C Commercial Practices to cover both B2B and B2C (marketing) practices at the pre-contractual stage.

SMEs IN THE COMMON EUROPEAN SALES LAW

Fernando Dias Simões*

1. The importance of SMEs for the European Market

The concept of small and medium sized enterprises (SMEs) has long been included in the European Union's lexicon.¹ The importance of SMEs for the European Market is irrefutable. According to data from the EUROSTAT quoted by the European Economic and Social Committee, 99.8% of European businesses are SMEs, 92% of which are microenterprises with an average of two employees.² The Committee points out that microenterprises export to a small number of Member States after analysing the market in depth, that the standard business model of a microenterprise does not aim to conclude cross-border contracts in 27 Member States, and that there are major barriers to cross-border transactions by SMEs.³

1.1. *SMEs and transaction costs*

The Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (the Proposal)⁴ pays special attention to SMEs, namely in its Explanatory Memorandum, where it acknowledges that 'the costs resulting from dealings with various national laws are burdensome particularly for SMEs. In their relations with larger companies, SMEs generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of the foreign law applicable to the contract and of complying with it. In contracts between SMEs, the need to negotiate the applicable law is a significant obstacle to cross-border trade. For

* Assistant Professor, Faculty of Law of the University of Macau (China); fernandodsimoes@umac.mo.

¹ See, e.g., the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Recommendation 96/280/CE), published in the Official Journal of the European Union L 124, of 20 May 2003, 36–41.

² Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law', COM(2011) 635 final, Official Journal of the European Union C 181, of 21 June 2012, 78.

³ *Ibidem*, 79.

⁴ SEC(2011) 1166 final, of 11 October 2011.

both types of contracts (business-to-business and business-to-consumer) for SMEs, these additional transaction costs may even be disproportionate to the value of the transaction'.⁵ According to the second recital of the Proposal, the deterrent effect of contract-law-related barriers 'is particularly strong for small and medium-sized enterprises (SME) for which the costs of entering multiple foreign markets are often particularly high in relation to their turnover. As a consequence, traders miss out on cost savings they could achieve if it were possible to market goods and services on the basis of one uniform contract law for all their cross-border transactions and, in the online environment, one single web-site'.⁶ Finally, recital 7 states that 'the barriers to cross-border trade may jeopardise competition between SME and larger companies. In view of the significant impact of the transaction costs in relation to turnover, an SME is much more likely to refrain from entering a foreign market than a larger competitor'.⁷

The concern with transaction costs, especially regarding SMEs, is pretty clear in the following figures presented by the Commission: 'Traders rank the difficulty in finding out the provisions of a foreign contract law first among the obstacles to business-to-consumer transactions and third for business-to-business transactions. Overcoming these hurdles means incurring transaction costs. These have the greatest impact on small and medium-sized enterprises (SMEs), in particular on micro and small enterprises, because the cost to enter multiple foreign markets is particularly high when compared to their turnover. The transaction costs to export to one other Member State could amount up to 7% of a micro retailer's annual turnover. To export to four Member States this cost could rise to 26% of its annual turnover. Traders who are dissuaded from cross-border transactions due to contract law obstacles forgo at least €26 billion in intra-EU trade every year'.⁸

The proposal aims at ensuring that, in those contracts to which it applies, SMEs can benefit from the CESL to the extent that they will not need to sustain any costs related to the analysis of the content of the law applicable to the contract imposed by the economically stronger party. However, in such cases it is unlikely that the SME would incur any costs regarding the drafting of standard terms. In fact, in such circumstances the smaller company would simply have to accept the other party's standard terms. Its prejudice would therefore be merely substantive and not related with the category of 'transaction costs'. The Proposal aims at making the CESL available to both parties (the big company and the SME), enabling both parties (and not only the SME) to reduce their legal discovery costs.⁹

⁵ Proposal, 3.

⁶ Proposal, 14–15.

⁷ Proposal, 16.

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Sales Law to facilitate cross-border transactions in the single market, COM(2011) 636 final, 11 October 2011, 2–3.

⁹ Simon Whittaker, 'Identifying Legal Costs of the Operation of the Common European Sales Law: Legal Framework, Scope of the Uniform Law and National Judicial Evaluations', <www.law.uchicago.edu/files/files/Whittaker%20paper.pdf>, 5.

1.2. *SMEs as the weaker party*

Traditionally, one of the explanations for consumer protection focuses on negotial asymmetry vis-à-vis the professional, as the former is considered an uninformed, inexperienced and even economically dependent subject. However, the truth is that SMEs, given their small size, can be as vulnerable as consumers regarding the lack of information, inexperience or dependence.¹⁰ Quoting Ole Lando, ‘the situation of the “small” professional, the farmer, the fisherman, the shopkeeper, the artisan, etc., is mostly the same as that of the consumer’.¹¹ From a normative coherence standpoint (treating similar cases similarly) there is a strong argument in favour of the extension to SMEs of the protection granted to consumers, at least in some situations.¹² From this perspective, there are no significant arguments opposing the expansion of the protection offered to consumers to vulnerable SMEs or non-profit organizations.

In 2006, the European Parliament reminded the Commission that ‘the term ‘business’ covers more than just large corporations and includes small – even one-person – undertakings which will often require contracts that are specially tailored to their needs and that take account of their relative vulnerability when contracting with large corporations’.¹³ Reflecting this line of thought, the Green Paper from the Commission on ‘policy options for progress towards a European Contract Law for consumers and businesses’ emphasizes the need to protect SMEs that find themselves in a position of fragility similar to that of a consumer. The Commission states: ‘Large companies with strong bargaining power can ensure that their contracts are subject to a particular national law. This may be more difficult for SMEs and therefore raise obstacles to pursuing a uniform commercial policy across the Union, thus preventing businesses from grasping opportunities in the internal market. Furthermore, ensuring compliance with different systems of contract law or obtaining information about the law applicable in another Member State and in another language might increase legal costs’.¹⁴

The same concern with the protection of SMEs stems from recital 13 of Directive 2011/83/EU of the European Parliament and of the Council, of 25 October 2011, on consumer rights, which provides that Member States remain competent to apply the provisions of the Directive to areas not falling within its scope. For instance, ‘Member

¹⁰ Martijn W. Hesselink, ‘CFR & Social Justice. A short study for the European Parliament on the values underlying the draft Common Frame of Reference for European private law: what roles for fairness and social justice?’, Centre for the Study of European Contract Law Working Paper Series No. 2008/08, <<http://ssrn.com/abstract=1270575>>, 33; Martijn W. Hesselink, ‘Towards a Sharp Distinction between b2b b2c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive’, European Review of Private Law, vol. 18, no. 1, 2010, 57–102.

¹¹ Ole Lando, ‘Liberal, Social and “Ethical” Justice in European Contract Law’, Common Market Law Review, vol. 43, 2006, 829.

¹² Martijn W. Hesselink, ‘SMEs in European contract law’, Background note for the European Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis, <www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf>, 13 and ff.

¹³ European Parliament resolution on European contract law and the revision of the acquis: the way forward (2005/2022(INI)), Official Journal of the European Union E, of 1 December 2006, 109–112.

¹⁴ COM(2010) 348 final, of 1 June 2010, 7.

States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises'.¹⁵

In June 2011, Viviane Reding, EU Justice Commissioner and Vice-President of the European Commission, stressed in a public speech her commitment to 'ensure that the optional instrument takes the specificities of SMEs into account, notably the fact that they can often be the weaker party in a business-to-business context'.¹⁶ How can we frame the background of consumer protection, clearly present in the Proposal, with the extension of its legal regime to commercial contracts? Since the Proposal is firmly rooted in the idea of protecting the weaker party, the extension of its scope to comprise commercial contracts means that a certain element of protectionism is also necessary in this context. Even though not all rules designed for consumer protection have been extended to commercial contracts, and many of them are presented as default rules, rather than mandatory rules, the focus of the optional instrument is, nevertheless, that some companies may be in the same position as consumers and lack adequate protection.¹⁷

2. The personal scope of application of the Proposal

The CESL presents a narrow personal scope of application. Pursuant to the first paragraph of article 7, the CESL may be used only if the seller of goods or the supplier of digital content is a trader. Where all the parties to a contract are traders, the CESL may be used if at least one of those parties is an SME. For the purposes of the CESL, an SME is a trader which:

- (a) employs fewer than 250 persons; and
- (b) has an annual turnover not exceeding €50 million or an annual balance sheet total not exceeding €43 million, or, for an SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country.

According to the Explanatory Memorandum, the Proposal is 'consistent with the Union policy of helping SME benefit more from the opportunities offered by the internal market. The Common European Sales Law can be chosen in contracts between traders where at least one of them is an SME, drawing upon the Commission Recommendation 2003/36113 concerning the definition of micro, small and medium-sized enterprises while taking into

¹⁵ Official Journal of the European Union L 304, of 22 November 2011, 65.

¹⁶ Viviane Reding, 'The Next Steps Towards a European Contract Law for Businesses and Consumers', Keynote Speech at the Conference 'Towards a European Contract Law' co-organised by the Study Centre for Consumer Law of the Catholic University of Leuven and the Centre for European Private Law of the University of Münster Leuven, 3 June 2011, <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/411&format=HTML&aged=0&language=EN&guiLanguage=en>>.

¹⁷ Nicole Kornet, 'The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?', Maastricht European Private Law Institute, Working Paper No. 2012/4, <<http://ssrn.com/abstract=2012310>>, 15.

account future developments'.¹⁸ The same Explanatory Memorandum states that 'the personal scope of the proposal is limited to transactions where the internal market problems are mainly found, i.e. business-to-business relations where at least one of the parties is an SME and business-to-consumer relations. Contracts concluded between private individuals and contracts between traders none of which is an SME are not included, as there is no demonstrable need for action for these types of cross-border contracts'.¹⁹

The Commission's effort to justify the limitation of the Proposal's scope is clear. Recital 21 reads: 'In order to tackle the existing internal market and competition problems in a targeted and proportionate fashion, the personal scope of the Common European Sales Law should focus on parties who are currently dissuaded from doing business abroad by the divergence of national contract laws with the consequence of a significant adverse impact on cross-border trade. It should therefore cover all business-to-consumer transactions and contracts between traders where at least one of the parties is an SME drawing upon Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises'.²⁰ Thus, the traditional distinction between 'B2C' (business to consumer) and 'B2B' (business to business) is replaced by a division between 'B2C' (business to consumer), 'SME2C' (SME to consumer) and 'B2SME' (business to SME).²¹

Member States are free to decide to make the CESL available for contracts where all the parties are traders but none of them is a SME (article 13, paragraph b). Hence, every Member State is given the choice to make the CESL also available for B2B contracts where neither of the parties is an SME, where a Member State considers this to be appropriate.

The reference, in the first paragraph of article 7 of the Regulation, to 'traders', if 'at least one of those parties is a small or medium-sized enterprise ('SME')', might be considered unusual.²² The use of such a definition (trader which employs fewer than 250 persons and has an annual turnover not exceeding €50 million or an annual balance sheet total not exceeding €43 million) can cause coverage problems for firms close to the line whose staff and sales fluctuate with economic tides.²³ Uncertainty over whether a party can be considered an SME can create doubts about whether the agreement to apply the CESL is valid or not and, if it is not, what contractual rules should apply. Apart from raising doubts about whether it is reasonable to create a specific legal regime for SMEs, this method creates legal uncertainty in contractual relationships between traders. Indeed, in the future, contractual parties are likely to feel the need to collect information on the number of employees of their potential customer in order to know which legal regime they might choose. Moreover, the Proposal discriminates against SMEs that are

¹⁸ Proposal, 7.

¹⁹ Proposal, 10.

²⁰ Proposal, 21.

²¹ Martin Illmer, 'Related Services in the Commission Proposal for a Common European Sales Law COM(2011) 635 final – Much ado about nothing?', Max Planck Private Law Research Paper no. 12/13, <<http://ssrn.com/abstract=2102476>>, 8, note 24.

²² Christoph Busch and Ronny Domröse, 'From a Horizontal Instrument to a Common European Sales Law. The Development of European Consumer and Market Law in 2011', *Journal of European Consumer and Market Law*, vol. 1, 2012, 51.

²³ Richard A. Epstein, 'Harmonization, Heterogeneity and Regulation: Why the Common European Sales Law Should Be Scrapped', <www.law.uchicago.edu/files/files/RAE%20paper.pdf>, 2, note 3.

successful and growing: the more success they have, the sooner they will fall outside the scope of the CESL.²⁴ Eidenmüller, for example, questions how a large company will evaluate whether the other party has an annual turnover not exceeding €50 million or an annual balance sheet total not exceeding €43 million.²⁵

In the opinion of Gómez Pomar and Gili Saldaña, the choice of such a limited scope is hardly justifiable, for various reasons. Firstly, it does not seem to make much sense for the CESL to only be applicable when the seller of goods or provider of digital content is a professional, or to require that, if all the parties are traders, at least one of them must be an SME, as the advantages of an optional instrument should not depend on the nature of the buyer. Secondly, if it is true that the concept of SME covers 99% of European companies, it is also true that 60% of European trade comes from large companies that make up the remaining 1%. Accordingly, the authors believe that it would be very desirable for Member States to make use of the option granted to them on Article 13. °, al. b) of the Regulation, thus removing the requirement of intervention of at least one SME in contracts between traders.²⁶

Ebers considers the restriction of the scope of the CESL to SMEs to be incomprehensible, questioning why big companies cannot have, in general, the same chance to base their contracts on an optional instrument.²⁷ This critique is not completely accurate since large companies are always free to draw inspiration from the optional instrument, replicating its solutions when drafting their contracts. Actually, in business-to-business transactions, traders enjoy full freedom of contract and are even encouraged by the Commission to draw inspiration from the Common European Sales Law in the drafting of their contractual terms.²⁸

The need to achieve a legal framework that affords some sort of protection to SMEs, particularly micro-enterprises, is undeniable. According to Hans-Wolfgang Micklitz and Norbert Reich, it might be easier to widen the concept of ‘consumer’ than to introduce a new category of ‘business in need of protection’. The authors call to mind the existing secondary European Union law in the field of telecommunication, energy and financial services, where the notion of ‘customer’, which is distinct from that of ‘consumer’, integrates exactly those SMEs which merit protection. In their opinion, any proposal which points to an enlargement of the concept of consumer might be more promising than the predictable conflict over the definition of SMEs.²⁹

²⁴ Christoph Busch and Ronny Domröse, ‘From a Horizontal Instrument to a Common European Sales Law. The Development of European Consumer and Market Law in 2011’, *supra* note 22, 51.

²⁵ Horst Eidenmüller *et al.*, ‘The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law’, Max Planck Private Law Research Paper No. 12/14, 3.

²⁶ Fernando Gómez Pomar and Marian Gili Saldaña, ‘El futuro instrumento opcional del Derecho contractual europeo: una breve introducción a las cuestiones de formación, interpretación, contenido y efectos’, *InDret – Revista para el Análisis del Derecho*, 1/2012, 12–13.

²⁷ Martin Ebers, ‘El control de las cláusulas abusivas en un futuro instrumento opcional’, *InDret – Revista para el Análisis del Derecho*, 1/2012, <<http://ssrn.com/abstract=1998670>>, 29–30.

²⁸ Proposal, 18.

²⁹ Hans-Wolfgang Micklitz and Norbert Reich, ‘The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too Broad or Not Broad Enough?’, *EUI Working Papers LAW* 2012/04, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013183>, 15.

3. Does the Proposal protect the interests of SMEs?

At present, European companies willing to offer their products across borders are faced with a wide variety of legal systems. The existence of 27 different contract law regimes grants parties the freedom to choose the applicable law. The question that arises is whether it is desirable or even necessary to have a twenty-eighth legal product, created by the European Union. Should the Proposal be approved, businesses and consumers will have the option to submit some contracts to a system of genuine European contract law. This is an option and not an obligation, as businesses and consumers are free to use the CESL but are not forced to do so. At first glance, the introduction of an optional regime seems to be a clever choice and hard to criticize: what can be wrong with an option? Why would market participants not rather have several 'legal products' available that they can freely select?³⁰

3.1. *The reduction of transaction costs*

One of the purposes clearly stated by the Proposal is to reduce transaction costs, namely costs related with the difficulty in finding out about the provisions of an applicable foreign contract law, obtaining legal advice and negotiating the applicable law. Differences relating to the applicable contract law have the effect of a 'tax' on cross-border transactions. Hence, the reduction of costs related to contract law in cross-border transactions is one of the main objectives of European policy. The harmonization and standardization of contract law rules reduces transaction costs.

On this regard, the Commission advocates that 'For B2B contracts, use of the Common European Sales Law would add value by easing negotiations of the applicable law for SMEs. It could be easier to agree on a neutral law that is equally accessible for both parties in their own language. Having familiarised themselves with the Common European Sales Law once, traders would no longer incur costs whenever it applies. As the problem of costs particularly affects SMEs, the Common European Sales Law is thus targeted at those B2B contracts where at least one of the parties is an SME. To ensure that maximum benefit can be reaped by SMEs the Commission would encourage Member States, via appropriate channels, to inform traders about the Common European Sales Law and its benefits.'³¹

Despite its good intentions, the Proposal is unlikely to significantly reduce any of the costs at which it is directed, and might even result in the rise of some of them. The real-world relevance of some of the proposed measures is unclear. First of all, this is because purely domestic contracts or contracts between traders in which neither party is an SME will only be subject to the CESL if States exercise the options provide for in article 13. As a consequence, the effects of reduction of transaction costs resulting from the harmonization or standardization will be limited. Secondly, because there are still other

³⁰ Horst Eidenmüller, 'What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool', <<http://ssrn.com/abstract=2102827>>, 1.

³¹ Communication 'A Common European Sales Law to facilitate cross-border transactions in the single market', 11.

barriers to cross-border transactions such as the linguistic difference, the possibility of having to litigate before foreign courts or the need to enforce judgments in foreign jurisdictions. Thirdly, because the range of any measures of harmonization or standardization depends on the amplitude of such measures. This raises the problem of the so-called 'hidden diversity': the practice of contract law in different countries may be very different even though the rules on the books are identical. Finally, the costs associated with moving to a new standardized or harmonized regime may be especially significant for SMEs.³² All in all, the argument of reduction of the transactions costs associated with contract law is based on an unsound empirical basis.

From an economic perspective, the proposal has raised several concerns about its potential role in the development of the internal market. To start with, it has been said that the costs of the CESL may outweigh its benefits and that its introduction may create a risk of over-regulation of the Law of Sales in Europe.³³ The European Economic and Social Committee is unenthusiastic about the Proposal, considering that it should be improved, making more allowance for the specific characteristics of SMEs. In its view, 'the proposal is not sufficiently user-friendly for SMEs. A complex and abstract instrument in the field of contract law, referring in some areas to the different domestic laws of the 27 Member States, cannot be applied by SMEs without support services and legal advice. Tools are imperative and could encourage SMEs to opt for the Common European Sales Law'.³⁴ The Committee recalls that 'The Common European Sales Law must ensure that the 'think small first' and proportionality principles are applied to their full extent at every stage, cutting red tape and needless expenses for SMEs. The Committee stresses that it is essential to keep regulatory costs at a minimum for SMEs, and calls on the Commission, the Council and the Parliament to take this aspect into consideration when shaping the Common European Sales Law'.³⁵

The European Commission's argument that transaction costs will be reduced if the Proposal comes into force must be confronted with the costs associated with the creation of an optional legal regime. These costs necessarily include not only the costs of obtaining comparative information but also the costs associated with the amendment of contractual forms, web sites, standard contract terms and the training of staff. Moreover, the costs associated with the uncertainty that surrounds the application of an optional regime may be high, as the correct interpretation of the new regime might only be possible through the decisions of courts. All of these costs must be analysed in light of the potential benefits that may result from choosing the new regime.³⁶ The heart of the

³² Horst Eidenmüller, 'What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool', *supra* note 30, 3–4.

³³ Chantal Mak, 'Unweaving the CESL – Legal-economic reason and institutional imagination in European Contract Law, Amsterdam Law School Legal Studies Research Paper no. 2012-73', <<http://ssrn.com/abstract=2088777>>, 1.

³⁴ Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law', COM(2011) 635 final – 2011/0284 (COD), Official Journal of the European Union C 181, of 21 June 2012, 79.

³⁵ *Ibidem*.

³⁶ Jan M. Smits, 'Party Choice and the Common European Sales Law, or: How to prevent the CESL from becoming a lemon on the Law Market', Maastricht European Private Law Institute, Working Paper no. 2012/13, <<http://ssrn.com/abstract=2060017>>, 12.

question is whether the creation of an optional European regime, with the vertical competition (between national and European legal rules) that it generates, has any added value when compared to the traditional horizontal competition between different national legal systems.³⁷

With regard to contracts between traders, parties certainly rather have a transparent and predictable legal regime which is substantially uniform. However, what is necessary in order to identify the differences between the different legal systems? The mere provision of information on the existence of an optional regime is not enough. Chiefly SMEs and consumers are only able to make rational decisions about the choice of legal rules if they can identify the differences between the law which is applicable by default and any other law they might choose. SMEs will not normally spend a lot of money on legal advice to understand the legal regime or to adapt their contractual forms. This calls for the provision of information by comparison: the parties must be able to clearly understand the advantages and disadvantages associated with the choice of a specific legal regime.³⁸

Unlike traditional laws, an optional instrument draws its validity from being chosen by the parties. This means that an optional instrument should be advertised in a more innovative fashion. This is further reinforced by the growing complexity that results from the introduction of the CESL, as is acknowledged in the 'Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses': 'a European optional instrument might be criticised for complicating the legal environment. By adding a parallel system, the legal environment would continue to be challenging and require clear information to allow consumers to understand their rights and thereby make an informed decision as to whether they want to conclude a contract on this alternative basis'.³⁹

The Proposal aims at reducing the costs associated with the difficulty in obtaining information on the applicable rules of foreign contract law, which are seen as a significant barrier to trade. However, the Proposal does not seem to be able to reverse this situation, even if it is adopted on a mass scale. Having regard to its vagueness, the use of concepts that are common to the different national legal systems but which are implemented with some differences and the predictable 'homeward trend' that emerged in the interpretation of the Vienna Convention (with national courts implicitly relying on national law when interpreting vague provisions), obtaining information about the contractual provisions of foreigner laws will continue to be necessary and important for traders who conclude contracts under the CESL.⁴⁰

On the other hand, the Law is considered as 'credence good': it is impossible to determine the quality by inspection or immediately after the completion of the contract, but only at the time a possible dispute is solved in a satisfactory way. As we all know, this

³⁷ *Ibidem*, p. 4.

³⁸ *Ibidem*, pp. 10–11.

³⁹ COM(2010) 348 final, 10.

⁴⁰ Lisa Bernstein, 'An (Un)Common Frame of Reference: An American Perspective on the Jurisprudence of the CESL', <<http://ssrn.com/abstract=2067196>>, 9.

could be years after the contract was concluded.⁴¹ Thus, it can take several years until we are able to fully assess the utility of the CESL for SMEs. Whether SMEs will be truly interested in the CESL depends on several factors. First of all, we need to know what the aspirations of European SMEs are. Some companies are more focused on the domestic market and, for them, the problem of diversity of legal regimes is irrelevant. SMEs, in contrast to large companies, generally do not aspire to cross-border trade. Thus, the CESL may not seem very attractive for them.

According to some authors, the existence of different contractual regimes, as such, might not create significant barriers to cross-border trade, taking into account the role played by the standardization of contracts.⁴² For several reasons, companies enjoy the familiarity of standardized contracts and of the laws that they usually apply. Frequently, problems are solved without changing laws but rather by changing or refining contractual terms.⁴³ Traders use their contractual freedom to lower transaction costs associated with the conclusion of contracts and to reduce the effects of the diversity of legal regimes. In this sense, Orgalime (European Engineering Industries Association) recalls that 'freedom of contract is the determining principle of Contract Law in all European legal systems, which allows companies to negotiate contracts with relative ease by using their own standard contracts or those developed by industry associations. This is especially true for SMEs. For decades companies have been doing cross-border sales on a daily basis, most of the time without any legal assistance. Only in cases when freedom of contract is hindered by mandatory national rules may obstacles arise.'⁴⁴

The use of standard contract terms, essentially self-sufficient, causes the divergence between the default rules of the different national laws, the Vienna Convention or the CESL to become basically irrelevant, except when such laws are necessary for the interpretation and execution of the contract. Traders seem to be dealing with the diversity of legal regimes through other mechanisms such as the development of standardized contracts, which render the use of the different national default rules needless. These standardized contracts are usually developed in strong connection with national law, so as to ensure their validity and enforceability. Thus, the CESL will only be appealing to businesses if it offers them legal certainty in this regard.

It is hard to imagine why SMEs would consider the CESL to be an attractive option. In terms of substantive law, the CESL does not differ significantly from the Vienna Convention or some national laws that are equally available for both parties in cross-border transactions. In addition, opting for CESL necessarily means that some rules of national law will still apply to matters not covered by the Regulation, unlike what happens if national law is chosen.

⁴¹ Jan M. Smits, 'Party Choice and the Common European Sales Law, or: How to prevent the CESL from becoming a lemon on the Law Market', *supra* note 36, 11.

⁴² Nicole Kornet, 'The Common European Sales Law and the CISG – Complicating or simplifying the Legal Environment?', *supra* note 17, 5.

⁴³ Gary Low, 'Unitas via diversitas. Can the Common European Sales Law harmonize through diversity?', <<http://ssrn.com/abstract=1991070>>, 143.

⁴⁴ Orgalime, 'Orgalime comments on the Commission Green paper on policy options for progressing towards a European Contract Law', COM(2010) 348, <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/270_en.pdf>, 1.

According to Smits, there are two points where the CESL might make a difference when compared to the different available laws. The first has to do with its scope: if the CESL is also available for domestic contracts and regardless of the nature of parties (consumers or SMEs), the incentive for parties to change their behaviour is likely to be greater. At the moment, opting for the Vienna Convention or other national law is possible only in cross-border situations. The CESL could change this, especially given the fact that the Proposal contains rules that cover more issues. The second point where the CESL could make a difference relates to the substantive rules it offers. If these are sufficiently innovative or clearly reflect a type of justice which the parties (or at least some types of parties) appreciate, its use may be more frequent.⁴⁵

It will probably take a long time until the 'high degree of legal certainty' mentioned in the second paragraph of article 1 of the Regulation is similar to that offered by national jurisdictions.⁴⁶ According to Recital 29 of the Proposal, 'Once there is a valid agreement to use the Common European Sales Law, only the Common European Sales Law should govern the matters falling within its scope. The rules of the Common European Sales Law should be interpreted autonomously in accordance with the well-established principles on the interpretation of Union legislation. Questions concerning matters falling within the scope of the Common European Sales Law which are not expressly settled by it should be resolved only by interpretation of its rules without recourse to any other law. The rules of the Common European Sales Law should be interpreted on the basis of the underlying principles and objectives and all its provisions'. However, the existence in the Proposal of too many vague concepts and the absence of a European higher court to decide on its interpretation raises doubts about how to achieve such an 'autonomous interpretation'. The 'homeward trend' that sometimes exists appears in the jurisprudence of the Vienna Convention seems inevitable.⁴⁷

3.2. *SMEs as the weaker party: from mandatory rules to standard contract terms*

The amplification of the scope of the Proposal as to include commercial sales, particularly when an SME is involved, is an implicit acknowledgment that some companies might be in a position similar to that of consumers and thus require special protection. This orientation toward the consumer naturally influences the nature of legal provisions, which are generally directed to the protection of the weaker party and to the re-establishment of balance between the consumer and the professional. When rules are drafted primarily for the consumer context, the expansion of such rules to different contexts can lead to 'consumerism creep', whereby solutions appropriate in a consumer context are generalized and used in a business context.⁴⁸

⁴⁵ Jan M. Smits, 'Party Choice and the Common European Sales Law, or: How to prevent the CESL from becoming a lemon on the Law Market', *supra* note 36, 14.

⁴⁶ John Cartwright, "'Choice is good" Really?', *European Review of Contract Law*, vol. 7, no. 2, 2011, 347.

⁴⁷ Jan M. Smits, 'Party Choice and the Common European Sales Law, or: How to prevent the CESL from becoming a lemon on the Law Market', *supra* note 36, 18.

⁴⁸ Nicole Kornet, 'The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?', 15.

When we look at the responses of companies to the proposals for the creation of a European contract law, the concern is not so much about the various default rules but rather about the different mandatory rules, especially those which might affect the validity of their standard contract terms. Whether firms will opt for the CESL will thus depend to a large extent on their confidence in the rules on interpretation and enforcement of such standardized contracts. In the view of Eidenmüller, the CESL contains several mandatory provisions applicable to contracts between traders, which make the scheme hardly attractive for companies, leading to the assumption that most of them will not make use of the option they are given.⁴⁹ Epstein notes that one way to understand the wide use of mandatory norms in the CESL is because they reduce transaction costs by allowing a certain degree of standardization, thus addressing other market failures which are frequent such as the inequality of bargaining power or information asymmetry. However, and quite strangely, the Proposal is silent in this regard, naming other rationales.⁵⁰

Kornet stresses that SMEs are not necessarily, by definition, weaker parties that require protection. Hence the question: when two SMEs enter into a contract with each other, can we say that one party is weaker than the other, and therefore needs to be protected? They should generally be treated as having the same bargaining power, not requiring, therefore, any kind of protection beyond that resulting from the general rules, for instance on error and fraud.⁵¹ Orgalime puts forward similar comments, emphasizing that 'consumers and SMEs are not in the same situation regarding their vulnerability in business relations. Being an SME does not automatically mean being the weaker party: the negotiating power of a company is measured not only by its size, but also by its position in the market, for example, as owner of innovative technologies. In addition, the position of strength is relative and may accordingly change (a medium-sized company of 200 employees negotiating a contract with a huge multinational company could be considered as the weaker party. The same company however may enter into negotiations with an SME of e.g. 20 employees and in that case the medium-sized company is the stronger party). If legal protection is only implemented due to the small size of a company, competition might be distorted'. The Association does not believe that a fair and clear differentiation is possible, between, on the one hand companies which need protection and, on the other hand, those which do not.⁵²

Clearly, the Proposal points toward the protection of SMEs facing the higher bargaining power of larger companies. But will it achieve its goal? In fact, the application of the CESL is voluntary, and bigger companies who have huge bargaining power will probably not opt for the CESL, continuing to choose the legal system with which they are most familiar and that offers them greater certainty, instead of choosing a set of rules

⁴⁹ Horst Eidenmüller, 'What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool', *supra* note 30, 13.

⁵⁰ Richard A. Epstein, 'Harmonization, Heterogeneity and Regulation: Why the Common European Sales Law Should Be Scrapped', *supra* note 23, 3.

⁵¹ Nicole Kornet, 'The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?', 16.

⁵² Orgalime comments on the Commission Green paper on policy options for progressing towards a European Contract Law, *supra* note 44, 2.

that essentially seeks to protect the weaker party (SMEs). Thus, the goal of restoring the balance between SMEs and large companies will probably not be reached. Kornet even raises the question of whether contract law is the appropriate tool to control the abuse of a dominant position and whether this problem would not be better solved by competition law.⁵³

Ultimately, knowing whether the CESL will add some value and be a popular choice among companies will depend on the adequacy of its rules. Standard contracts play a key role in this context. Indeed, companies are concerned primarily with the interpretation, validity and enforcement of the standard contract terms. While the Vienna Convention does not specifically regulate standard contract clauses, the CESL addresses the problem. Whether companies will opt for the optional instrument will thus depend, to a large extent, on the feasibility of such clauses under the light of the CESL.

Even though the second paragraph of article 86 of the CESL (meaning of 'unfair' in contracts between traders) provides several criteria to assess the unfair nature of a contractual clause, it can be said that this provision is still too vague, which can lead to considerable uncertainty in its application, and, consequently, in the enforcement of standard contract terms. It will surely take some time until the uncertainty regarding the nature and scope of these criteria is established. Until then, companies will probably continue to develop their own standard contracts in strong connection with national law, which they have already tested previously.⁵⁴

The provisions on the control of standard contract terms and not individually negotiated terms within the CESL are more restrictive than those contained in the Vienna Convention and in the law of many European legal systems. The Vienna Convention does not have any rules on the control of such clauses. In the European Union, at least 14 Member States refused to establish general rules to control standard terms in contractual relationships between professionals. On the other hand, there are several countries where the control of unfair terms is also possible in contracts agreed between professionals, such as in the Netherlands (if a company with fewer than 50 employees is concerned). In Portugal, the second section (articles 17 to 19) of chapter fifth (prohibited standard contract terms) of Decree-Law no. 446/85, of 25 October, is specifically applicable to 'relations between traders or similar entities', regardless of whether or not they are SMEs.

The truth, however, is that the CESL does not effectively address the problem of legal uncertainty. The standard of 'good commercial practice' that results from the first paragraph of article 86 does not offer enough support in determining whether clauses are valid, since for now there is not a general consensus in Europe about how this standard should be understood.⁵⁵ As a result, large companies who conclude contracts with SMEs will probably not choose this optional instrument, so as to avoid a new type of control over their standard terms.

⁵³ Nicole Kornet, 'The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?', 16.

⁵⁴ *Ibidem*.

⁵⁵ Martin Ebers, 'El control de las cláusulas abusivas en un futuro instrumento opcional', *supra* note 27, 36–37.

Whether SMEs will adopt the CESL depends, ultimately, on its costs and benefits. Eidenmüller, who is quite critical of the Proposal, warns that ‘there is a real danger that the CESL may establish itself as a focal point for academic scholarship, legal practice, and political processes irrespective of the CESL’s market success. In that sense, the CESL might become an influential “reference text”’.⁵⁶ The European Court of Justice might feel tempted to use concepts that result from the CESL considering that it reflects fundamental principles of European contract law. The European legislator will quite likely rely on such concepts when legislating in areas related to European contract law.

4. The development of ‘European model contract terms’

In order to tackle some of the criticism that has been targeted at the Proposal, the Commission envisages future supporting measures. Since, in business-to-business transactions, traders enjoy full freedom of contract and are encouraged to draw inspiration from the CESL in the drafting of their contractual terms (recital 21 of the Proposal). However, a mere incentive might not be enough. Epstein argues that ‘Like other general codes, the CESL speaks with two voices on this issue. First, under the CESL “in business-to-business transactions, traders enjoy full freedom of contract and are encouraged to draw inspiration from the Common European Sales Law in the drafting of their contractual terms.” (...) Unfortunately, the CESL then switches gears by supporting two types of coercive interventions. The first set (...) involves SME’s or small or medium business entities, which the CESL thinks suffer in their relations with larger firms. The second, and more robust, involves consumer transactions (...)’.⁵⁷

On the other hand, the Commission encourages the development of ‘European model contract terms’. The Commission pledges to ‘work closely with all relevant stakeholders to help develop ‘European model contract terms’ for specialist areas of trade or sectors of activity. A model contract which has standard terms and conditions and is available in all official languages of the European Union could be helpful for traders wishing to conclude cross-border contracts for which the Common European Sales Law is chosen. The Commission will, within three months of the entry into force of the Common European Sales Law, start this process by setting up a Group of Experts which represents in particular, the interests of the users of the Common European Sales Law. Stakeholders could contribute the necessary knowledge and expertise about commercial practices and draw up standard terms and conditions in their sector while applying lessons from their first hand practical experiences with the use of the Common European Sales Law.’⁵⁸

The plan is to promote the creation of clauses that SMEs and other companies involved in cross-border trade can use at a low cost. Said clauses would have the advantage of becoming clearer over time according to the interpretations regularly sent to the

⁵⁶ Horst Eidenmüller, ‘What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool’, *supra* note 30, 17.

⁵⁷ Richard A. Epstein, ‘Harmonization, Heterogeneity and Regulation: Why the Common European Sales Law Should Be Scrapped’, *supra* note 23, 1–2.

⁵⁸ Communication: a common European sales law to facilitate cross-border transactions in the single market, 11.

database. The idea is not new. In 2003 the European Commission made reference to initiatives in which standard contract terms had been developed specifically for international transactions, quoting the example of Orgalime, who had developed General Conditions, Model Forms and Guides to provide practical assistance for companies when they draw up different types of contracts which are commonly used in international trade.⁵⁹

If the process of creation of such 'European model contract terms' is structured carefully, this support measure may further the objectives of the Proposal. Standard contract clauses drafted by the industry might also codify those customs and practices which are in fact widely recognized and observed, thereby reducing or eliminating the costs associated with its availability and resolving conflicts between local uses. Furthermore, if the terms of such contracts are deemed acceptable by the Commission and considered reasonable and consistent with 'good commercial practice' and good faith, some of the uncertainty around of the requirements set by CESL could be eliminated.⁶⁰

5. Final remarks

The presentation of a Proposal for a Regulation on a Common European Sales Law is the last step in a long process aimed at the creation of a European contract law, seen by many as a necessary condition for the strengthening of the single market. The proposal envisages the creation of a broad set of uniform contract law rules that would become part of the national law of each Member State as a 'second regime' of contract law. The Proposal covers not only contracts between professionals and consumers but also between two professionals when at least one of them is an SME. It is expected to reduce transaction costs arising from contract law and allow companies to be able to carry out their activities in a less complex legal framework. Because of its optional nature, the application of the CESL depends on the comparative advantages that it can offer to the parties.

Costs arising from the diversity of national laws are especially heavy for SMEs, making it difficult to penetrate into foreign markets. Moreover, these companies might be as vulnerable as consumers as regards lack of information, inexperience or dependence. The CESL may be used only if the seller of goods or the supplier of digital content is a trader. Where all the parties to the contract are traders, the CESL may be used if at least one of those parties is a SME. Member States are free to decide to make the CESL available for contracts where all the parties are traders but none of them is an SME. The definition of SMEs presented by the Proposal might raise doubts, creating uncertainty in contractual relationships between traders. It would be preferable to extend the concept of the consumer, thereby avoiding the predictable conflicts over the legal definition of SME.

⁵⁹ Communication from the Commission to the European Parliament and the Council: A more coherent European Contract Law. An action plan, COM(2003) 68 final, of 12 February 2003, 22.

⁶⁰ Lisa Bernstein, 'An (Un)Common Frame of Reference: An American Perspective on the Jurisprudence of the CESL', *supra* note 40, 16.

Currently SMEs wishing to offer their products across borders are faced with 27 different contract law regimes. The question that arises is whether it is desirable or even necessary to have a twenty-eighth legal product, created by the European Union itself. Despite its good intentions, the Proposal is not able to significantly reduce any of the costs at which it is addressed, and may, on the contrary, increase some of them. The practical relevance of the proposed measures is unclear. The European Commission's argument that transaction costs will be reduced if the Proposal comes into force must be confronted with the costs associated with the creation of an optional legal regime. SMEs and consumers are only able to make rational decisions about the choice of legal rules if they can identify the differences between the law which is applicable by default and any other law they may choose.

The existence of different contractual regimes alone might not create significant barriers to cross-border business, taking into account the role played by standard contracts. The use of standard contract terms, essentially self-sufficient, renders the divergence between the default rules of the different national laws, the Vienna Convention or the CESL largely irrelevant, except when such laws are necessary for the interpretation and execution of such contracts. These standardized contracts are usually developed in strong connection with national law, so as to ensure their validity and enforceability. Therefore, the CESL will only be appealing to businesses if it offers them legal certainty in this field. It will probably take several years until the CESL is able to offer a level of safety similar to that offered by national jurisdictions. Traders are not particularly concerned with the various default rules but rather by the various mandatory rules, especially those that might affect the validity of their standard contract terms. Whether traders will opt for the CESL will thus depend in large extent on their confidence in the rules on interpretation and implementation of standard contract terms.

CESL's standards for control of unfair terms and terms not individually negotiated are more restrictive than those contained in the Vienna Convention and on national laws of many European countries. The CESL does not address adequately the problem of legal uncertainty. As the application of the CESL is voluntary, large companies will probably not opt in, continuing to choose the legal regime with which they are most familiar and that offers them greater certainty, instead of choosing a set of rules that essentially seeks to protect the weaker party. The success of CESL might, on the other hand, be stimulated by the development, in parallel, of 'European model contract terms' in specific business areas. If the process of creation of such model contract terms is structured carefully, this flanking measure may foster the aims of the CESL.

Given the financial crisis that is currently shaking Europe, the European Commission seems eager to implement the CESL as a strategy to provide a 'targeted boost to growth and employment'.⁶¹ Current efforts towards the harmonization of European Contract Law might also (though such purpose is not clearly assumed) be driven by the need to compete with the United States and China, where harmonization is more advanced and apparently more successful. However, we should keep in mind that the European legal tradition is quite distinct from that of its economic rivals. On the other hand, any effort

⁶¹ Communication from the Commission 'A roadmap to stability and growth', COM(2011) 669 final, of 12 October 2011, 5–6.

of harmonization in such a vital area for the single market cannot be made at the expense of accuracy and without properly considering the different facets of the problem. Finally, it should also be borne in mind that the creation of a harmonized legal regime does not necessarily lead to a less complex legal system. Costs associated with moving to a new regime might well be higher than the gains of an illusory simplification.

CAN THE COMMON EUROPEAN SALES LAW DO WITHOUT THE DEFINITION OF AN SME?

Sonja Kruisinga*

1. Introduction

Party autonomy is at the heart of contract law. Freedom of contract is, however, not unlimited. Very often, the law will provide protection for weaker parties, such as consumers, employees and tenants. Small and medium-sized enterprises (SMEs) are typically excluded from weaker party protection.¹ However, when the European Commission published its Proposal for a Regulation on a Common European Sales Law (hereafter referred to as the Regulation on CESL),² a new distinction was introduced between SMEs and other enterprises. The Regulation on CESL defines an SME in Article 7 as ‘a trader which (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million (...)’. This paper aims to discuss this distinction and its rationale. The definition of an SME in the proposed Regulation will be compared to those provisions of private law in the Netherlands which also contain quantitative criteria to determine whether an enterprise may be qualified as a small or a large enterprise. After an introduction to the background of the Regulation on CESL (section 2), this paper will introduce the definition of an SME in the Regulation on CESL (section 3). Secondly, the distinctions used in the private law of the Netherlands will be illustrated (section 4). Finally, a conclusion will be drawn concerning the feasibility of the definition of an SME in the Regulation on CESL.

* Sonja Kruisinga is Associate Professor of Company and Commercial Law at the Molengraaff Institute for Private Law of Utrecht University.

¹ See M.W. Hesselink, SMEs in European Contract Law, Centre for the Study of European Contract Law Working Paper Series No. 2007/03 of 2007 (available at: ssrn.com/abstract=1030301), p. 5, who states that ‘(n)one of the Member States has a comprehensive contract law regulation which applies exclusively to contracts where one or both parties are SMEs’.

² Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels 11 October 2011 COM(2011) 635 final.

2. Background of the Regulation on CESL

In 2001, the European Commission expressed its clear interest in European contract law and published a Communication on European Contract Law.³ This was the start of a process of extensive public consultation on the potential problems arising from the differences between the Member States' contract laws. Between 2005 and 2009, a network of European contract law experts developed a Draft Common Frame of Reference on the basis of comparative law research. The European Commission examined several options as to how to ease cross-border transactions by making contract law more coherent within the European Union.⁴ In 2010, the European Commission decided to set up an Expert Group in the area of European contract law. The task of this group was to assist the Commission by means of a feasibility study and in making further progress in the development of a possible future European contract law instrument.⁵ The Commission requested the Expert Group to select those parts of the Draft Common Frame of Reference which are of direct relevance to contract law and to restructure and supplement the selected content. In 2011, the Expert Group published its Feasibility Study on a future initiative on European contract law.⁶

It was on the basis of this Feasibility Study that the European Commission drafted its Proposal for the Regulation on CESL. The aim of this proposed instrument is to facilitate cross-border trade within the internal market both for business to consumer contracts and for business to business transactions.⁷ The proposed Regulation itself merely provides for the scope of application of the instrument. The provisions of the proposed instrument of European contract law (hereafter referred to as the Common European Sales Law or the CESL) are to be found in Annex I. The rules in the CESL can apply to cross-border transactions for the sale of goods, for the supply of digital content and for related services.⁸ Article 1 of the Regulation on CESL states that the rules in the CESL can be used 'where the parties to a contract agree to do so'. Thus, the CESL takes the form of an optional instrument; businesses and consumers can agree to apply the CESL to their transactions.

It is important to note that the aim of the European Commission is for the CESL to be a second contract law regime within the national law of each Member State.⁹ This

³ Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final, 11 July 2001.

⁴ Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) 348 final.

⁵ Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, (2010/233/EU); OJ L 105/109 27.4.2010.

⁶ In the version of 19 August 2011, to be found at: http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf.

⁷ See the Explanatory Memorandum, which precedes the proposed text of the Regulation on CESL.

⁸ The term 'digital content' is defined in Art. 2(j) of the Regulation on CESL, see also M. Loos, N. Helberger, L. Guibault and C. Mak, *The Regulation of Digital Content Contracts in the Optional Instrument of Contract Law*, ERPL 2011/6, p. 729–758. The term related services is defined in Art. 2(m) of the Regulation on CESL.

⁹ See the aforementioned Explanatory Memorandum, p. 6. This also clearly follows from section 9 of the Preamble to the Regulation, which states that the Regulation creates a second contract law regime within each Member State's national law for contracts within its scope.

would mean that where the parties have agreed to use the Common European Sales Law, its rules will be the only rules which are applicable to matters falling within its scope. For matters which fall within the scope of the Common European Sales Law, there would thus be no room for the application of any other national rules. In the words of Rühl: the CESL 'will not amount to an additional contract law that parties may choose in accordance with the rules of private international law. Rather, it will be a second contract law regime that will exist alongside each member state's contract law and that parties may choose if the law of a member state applies'.¹⁰ Hellwege¹¹ distinguishes three steps for the application of the CESL. First of all, it needs to be ascertained whether the law of a Member State will apply. Secondly, it will have to be determined whether the CESL can apply on the basis of Articles 4 to 7 of the Regulation on CESL. The question which needs to be answered in this respect is whether the contract in the case at hand qualifies as a contract which can be governed by the CESL. Finally, one needs to determine whether the contracting parties have reached an agreement on the application of the CESL on the basis of Articles 8 and 9 of the Regulation on CESL.

In general, one can say that the publication of the proposed Regulation has led to different responses; some authors discuss the CESL with scepticism.¹² Other authors advocate a revision of the text of the Proposal.¹³ The German Federal Bar¹⁴ recommends for B2B contracts to include the CISG into the CESL without any change and to include additional provisions on those issues which are not regulated by the CISG; this would mean that the existing case law on the basis of the CISG and all the literature on the CISG can be used in the application of parts of the CESL, which could promote legal certainty. Recently, the CISG Advisory Council stated in its Declaration entitled 'The CISG and Regional Harmonization' that 'the existence of a global and a regional sales law, in addition to the two national laws of the contracting parties, would certainly have a complicating impact on the pre-contractual process'.¹⁵ Both the UK Law Commission and the European Law Institute (hereafter the ELI) have reviewed the text of the Proposal in a critical and constructive manner and have suggested a number of revisions.¹⁶

¹⁰ G. Rühl, *The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?*, Maastricht European Private Law Institute Working Paper 2012/5, p. 2 to be consulted at: www.ssrn.com.

¹¹ P. Hellwege, *Die Geltungsbereiche des UN-Kaufrechts und des Gemeinsamen Europäischen Kaufrechts im Vergleich*, IHR 2012/5, p. 185.

¹² See for example, P. Mankowski, *CESL – who needs it?*, IHR 2012/2, p. 45 ff.

¹³ See for example, B. Piltz, *The Proposal for a Regulation on a Common European Sales Law and more particular its Provisions on Remedies*, IHR 2012/4, p. 133 ff.

¹⁴ See *Stellungnahme der Bundesrechtsanwaltskammer* IHR 2012/3, p. 53 and B. Piltz, *The Proposal for a Regulation on a Common European Sales Law and More Particular its Provisions on Remedies* IHR 2012/4, p. 133. A similar comment was made by O. Lando, *Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law* ERPL 2011/6, p. 722.

¹⁵ CISG-AC Declaration No. 1, *The CISG and Regional Harmonization*, Rapporteur: Professor Michael Bridge, London School of Economics, London, United Kingdom. Adopted by the CISG-AC following its 16th meeting, in Wellington, New Zealand, on Friday, 3 August 2012.

¹⁶ Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, approved by the ELI Council as an official Statement of the ELI on 7 September 2012, to be consulted at: www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_

3. The definition of an SME in the Regulation on CESL

3.1. *Defining an SME*

The European Commission stated in section 21 of the “to the draft Regulation on CESL that in order to tackle the problems of the internal market ‘in a targeted and proportionate fashion’ the proposal should focus on ‘parties who are currently dissuaded from doing business abroad by the divergence of national contract laws’. Therefore, the instrument should cover all business-to-consumer contracts and contracts between traders where at least one of the parties is a small or medium-sized enterprise.¹⁷ Article 7(1) of the Regulation on CESL provides that the Common European Sales Law may only be used if the seller of the goods or the supplier of digital content is a trader. The same provision continues to state that, where all the parties to a contract are traders, the CESL may be used if at least one of those parties is an SME. Hellwege¹⁸ correctly notes that it is probable that the Commission intended to provide that if both contracting parties are traders, the CESL may *only* be applied if at least one of those is an SME. Thus, if both contracting parties are traders, the CESL may in principle only be used when at least one of them is an SME. The Regulation on CESL allows the Member States to make the CESL available for contracts where all parties are traders but none of them is an SME. It remains unclear why two larger traders would not have the option to choose the application of the CESL. Of course, they can agree to insert the provisions of the CESL in their contract. However, it will depend on the applicable rules of conflict of laws whether such choice will be allowed.¹⁹

The Regulation on CESL defines an SME in Article 7 as “a trader which (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million”. Thus enterprises qualify as an SME if they fulfil the maximum ceiling for staff headcount and either the turnover ceiling or the balance sheet ceiling. According to Article 2(e) of the Regulation on CESL, a trader is any natural or legal person who is acting for purposes relating to that person’s trade, business, craft or profession. Thus, it seems that where the buyer is a non-profit-making entity, such as a charity, an association, a foundation or a government body, the CESL cannot be applied. Why these parties were excluded from the scope of application

European_Sales_Law.pdf. The report by the UK Law Commission, An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government, November 2011 can be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf.

¹⁷ It is important to note that the definition of a consumer in Art. 2(f) of the Regulation on CESL is very strict; a consumer only means a natural person who is acting for purposes which are (completely) outside that person’s trade, business, craft, or profession; also see M.B.M. Loos, De algemene voorwaarden-regeling in het voorstel voor een Gemeenschappelijk Europees kooprecht: een vergelijking met het Nederlandse recht, NTBR 2012/24. This means that any natural person who buys a product for both business and private purposes will not be regarded as a consumer but as a trader.

¹⁸ P. Hellwege, Die Geltungsbereiche des UN-Kaufrechts und des Gemeinsamen Europäischen Kaufrechts im Vergleich, IHR 2012/5, pp. 182–183.

¹⁹ See also A.L.M. Keirse, S.A. Kruisinga and M.Y. Schaub, Nieuws uit Europa: Twee nieuwe wetgevingsinstrumenten: de Richtlijn Consumentenrechten en het gemeenschappelijk Europees kooprecht Contracteren 2012/1, pp. 21/22.

of the Regulation on CESL, and will thus not be allowed to choose the application of the CESL to their contracts, remains unclear. The European Law Institute²⁰ has noted in its recent Statement on the proposed Regulation that this requires ‘a trader who wishes to sell under the CESL to ascertain, in each case where a customer is not a natural person, whether that customer is a profit or non-profit making entity. This would cause, without any justification, an unnecessary degree of complexity and uncertainty, in particular in cross-border settings and for mass contracts’. There seems to be no reason why such non-profit organisations should not be entitled to freely choose the application of the CESL in their cross-border contracts.

Although the definition of an SME is based on a Commission Recommendation from 2003 concerning the definition of micro, small and medium-sized enterprises,²¹ the insertion of this definition in the Regulation on CESL has been heavily criticized in the legal literature. Heidemann²² noted that ‘providing stifling definitions of contractual parties such as SMEs should be avoided’. Hellwege²³ stated that SMEs have been defined ‘auf nicht unproblematische Weise’. According to DiMatteo²⁴ the ‘most controversial concept found in CESL is its distinction of large businesses from small-to-medium sized businesses’. One of the reasons to criticize the definition of an SME is that it is based on a Recommendation which has a public law character.²⁵ Heidemann²⁶ states that ‘(i)t is regrettable to see an intrusion of the spirit of regulatory and public law into a genuinely private law sector’.

²⁰ Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, approved by the ELI Council as an official Statement of the ELI on 7 September 2012, p. 19, to be consulted at: www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf.

²¹ This clearly follows from section 21 of the preamble to the Regulation on CESL which states that the CESL should cover all contracts between traders where at least one of the parties is an SME drawing upon Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.05.2003, p. 36).

²² M. Heidemann, ‘European Private Law at the Crossroads: The Proposed European Sales Law’, ERPL 2012/4, p. 1138.

²³ P. Hellwege, *Die Geltungsbereiche des UN-Kaufrechts und des Gemeinsamen Europäischen Kaufrechts im Vergleich*, IHR 2012/5, pp. 180–186, on p. 183.

²⁴ L.A. DiMatteo, *The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC*, in: U. Magnus (ed.), *CISG vs. Regional Sales Law Unification*, Munich: Sellier European Law Publishers 2012, p. 38.

²⁵ The public law character of the Recommendation is illustrated in the Report from the European Commission on the implementation of the Commission Recommendation (2003/361/EC) of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, Brussels 21 December 2006, C(2006)7074. See also the Commission Staff Working Document on the implementation of the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, Brussels, 7 October 2009 SEC(2009) 1350 final which states that the Commission Recommendation concerning the definition of micro, small and medium-sized enterprises of 6 May 2003 is mandatory for national State aid schemes and Community programmes.

²⁶ M. Heidemann, *European Private Law at the Crossroads: The Proposed European Sales Law*, ERPL 2012/4, p. 1135.

The choice of the European Commission to use this definition in order to limit the scope of application of the Regulation on CESL leaves numerous questions unanswered. Before addressing these issues, it will first be illustrated that the importance of the definition of an SME should not be overestimated. This clearly follows from the possibility for Member States to make the CESL available for contracts where all parties are traders but none of them is an SME (Article 13(b) of the Regulation on CESL). What are the consequences of such a decision by a Member State? What will happen if both contracting parties are from states which have not taken such a decision, but the contract contains a choice of law clause referring to the law of a state which has taken such a decision? The UK Law Commission²⁷ rightly pointed out that if one Member State exercises the option under Article 13(b) of the Regulation on CESL to extend the CESL to larger businesses, every large business in Europe could apply the CESL to its contracts, as incorporated in the law of that Member State if the contracting parties choose the law of this Member State. Thus, the CESL can be applied even if both traders are from a Member State which has not used the option in Article 13(b) of the Regulation on CESL. Thus even though the initial motive of the Commission for the introduction of this Regulation was the protection of SMEs and the improvement of the internal market, this limitation will no longer be of any relevance if one of the Member States decides to make the CESL available for contracts where all parties are traders but none of them is an SME.

3.2. *Questions which were left unanswered concerning the definition of an SME*

The choice of the European Commission to insert the aforementioned definition of an SME in order to limit the scope of application of the Regulation on CESL leaves numerous questions unanswered. First of all, it is not clear when an SME has to comply with the said requirements. Will it be sufficient if an enterprise qualifies as an SME at the time of the conclusion of the contract? Secondly, the definition may give rise to some practical problems when applying it.

As to the first issue, it may be that the European Commission intended to provide that a trader will only qualify as an SME if it complies with the said requirements of Article 7 of the Regulation at the time of the conclusion of the contract. However, as this has not been clearly provided for in the Regulation, disputes may arise on this issue. Especially if a contract arrangement proves to be very successful, both companies grow rapidly and continue to use the same contract without rethinking its terms, there is a danger that the original choice of the CESL would become invalid because none of the parties is an SME.²⁸ If a dispute were to arise, it might be difficult to decide which law

²⁷ Report by the UK Law Commission, *An Optional Common European Sales Law: Advantages and Problems*, Advice to the UK Government, November 2011 (to be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf), pp. 88–89. See also P. Hellwege, *Die Geltungsbereiche des UN-Kaufrechts und des Gemeinsamen Europäischen Kaufrechts im Vergleich*, IHR 2012/5, p. 185.

²⁸ Report by the UK Law Commission, *An Optional Common European Sales Law: Advantages and Problems*, Advice to the UK Government, November 2011 (to be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf), p. 89.

applies. Busch and Domröse²⁹ have rightly concluded that the draft Regulation ‘disadvantages successful and growth-oriented SMEs selling to other businesses: The more successful they are, the sooner they will grow out of the field of application of the CESL’.

Although the definition of an SME is based on a Commission Recommendation from 2003 concerning the definition of micro, small and medium-sized enterprises,³⁰ the insertion of this definition in the Regulation on CESL is problematic for a number of reasons. First of all, Annex I to the Commission Recommendation of 6 May 2003 states in Article 4 that the data to apply to the headcount of staff and the financial amounts are those relating to the latest approved accounting period.³¹ This would mean that a company can be regarded as an SME as long as it complied with the said criteria in its latest approved accounting period. These data are taken into account from the date of the closure of the accounts. Where, at the date of the closure of the accounts, an enterprise finds that, on an annual basis, it has exceeded or fallen below the headcount or financial ceilings, this will not result in the loss or acquisition of the status of SME unless those ceilings are exceeded over two consecutive accounting periods.

Would it be the intention of the European Commission to apply this provision also with respect to the scope of application of the CESL? I would assume so as section 21 of the Preamble to the Regulation on CESL refers to ‘an SME drawing upon Commission Recommendation 2002/361’. It would also be a pragmatic solution for defining an SME. One may wonder whether it was also the intention of the European Commission to apply the aforementioned two-year period for the status of SME when defining an SME in the context of the Regulation on CESL. This would certainly increase legal certainty. It may, however, become complex for a prospective contracting party to ascertain whether its counterparty qualifies as an SME.

In addition, Article 5 of the Annex to the Recommendation provides that in order to ascertain whether a trader employs fewer than 250 persons, one should count the number of annual working units, i.e. the number of persons who worked full time within the enterprise in question during the entire reference year.³² Thus, part-time

²⁹ C. Busch and R. Domröse, *From a Horizontal Instrument to a Common European Sales Law*, *Journal of European Consumer and Market Law* 2012, p. 51.

³⁰ This clearly follows from section 21 of the preamble to the Regulation on CESL which states that the CESL should cover all contracts between traders where at least one of the parties is an SME drawing upon Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.05.2003, p. 36).

³¹ Article 4 of the Annex to the Recommendation provides: ‘(1) The data to apply to the headcount of staff and the financial amounts are those relating to the latest approved accounting period and calculated on an annual basis. They are taken into account from the date of closure of the accounts. The amount selected for the turnover is calculated excluding value added tax (VAT) and other indirect taxes. (2) Where, at the date of closure of the accounts, an enterprise finds that, on an annual basis, it has exceeded or fallen below the headcount or financial ceilings stated in Article 2, this will not result in the loss or acquisition of the status of medium-sized, small or microenterprise unless those ceilings are exceeded over two consecutive accounting periods. (3) In the case of newly established enterprises whose accounts have not yet been approved, the data to apply is to be derived from a bona fide estimate made in the course of the financial year.’

³² Article 5 of the Annex to the Recommendation provides: ‘The headcount corresponds to the number of annual work units (AWU), i.e. the number of persons who worked full-time within the enterprise in

staff are counted as part employees and seasonal staff only count for the proportion of the year. As rightly pointed out by the UK Law Commission this can be a complex sum to calculate.³³ Article 6 of the Annex to the Recommendation provides that the data of linked enterprises and of partner enterprises will be added to the data of the company in question. In doing so, the Recommendation introduces complex rules in Article 3 of the Annex to the Recommendation to distinguish in this respect between autonomous and linked enterprises.³⁴ Thus, if the European Commission intends to use these criteria in the definition of an SME in the Regulation on CESL, it may be complex to determine whether a trader will qualify as an SME.

Finally, one may wonder which is the relevant exchange rate to apply. Article 7 of the Regulation on CESL provides that for an SME which has its habitual residence in a Member State whose currency is not the euro, or in a third country, the amounts referred to in Article 7 should be the equivalent amounts in the currency of that Member State or third country. Which exchange rate has to be used in this respect? Is this the exchange rate of the date of the conclusion of the contract, or the exchange rate of the date on which the annual accounts were filed? As the UK Law Commission³⁵ correctly points out: '(i)n a world of financial instability, this could become an important issue'.

Thus, a large enterprise would, before accepting an order placed by another enterprise, have to check whether the particular customer satisfies the definition of an SME. In the words of Hellwege³⁶ SMEs are defined in a not unproblematic way because of 'der mangelnden Erkennbarkeit für den Vertragspartner (...) über ihre Mitarbeiterzahl und ihren Jahresumsatz bzw. ihre Jahresbilanzsumme'. The European Law Institute³⁷ argued in its recently published Statement that for that reason the restriction to SMEs should be abandoned. It stated that the criteria in Article 7 of the Regulation on CESL 'are complex

question or on its behalf during the entire reference year under consideration. The work of persons who have not worked the full year, the work of those who have worked part-time, regardless of duration, and the work of seasonal workers are counted as fractions of AWU. The staff consists of: (a) employees; (b) persons working for the enterprise being subordinated to it and deemed to be employees under national law; (c) owner-managers; (d) partners engaging in a regular activity in the enterprise and benefiting from financial advantages from the enterprise. Apprentices or students engaged in vocational training with an apprenticeship or vocational training contract are not included as staff. The duration of maternity or parental leaves is not counted.'

³³ Report by the UK Law Commission, *An Optional Common European Sales Law: Advantages and Problems*, Advice to the UK Government, November 2011 (to be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf), p. 89.

³⁴ Report by the UK Law Commission, *An Optional Common European Sales Law: Advantages and Problems*, Advice to the UK Government, November 2011 (to be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf), p. 89.

³⁵ Report by the UK Law Commission, *An Optional Common European Sales Law: Advantages and Problems*, Advice to the UK Government, November 2011 (to be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf), p. 89.

³⁶ P. Hellwege, *Die Geltungsbereiche des UN-Kaufrechts und des Gemeinsamen Europäischen Kaufrechts im Vergleich*, IHR 2012/5, pp. 180–186, on p. 183.

³⁷ Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, approved by the ELI Council as an official Statement of the ELI on 7 September 2012, pp. 18–19, to be consulted at: www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf.

and pose particular difficulties for businesses with more than one branch or establishment. A seller would have to ask the customer to provide information such as the annual turnover, balance sheet, and number of employees, which would be difficult to operate and cause embarrassment and great uncertainty as to whether or not the CESL applies to a contract.' From the reactions by the UK Law Commission and the European Law Institute, it clearly follows that it may be complex to determine whether, in a particular contract, the contracting parties will be allowed to choose the application of the CESL.³⁸

4. A comparison: the definitions of small and large enterprises in private law in the Netherlands

In order to assess the implications of Article 7 of the Regulation on CESL, it is interesting to compare the requirements of this provision with the existing provisions in national law using similar criteria. The private law of the Netherlands offers two striking examples of provisions which define small and large enterprises. Even though their function differs extensively from that of the definition of Article 7 of the Regulation, as will be illustrated *infra*, a comparison may be illustrative. On the basis of this comparison, one can try to estimate whether any difficulties will arise in the application of the definition of Article 7 of the Regulation. The provisions mentioned are to be found in Article 6:235(1) of the Netherlands Civil Code (BW) on the use of standard terms and Article 2:153/263 of the Netherlands Civil Code on the so-called Structure Regime (in Dutch: *structuurregeling*), which is the mandatory corporate governance regime for larger companies. Both will be addressed respectively in sections 4.1 and 4.2.

4.1. Large companies within the meaning of Article 6:235(1) of the Netherlands Civil Code

With respect to the use of standard terms, contract law in the Netherlands distinguishes between SMEs and larger enterprises. Articles 6:233 and 234 BW provide in which circumstances a clause in the general terms and conditions may be nullified. These provisions apply to consumers and SMEs but not to large enterprises. Article 6:235(1) BW³⁹ provides that so-called large contracting parties cannot rely on the grounds to annul particular provisions from the standard terms on the basis of Articles 6:233 and 234 BW. Large enterprises within the meaning of Article 6:235(1) BW are, briefly stated,

³⁸ See also H. Eidenmüller, N. Jansen, E.M. Kieninger, G. Wagner and R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, JZ 2012, p. 270.

³⁹ Art. 6:235 of the Netherlands Civil Code adds that the grounds for nullification referred to in the aforementioned provisions may not be invoked by '(a) a legal person referred to in Article 360 of Book 2 [of the Dutch Civil Code] which, at the time of entry into the contract, has recently published its annual accounts or a legal person in respect of which, at that time, Article 403, paragraph 1 of Book 2 has recently been applied; (b) a party to which the provision in subparagraph (a) does not apply, if, at the aforementioned time, fifty or more persons work for it or if, at that time, a declaration pursuant to the *Handelsregisterwet 2007* (Commercial Registry Act 2007) shows that fifty or more persons work for it', as translated by H. Warendorf, R. Thomas and I. Curry-Sumner, *The Civil Code of the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2009.

(a) those legal persons which at the time of the conclusion of the contract have recently published their annual accounts as well as (b) other contracting parties if at the time of the conclusion of the contract fifty or more persons work for them. As soon as an enterprise falls within the category of Article 6:235(1)(a) or (b) BW, that company cannot rely on the provisions of Article 6:233 and 6:234 BW. The CESL does not contain a provision as in Article 6:235(1) BW. This means that if a contract is governed by the CESL also a large trader can rely on the protection offered by the CESL, as for example in Article 86 CESL.⁴⁰

The provision in Article 6:235(1) BW was introduced as such larger counterparties do not need the special protection against standard terms which the provisions in Articles 6:233 and 234 BW offer. The application of these provisions in such cases would imply an undesirable limitation on the freedom of contract.⁴¹ At the time when this provision was introduced, it was noted that it was very important that it can easily be determined whether or not the provision in Article 6:235(1) BW would apply.⁴² Therefore, Article 6:235(1) BW does not provide that a company will qualify as 'large' if the company is under the obligation to publish its annual accounts, but instead it states that a company is considered to be 'large' if it has *in fact* published its annual accounts.⁴³ Secondly, contracting parties in trade and industry tend to be aware of the number of employees at the other party's enterprise, which is sufficient for this provision to apply.⁴⁴ In addition, it was noted that the number of employees will generally also be known from the statement on the basis of the *Handelsregisterwet* (the Commercial Registry Act).⁴⁵

Thus, it is in the interest of the party (A) using standard terms that it can rely on Article 6:235(1) BW and state that the other party (B) cannot annul A's standard terms, because B has more than fifty workers. The party using standard terms (A) bears the burden of proof that the criteria in Article 6:235(1) BW have been complied with.⁴⁶ The measure of protection also clearly follows from the fact that if the Commercial Registry states that the enterprise (of B) has fewer than 50 workers, the user of the standard terms (A) may prove that the actual number of workers (at B) is higher. In that case, the actual number of workers is decisive in the application of Article 6:235(1) BW. However, if the Commercial Registry states that the number of workers (at B) is higher than fifty, the

⁴⁰ See M.B.M. Loos, De algemene voorwaarden-regeling in het voorstel voor een Gemeenschappelijk Europees kooprecht: een vergelijking met het Nederlandse recht, NTBR 2012/24.

⁴¹ TK 1984/1985, 16 983, Invoeringswet Boeken 3, 5 en 6 van het nieuwe Burgerlijk Wetboek (tweede gedeelte) (algemene voorwaarden), no. 33 Amendement van het lid Korthals 24 January 1985.

⁴² TK 1984/1985, 16 983, Invoeringswet Boeken 3, 5 en 6 van het nieuwe Burgerlijk Wetboek (tweede gedeelte) (algemene voorwaarden), no. 40 Gewijzigde amendementen van het lid Salomons ter vervanging van die gedrukt onder no. 27.

⁴³ See M.B.M. Loos, Algemene voorwaarden, The Hague: Boom Juridische Uitgevers 2001, p. 24. This part of the provision was – convincingly – criticized by H.N. Schelaas, Algemene voorwaarden in handelstransacties, Deventer: Kluwer 2011, p. 18.

⁴⁴ TK 1984/1985, 16 983, Invoeringswet Boeken 3, 5 en 6 van het nieuwe Burgerlijk Wetboek (tweede gedeelte) (algemene voorwaarden), no. 40 Gewijzigde amendementen van het lid Salomons ter vervanging van die gedrukt onder no. 27, p. 2.

⁴⁵ On the basis of Art. 11 (heading and under a) of the *Handelsregisterbesluit* 2008 an enterprise (*onderneming*) has to publish in the Commercial Registry the number of persons working for it.

⁴⁶ See M.B.M. Loos, Algemene voorwaarden, The Hague: Boom Juridische Uitgevers 2001, p. 24.

party using standard terms (A) can rely on Art. 6:235(1) BW as it may rely on this Registry. As the other party (B) left the number of workers unchanged, it should bear any risks attached thereto.

It was also noted, at the time when this provision was introduced, that no second, financial criterion was sought to be introduced as such a criterion might be complex to apply in practice.⁴⁷ A number of reasons were stated why such a criterion was not being introduced. First of all, different from the number of employees, the annual turnover or the annual balance sheet is not always known by the other contracting party. Secondly, the annual turnover and the annual balance sheet have not always been published. For example, the Dutch *vennootschap onder firma* is under no obligation to publish its annual turnover or its annual balance sheet. The final objection against using the annual turnover was that for foreign companies there was – in the 1980s – an additional drawback. In order not to make these companies too dependent on the whimsical course of the exchange rates, their annual accounts or turnover would have to be converted against the exchange rate on the annual accounts or balance sheet, which date did not have to be published.⁴⁸ Even though the introduction of the euro has solved this issue in some respects, it may still play a role concerning foreign currencies.

Even before this provision entered into force, it had already been heavily criticized. Hartkamp⁴⁹ stated that there is no justification for this exception for larger companies as there is practically no type of enterprise that will not suffer from onerous standard terms. Also later on, scholars have argued that the criteria to determine whether an enterprise will be regarded as a large enterprise are somewhat arbitrary, especially because it does not concern full-time jobs, but merely persons, including temporary workers and part-time employees.⁵⁰ Thus, a small company with numerous part-time employees will qualify as ‘large’, whereas a company which only has full-time employees will need less employees in total. The effect of these provisions is, however, different from that of Art. 7 of the Regulation on CESL. Article 6:235 BW merely provides whether protection is granted to a larger company, whereas Article 7 of the Regulation on CESL will determine the scope of application of the Regulation.

4.2. *Large companies within the meaning of Articles 2:153 and 263 of the Netherlands Civil Code*

Another example within the Netherlands Civil Code in which quantitative criteria are used to define a large company can be found in the provisions on company law. The two

⁴⁷ TK 1984/1985, 16 983, Invoeringswet Boeken 3, 5 en 6 van het nieuwe Burgerlijk Wetboek (tweede gedeelte) (algemene voorwaarden), no. 40 Gewijzigde amendementen van het lid Salomons ter vervanging van die gedrukt onder no. 27.

⁴⁸ TK 1984/1985, 16 983, Invoeringswet Boeken 3, 5 en 6 van het nieuwe Burgerlijk Wetboek (tweede gedeelte) (algemene voorwaarden), no. 40 Gewijzigde amendementen van het lid Salomons ter vervanging van die gedrukt onder no. 27, p. 4.

⁴⁹ A.S. Hartkamp, Wet algemene voorwaarden, AA 36 (1987) 11, pp. 710–716, in particular p. 714.

⁵⁰ H.N. Schelhaas, Algemene voorwaarden in handelstransacties, Deventer: Kluwer 2011, p. 18 and M.B.M. Loos, Algemene voorwaarden, The Hague: Boom Juridische Uitgevers 2001, p. 25.

most important legal forms of companies in the Netherlands are the so-called *Naamloze Vennootschap* (NV) (a public limited company) and *Besloten Vennootschap* (BV) (a private company with limited liability). Articles 2:153 and 263 of the Netherlands Civil Code provide that if a BV or NV complies with three specific requirements, it will be a 'large company'. If a company qualifies as a large company, it will be mandatory for the company to have a Supervisory Board (*raad van commissarissen*). In addition, a special regime will apply to the organisation of the company. This means that important rights which are normally granted to the General Meeting of Shareholders will be granted to the Supervisory Board. For example, the Supervisory Board will appoint the members of the Board of Directors and for certain transactions, the approval of the Supervisory Board will be required.⁵¹ The provisions of this so-called Structure Regime are to be found in Articles 2:158–164 BW for the *Naamloze Vennootschap* and in Articles 2:268–274 BW for the *Besloten Vennootschap*.

To put it succinctly, the criteria for a large company within the meaning of Articles 2:153(2) and 263(2) BW are: (a) according to the balance sheet the sum of the issued capital of the company and its reserves amount to €16 million, (b) the company has established a works council pursuant to a legal obligation *and* (c) the company and its dependent companies normally employ at least one hundred employees in the Netherlands.⁵² Thus, these three criteria all have to be complied with for a company to qualify as a large company. However, compliance with these criteria is by no means decisive. First of all, there are numerous exceptions to the rule.⁵³ It would, however, go beyond the scope of this paper to discuss all these exceptions. Secondly, the provisions in Articles 2:153 and 263 BW in fact only require a company which complies with the said criteria to lodge a statement with the Commercial Registry that it meets the requirements. Such a statement needs to be lodged within two months after the adoption of the annual accounts by the General Meeting of Shareholders (Articles 2:153(1) and 263(1) BW).⁵⁴

Most important in this context is that a company will only qualify as a large company within the meaning of the aforementioned provisions if such statement has been registered for a period of three consecutive years (Articles 2:154(1) and 264(1) BW). Only then will the company qualify as a large company and will it have to comply with the said requirements. If a company no longer complies with the said criteria, the aforementioned statement will be deleted. However, such deletion will only mean that the company will no longer be qualified as a large company after three years have passed after the deletion of such statement and the company has not been obliged to lodge such statement again in the meantime (Article 2:154(2) and 264(2) BW). Thus, legal certainty is safeguarded – to some extent – by the obligation to file a statement at the Commercial Registry.

⁵¹ See Arts. 2:162, 164 and 272 and 274 of the Netherlands Civil Code.

⁵² See also M.J. Kroeze, L. Timmerman and J.B. Wezeman, *De kern van het Ondernemingsrecht*, Deventer: Kluwer 2007, pp. 27–28.

⁵³ See Arts. 2:153(3) and 263(3) of the Netherlands Civil Code.

⁵⁴ A failure to comply with the requirement to lodge such statement is a criminal offence as provided for by Art. 1(4) of the *Wet Economische Delicten*.

5. Concluding remarks

It is not exactly clear what the rationale is for limiting the scope of application of the Regulation on CESL to SMEs. There seems to be no reason for such a limitation. It would be my position that the choice for the insertion of the quantitative criteria in Article 7 of the Regulation is unfortunate. A number of reasons were stated above which justify the elimination of this criterion in the Regulation on CESL. For example, as an enterprise, before accepting an order placed by another enterprise, would have to check whether the particular customer satisfies the definition of an SME. This approach creates legal uncertainty in the B2B market. Parties may have to enquire about the number of employees of their potential contracting partner in order to know whether they would be entitled to apply the CESL. Similar drawbacks and objections as were raised against the use of quantitative criteria in the Netherlands Civil Code also apply to the criteria used in the Regulation on CESL. For example, the choice for the number of employees seems arbitrary. In the wording used by the UK Law Commission:⁵⁵ '(t)he definition of an SME adds unnecessary complexity to the process'.

Although the definition of an SME is based on a Commission Recommendation from 2003 concerning the definition of micro, small and medium-sized enterprises, it is not certain whether that also means, as follows from Article 4 of this Recommendation, that where, at the date of the closure of the accounts, an enterprise finds that, on an annual basis, it has exceeded or fallen below the headcount or financial ceilings, this will not result in the loss or acquisition of the status of an SME unless those ceilings are exceeded over two consecutive accounting periods. The comparison with the Structured Regime in Dutch company law illustrates that this position would certainly increase legal certainty.

Is restricting the scope of application of the Regulation on CESL to SMEs justified? From my personal perspective, there does not seem to be any justification for restricting the use of the CESL to contracts in which one of the contracting parties is an SME. Thus, either the restriction to SMEs in the Regulation on CESL should be deleted or – at least – one of the Member States should (be requested to) exercise the option under Article 13 to extend the availability of the CESL to large businesses. Apparently, the UK Law Commission⁵⁶ might opt for the latter: '(i)f the CESL is brought in, the UK Government should consider exercising its option under Article 13 to extend the availability of the CESL to large businesses contracting between themselves' It also states that contracting parties may be well advised to use a version of the CESL which does not include Article 7, even if at first sight one of the contracting parties is an SME.

Thus, the definition introduced in the Regulation on CESL unnecessarily complicates the scope of application of an instrument which is intended to *facilitate* cross-border

⁵⁵ Report by the UK Law Commission, An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government, November 2011 (to be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf), p. 89.

⁵⁶ Report by the UK Law Commission, An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government, November 2011 (to be consulted at: http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf), p. 90.

Can the Common European Sales Law do without the definition of an SME?

trade within the internal market by offering a single uniform set of contract law rules with the same meaning and interpretation in all Member States, a Common European Sales Law. Recital 8 states that the CESL should 'represent an additional option increasing the choice available to parties and open to use whenever jointly considered to be helpful in order to facilitate cross-border trade'. The CESL can only properly serve this function if it may apply to all contracts between traders even if none of them is an SME. The restricted scope of application of the Regulation on CESL to contracts between traders if one of them is an SME will discourage businesses from opting into the CESL.

A CONSUMER LAW FOR PROFESSIONALS: RADICAL INNOVATION OR CONSOLIDATION OF NATIONAL PRACTICES?

Pieter Brulez*

‘Le droit des contrats contemporain incorpore désormais de manière systématique le facteur d’inégalité et le souci de protection.’¹

1. *P.CESL: realizing the internal market.* In October 2011 the European Commission published its ‘Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law’ (hereinafter P.CESL). The aim of the Proposal is to create an optional contract law regime or 28th contract law system which the parties to a sales contract can opt for to apply to their contract instead of their national contract law system.² Contrary to earlier initiatives taken by the Commission in the area of contract law, a limited number of specific rules that are to regulate commercial relationships in which one or more small and medium-sized enterprises (hereinafter SME) is involved,³ were incorporated in the P.CESL,⁴ alongside a more extensive body of rules which reflect

* Pieter Brulez is a PhD Candidate at the Institute for Contract Law of the University of Leuven.

¹ M. Fontaine, ‘La protection de la partie faible dans les rapports contractuels’, in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 652.

² On the notion of an optional contract law regime and the many problems related thereto, see e.g. M. Hesselink, A. Van Hoeck, M. Loos and A. Salomons, *Groenboek Europees contractenrecht: naar een optioneel instrument?*, Den Haag, Boom Juridische Uitgevers, 2011; Martijn Hesselink, ‘How to Opt into the Common European Sales Law? Brief Comments on the Commission’s Proposal for a Regulation’, *ERPL* 2012, 195–212. See also F. Von Holger, ‘Optionales europäisches Privatrecht (‘28. Modell’), *RabelsZ Bd.* 2012, 235–252. Von Holger compares the optional character of the P.CESL with earlier attempts to instore a European optional instrument in the area of company law, insurance law and intellectual property law.

³ Art. 7 D.CESL clearly stipulates that in B2B contracts the CESL will be applicable only if at least one of the contracting parties is an SME. The Article defines an SME as ‘a trader which employs fewer than 250 persons; and has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts of that Member State or third country.’

⁴ It is however erroneous to state that no protective B2B legislation currently exists at the European level. A limited number of directives have been adopted which aim at protecting the customer, irrespective of

the general law of obligations. These rules are inspired by and to a large extent copied from the Draft Common Frame of Reference (hereinafter DCFR). Underlying their insertion in the P.CESL is the belief that the existence of 27 different national sales regimes, and the transaction costs resulting from dealings with these various national laws, deters SMEs vested in one Member State from offering their goods and related services in another Member State.⁵

2. *P.CESL: protecting weaker companies?* It is believed by some that the Commission is hereby creating some kind of ‘consumer law for professionals’, meaning that the Commission is attempting to protect SMEs contracting with large enterprises (hereinafter LEs) or with other, more powerful,⁶ SMEs. This seems surprising. The number of rules which are specifically applicable to B2B contracts is limited, far more limited than is the case of B2C contracts. Also, the Preamble to the P.CESL clearly states that its SME rules mainly aim at preserving demand in the internal market. Contractual protection of SMEs against other companies is not mentioned as an express aim of the proposal. It goes without saying that the mere establishment of the internal market does not suffice to protect the weaker party in a contractual relationship.⁷ The DCFR and its preparatory

whether the customer is a consumer or another trader and irrespective of their size. See e.g. Advertising Directive, Product Liability Directive, Insurance Directive, Package Travel Directive, Credit Transfer Directive, E-commerce Directive.

⁵ See the explanatory memorandum to the Proposal. See also SME Panel Survey on the Impacts of European Contract Law, available at http://ec.europa.eu/justice/contract/files/report_sme_panel_survey_en.pdf; M. Hesselink, *SMEs in European contract law – Background note for the European Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis – Final version – 5 July 2007*, 23–25, available at www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf; Green Paper on the Review of the Consumer Acquis COM(2006) 744 final, Brussels, 8 February 2007, 4; M. Dechamps, ‘Analyse d’impact de la proposition de règlement relative au droit commun européen de la vente sur le droit applicable au contrat de consommation’, *European Journal of Consumer Law* 2012, 393–396; J. Smits, ‘Diversity of Contract Law and the European Internal Market’, *Maastricht Working Papers – Faculty of Law* 2005/9, available at <http://ssrn.com/abstract=831944>. For a diverging view, see R. Illescas Ortiz and P. Perales Viscasillas, ‘The scope of the Common European Sales Law: B2B, goods, digital content and services’, *Journal of International Trade Law & Policy* 2012, 2–4.

⁶ The notion of SME is a very heterogeneous one. Both the trader having no personnel and with an annual turnover of €1 and the trader employing 249 persons and with a turnover of €50 million are SME. It goes without saying the former and the latter SME find themselves in an unequal bargaining position and that the former SME should be protected in its dealings with the latter SME.

⁷ Critics state that the main aim of the EU has always been to safeguard the level of demand in the internal market and not so much the protection of the customer, even in B2C contracts. See, implicitly, Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, Brussels, 8 February 2007, 5–6; Consumer policy Strategy 2002–2006, COM(2002) 208 final 6. See also H. Collins, ‘Good Faith in European Contract Law’, *Oxford Journal of Legal Studies* 1994, 236–238; M. Hesselink, *SMEs in European contract law – Background note for the European Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis – Final version – 5 July 2007*, 13–14, available at www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf; M. Hesselink, ‘European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?’, *European Review of Private Law* 2007, 328–330; J. Rochfeld, ‘Du statut du droit contractuel ‘de protection de la partie faible’: les interférences du droit des contrats, du droit du marché et des droits de l’homme’, in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008,

works also do not mention the protection of weaker parties as one of its aims. Furthermore, whereas the Treaty on the Functioning of the European Union expressly proclaims consumer protection as one of the aims of the European Union,⁸ this appears not to be the case for SMEs. One can only refer to earlier statements of the European Commission, which seem to indicate that the Commission considers it desirable to offer some sort of protection to weaker companies involved in a B2B contract. In its Green Paper on the Revision of the Consumer Acquis of 2007 for example the Commission considers that ‘some businesses, such as individual entrepreneurs or small businesses may sometimes be in a similar situation as consumers when they buy certain goods or services which raises the question whether they should benefit to a certain extent from the same protection provided for consumers.’⁹

One can therefore wonder whether the P.CESL truly aims at protecting weaker companies dealing with more powerful companies, either directly or indirectly. By comparing the relevant articles of the P.CESL with the approaches taken by the Member States to the issue of inequality of bargaining power in B2B transactions this contribution will show that the P.CESL is at least indirectly capable of offering some sort of protection to the weaker company in the contracts relationship. In order to prove this, the contribution primarily focuses on another question, i.e. the question of whether protective commercial law currently exists at either the national or supranational level, or whether the idea is completely new, and if so, precisely what these national rules would look like. The national examples will show that the creation of an extensive body of rules which aims at covering the entire lifecycle of a contract, and which is to a large extent based upon a comparison of these national rules, as the P.CESL sets out to do, almost inevitably entails some form of protection for the weaker party in a B2B contract. The material scope of this contribution is limited in two respects. A first limitation is the number of legal systems that are taken into account. The text only focuses on French, Belgian, Dutch and English contract law, as well as on the relevant provisions of DCFR. These systems have been chosen because each of them represents a somewhat different approach to the protection of weaker contract parties. A second limitation is of a more substantive nature, namely that the text only takes into account traditional contract law and does not go into issues of competition law. Although competition law also addresses the issue of market power on the supply side,¹⁰ the text does not take it into consideration, as the P.CESL is only concerned with contract law as well.

843–851; S. Grundmann, ‘The Structure of European Contract Law’, *European Review of Private Law* 2001, 5220–521; Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: a Manifesto’, *European Law Journal* 2004, 655; A. Verbeke, *Negotiating (in the shadow of a) European Private Law*, Tilburg Institute of Comparative and Transnational Law Working Paper no. 2008/9, October 2008, 9–11, available at <http://ssrn.com/link/Tilburg-TICOM.html>.

⁸ Art. 169 TFEU.

⁹ Green Paper on the Review of the Consumer Acquis COM(2006) 744 final, Brussels, 8 February 2007.

¹⁰ H. Rössler, ‘Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law’, *ERPL* 2010, 743. See in detail on the impact of competition law on B2B contracts: A. Cathiard, *L’abus dans les contrats conclus entre professionnels: L’apport de l’analyse économique du contrat*, Aix-en-Provence, Aix-Marseille, 2006, 305–362.

1. Protecting the weaker party through detailed legislation

3. The notion of consumer law is often associated with a set of detailed rules, each of them having a specific and clearly delineated scope of application. The central question of the present paragraph is whether such detailed set of rules currently exists at the B2B level in the national legal orders.

1.1. *No detailed legislation specifically designed for B2B transactions*

4. *Protecting categories.* In the second half of the 20th century national legislators all across Europe introduced comprehensive sets of detailed contract law rules for the protection of the weaker party in all sorts of specific contractual relationships, such as contracts of hire, contracts for the sale and supply of goods and services, medical treatment contracts, etc. They chose to adopt a categorical approach to the issue:¹¹ each and every time national legislators focused on clear-cut categories of persons or entities which are automatically and irrefutably presumed to be in a weaker contractual position than their counterpart. Persons and entities obtain protection by the mere fact of belonging to the relevant category, even if – in reality – it is their counterpart that finds itself in a precarious situation. At the same time, protection is refused to all those who do not belong to that category, even when they are in a disadvantageous position in relation to the other contracting party.¹²

5. *Focus on the consumer category.* As far as contracts for the sale and supply of goods and services are concerned, legislators almost exclusively focused on the protection of the ‘consumer’, excluding all other persons and entities,¹³ the consumer being a natural person (sometimes also a legal person) who acquires or utilizes goods or services for purposes which are not related to his or her profession.¹⁴ A person is considered to be

¹¹ M. Hesselink, ‘European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?’, *European Review of Private Law* 2007, 327; E. Swaenepoel, *Toetsing van het contractuele evenwicht*, Antwerp, Intersentia, 2011, 19–30.

¹² E. Hondius, ‘De zwakke partij in het contractenrecht; over de verandering van de paradigma’s van het contractenrecht’, in T. Hartlief and J. Stolker, *Contractvrijheid*, Deventer, Kluwer, 1999, 391; T. Hartlief, *De vrijheid beschermd*, Oegstgeest, E.M. Meijers Instituut, 1999, 29; J. Rochfeld, ‘Du statut du droit contractuel de protection de la partie faible’: les interférences du droit des contrats, du droit du marché et des droits de l’homme’, in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 840–841.

¹³ In some Member States persons who are acquiring goods or services for mixed purposes, for both professional and business purposes, can be treated as consumers.

¹⁴ For Belgium, see Art. 2, 3° Wet 6 April 2010 betreffende de marktpraktijken en de consumentenbescherming. The notion has not been explicitly defined in French legislation. Only Art. L.311–1 Code de la consommation contains a definition – using the destination criterion – in relation to credit contracts. The vast majority of French legal doctrine and French jurisprudence seem to adhere to the same definition. See e.g. J. Calais-Auloy and H. Temple, *Droit de la consommation*, Paris, Dalloz, 2010, 7–8; Y. Picod and H. Davo, *Droit de la consommation*, Paris, Dalloz, 2005, 23. For the Netherlands, see e.g. Hoge Raad 14 September 2007, *RvdW* 2007, 793. For England, see section 12 Unfair Terms in Consumer Contract Regulations; C. Willet and D. Oughton, ‘Consumer Protection’, in M. Furmston and J. Chuah, *Commercial and consumer law*, Pearson, Edinburgh, 2004, 376–377.

acting for professional purposes if he or she conducts these activities on a regular basis and in exchange for some type of remuneration.¹⁵ In other words, consumer is someone who concludes contracts for personal, family or household purposes.¹⁶ The destination given by the recipient to the goods or services he is acquiring is clearly the decisive element.¹⁷ The European consumer directives, which were adopted parallel to national initiatives, built upon similar definitions.¹⁸ The national contract law systems and the European consumer directives have mutually influenced one another in this regard.¹⁹

Since all acts of an SME are believed to have a professional character, it is self-evident and probably superfluous to state that the destination criterion excludes SMEs from the

¹⁵ C. von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) – Full Edition*, Vol. 1, München, Sellier European Law Publishers, 2009, 91 and following.

¹⁶ C. von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) – Full Edition*, Vol. 1, München, Sellier European Law Publishers, 2009, 91 and following.

¹⁷ For Belgium, see Antwerp 30 June 2009, *NjW* 2010, 504; Gent 4 April 2007, *NjW* 2008, 174; Antwerp 12 September 2000, *TBBR* 2001, 556; Kh. Bergen 9 August 2005, *DAOR* 2006, 435; G.-L. Ballon and S. Ververken, *De wet marktpraktijken: een eerste commentaar*, Mechelen, Kluwer 2011, 20; R. Steennot, F. bogaert, D. Bruloot and D. Goens, *Wet marktpraktijken*, Antwerp, Intersentia 2010, 10; R. Steennot and S. De Jonghe, *Handboek consumentenbescherming en handelspraktijken*, Antwerp, Intersentia, 2007, 10.

For France, see J. Calais-Auloy and H. Temple, *Droit de la consommation*, Parijs, Dalloz, 2010, 9; Y. Picod and H. Davo, *Droit de la consommation*, Parijs, Dalloz, 2005, 23.

For Dutch law on consumer sales, see Art. 7:5 DCC; J. Hijma, *Assers' handleiding tot de beoefening van het Nederlands burgerlijk recht – Bijzondere overeenkomsten – Koop en ruil*, Deventer, Kluwer, 2007, no. 77.

¹⁸ Art. 2 (b) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; Art. 2 (2) Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises; Art. 1 (2) (a) Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts; Art. 2 (e) Richtlijn 98/6/EG van het Europees Parlement en de Raad van 16 februari 1998 betreffende de bescherming van de consument inzake de prijsaanduiding van aan de consument aangeboden producten; Art. 1 (2) (a) Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; Art. 2 (e) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; Art. 2 (d) Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC; Art. 2 (a) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council; Art. 2 (1) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. See also V. Luby, 'La notion de consommateur en droit communautaire: une commodité inconstante', *CCC* 2000, *Chron.*, 1.

¹⁹ E. Hondius, 'De zwakke partij in het contractenrecht; over de verandering van de paradigma's van het contractenrecht', in T. Hartlief and J. Stolker, *Contractvrijheid*, Deventer, Kluwer, 1999, 390.

scope of application of consumer legislation. The exclusion of SMEs is even further enhanced by the fact that many Member States expressly exclude legal persons from the consumer notion. It should thus be clear that, as legislators only focused on consumers and SMEs are not consumers, there is no *specific* and *detailed* legislation protecting companies contracting with more powerful companies which has the same detail as consumer legislation (with the exception of national and European regulations on commercial agency²⁰ and the Late Payment Directive)²¹. It is only in recent years that some *general* and *non-detailed* rules have been adopted (cf. *infra*). This is also the case for the DCFR: some general B2B rules were incorporated, but a detailed set of very specific rules is lacking.

1.2. Extending the consumer notion

6. *Small businesses as consumers?* The idea that only consumers find themselves in a weaker contractant position has been superseded. It is now widely recognised that businesses may also be in a weaker position.²² In the Green Paper on the Revision of the Consumer Acquis of 2007, already cited above, the European Commission considered extending the consumer notion to weaker companies. The stance taken by the Commission in this Green Paper is not new.²³ In 2005 the Law Commission of England and the Scottish Law Commission also launched a proposal to extent the scope of application of the existing unfair contract terms legislation for consumers to very small businesses.²⁴ The consumer notion is thus not as intransigent and undisputed as one might think.

7. *Focusing on usual field of business.* In many Member States the exact range of the notion was indeed subject to debate for several decennia, especially in the area of unfair contract terms regulation.²⁵ Whereas Belgium in general tends to hold on to a restrictive

²⁰ Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. For Belgium, Law 13 April 1995 'betreffende de handelsagentuurovereenkomst'. For the Netherlands, see Art. 7: 428 to 7: 455 DCC. For France, see LOI no 91-593 du 25 juin 1991 relative aux rapports entre les agents commerciaux et leurs mandants, codifiée aux Art. s L134-1 et suivants du Code de commerce. For the UK, see The Commercial Agents (Council Directive) Regulations 1993.

²¹ Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

²² M. Hesselink, 'Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the 'Consumer Rights Directive', *ERPL* 2010, 57-102.

²³ See e.g. M. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?', *European Review of Private Law* 2007, 327.

²⁴ *Unfair Terms in Contracts* (Law Com No 292, Scot Law Com No 1999, 2005) 5LC 292). See H. Beale, 'Exclusion and Limitation Clauses in Business Contracts: Transparency', in A. Burrows and E. Peel (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, 191-209.

²⁵ In most other areas of law, the definition on the basis of the destination criterion seems to excite less controversy. On consumer sales law, see e.g. J. Hijma, *Assers' handleiding tot de beoefening van het Nederlands burgerlijk recht – Bijzondere overeenkomsten – Koop en ruil*, Deventer, Kluwer, 2007, nr. 77.

interpretation,²⁶ other systems such as France and the Netherlands, and to a certain extent also England, extended the level of protection granted to consumers against unfair contract terms also to persons acting for professional purposes, but who are supposed to find themselves in a weaker contractual position than their counterparty, thereby possibly covering SMEs (insofar as the regulation on unfair contract terms may be applied to legal persons). Former French jurisprudence concerning unfair contract terms,²⁷ as well as a part of the relevant present-day English jurisprudence,²⁸ considered extending the consumer notion to natural persons (and in the case of England also to legal persons) who are acquiring goods and services which fall outside their usual field of business although having a clear professional purpose.²⁹ However, when looking at French and English law, one will see that the 'usual field of business' of a company can be interpreted restrictively or more extensively.

French courts originally held that activities fall outside of the usual field of business when they are not conducted on a regular basis and therefore do not form a constituent part of the business. So as to ascertain whether a particular activity is conducted on a regular basis, courts began focusing on the question of whether or not the acquiring actor was specialized in the area he was dealing in, and thus replaced the destination criterion by a specialization criterion.³⁰ The European Court of Justice however has always explicitly rejected the criterion in consumer matters.³¹ If a French professional was acquiring goods or services outside of its core business, and thus in an area it was not specialized in, he was considered a consumer.³² For example, a pharmacist buying a cash

²⁶ For Belgium, see Antwerp 7 April 1997, *RW* 1997–98, 505; R. Steennot and S. De Jonghe, *Handboek consumentenbescherming en handelspraktijken*, Antwerp, Intersentia, 2007, 11; G. Straetmans, 'Wie verkoper is, is geen consument – Wie consument is, is geen verkoper – Maar is daarom wie geen verkoper is, consument en wie geen consument is, verkoper?', *TBH* 2001, 694; M. Van Den Abbeele, 'Les contours de la notion de consommateur dans la loi sur les pratiques de commerces', *DCCR* 2007, 63.

For EU law, G. Straetmans, 'The consumer concept in EC law', in J. Meeusen, M. Pertegás and G. Straetmans, *Enforcement of international contracts in the EU: convergence and divergence between Brussels I and Rome I*, Antwerp, Intersentia, 2004, 295–322.

²⁷ For French law, see Cass. civ. 28 April 1987, *D.* 1988, 1; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 20 October 1992, *CCC* 1993, 21. For English law, see Court of Appeal, *R&B Customs Broker Ltd v. United Dominions Trust Ltd* [1988] 1 *All ER* 847. See also M. Chen-Wishart, *Contract law*, Oxford, Oxford University Press, 2010, 466.

²⁸ See Court of Appeal, *R&B Customs Broker Ltd v. United Dominions Trust Ltd* [1988] 1 *All ER* 847. See also *Rasbora Ltd v. JCL Marine Ltd* [1977] 1 *Lloyd's Rep* 645.

²⁹ Cass. civ. 28 April 1987, *D.* 1988, 1; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 20 October 1992, *CCC* 1993, 21.

³⁰ On the difference between the two criteria, see E. Terryn, 'Invloed van het consumentenrecht op de aannemingsovereenkomst – capita selecta: Informatieverplichtingen, onrechtmatige bedingen en overeenkomsten gesloten buiten onderneming', 6.

³¹ ECJ 14 March 1991, C-361/89, *ECR* 1991, I-1189; J. Ghestin, 'Rapport introductif', in C. Jamin and D. Mazeaud, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 11–12; G. Howells, 'Consumer concepts for a European Code', in R. Schulze (ed.) *New Features in Contract Law*, München, Sellier European Law Publishers, 2007, 121–122.

³² Cass. civ. 28 April 1987, *D.* 1988, 1; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 20 October 1992, *CCC* 1993, 21; G. Virassamy, 'Les relations entre professionnels en droit français', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 493–495.

till or a baker buying a new bakery were considered to be consumers for the purpose of these acquisitions. Although it was the French Cour de cassation that had extended the consumer notion to non-specialized professional parties, the issue evolved into an object of fierce doctrinal and jurisprudential debate. After decades of discussions on the relevant criteria, the Cour de cassation decided in 1995 that specialization in itself is not an efficient criterion and held that for a natural person to be considered a consumer with respect to a certain operation, this operation may not have 'a direct link with the professional activities' of that person.³³ It is up to the lower courts dealing with a specific case to decide whether such a direct link exists or not. Although this notion still seems to allow a wide interpretation of the consumer notion, incorporating instances where an operation only has an indirect link with professional activities (such as the pharmacist buying a cash till), it appears that in practice the French courts almost always decide that there is such direct link when a person is acting for professional purposes.³⁴ All activities which are not completely atypical for the business at hand are considered to have a direct link with his professional activities.³⁵ In other words, whereas France originally gave a restrictive interpretation to the usual field of business, it now interprets the term widely.³⁶ English courts have always given such restrictive interpretation to *the usual field of business* and only consider business operations as consumer transactions when they are truly atypical or merely incidental and exceptional for the company.³⁷ An example of an activity which is completely atypical is the case of a company of brokers buying a car for the personal use of its director. As a result, SMEs are now ready always excluded from the consumer notion. At the end of the day, the French and English approach seem to approximate the destination criterion more than one might have expected, to the great dismay of some authors.³⁸ Differences between the French and English approach on the one hand and the Belgian approach on the other exist only very exceptionally.

8. *Focusing on a combination of criteria.* Underlying the former French jurisprudence is the assumption that professional parties dealing outside of their core business always find themselves in a weaker position when acquiring goods or services from a well-

³³ See Cass. civ. 24 January 1995, D. 1995, 327; Cass. civ. 21 February 1995, CCC 1995, 84. See also Cass. civ. 5 November 1996, CCC 1997, 9; Cass. civ. 15 May 2005, Bull. civ. 2005, I, no. 135; J. Ghestin, 'Rapport introductif', in C. Jamin and D. Mazeaud, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 12–14.

³⁴ J. Calais-Auloy and H. Temple, *Droit de la consommation*, Parijs, Dalloz, 2010, 12; G. Paisant, 'A la recherche du consommateur: pour en finir avec l'actuelle confusion née de l'application du critère du rapport direct', JCP 2003, I, 121.

³⁵ C. von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) – Full Edition*, Vol. 1, München, Sellier European Law Publishers, 2009, 91–109.

³⁶ L. Leveneur, *Droit des contrats – 10 ans de jurisprudence commentée – La pratique en 400 décisions*, Paris, Litec, 2002, 71–86.

³⁷ See Court of Appeal, R&B Customs Broker Ltd v. United Dominions Trust Ltd [1988] 1 All ER 847. See also Rasbora Ltd v. JCL Marine Ltd [1977] 1 Lloyd's Rep 645; M. Chen-Wishart, *Contract law*, Oxford, Oxford University Press, 2010, 466; L. Koffman and E. MacDonald, *The Law of Contract*, Oxford, Oxford University Press, 2010, 217–219.

³⁸ See e.g. G. Raymond, 'Domaine d'application du droit de la consommation', *Juris Classeur Commercial*, Fasc. 902, 1 August 2012, no. 7–13.

organized and experienced supplier.³⁹ However, one cannot help but wonder whether this assumption is not too categorical. Indeed, a company acting outside of its core business does not always find itself at a disadvantage. In practice, a large non-specialized acquirer does find itself in a stronger economic position than a small specialized supplier.⁴⁰

Dutch contract law seems to be aware of this, as it does not seem to draw such a sharp distinction between B2C and B2B contracts as France and Belgium do, but rather focuses on the size of a company in deciding whether a company is in a consumer-like position, at least at first sight. The starting point for deciding whether a Dutch company can be treated as if it were a consumer in the sense of the unfair contract terms regulations is indeed the size of the company. Dutch contract law is the only contract law system which has thus made an explicit distinction between large companies and small and medium-sized companies.⁴¹

The Dutch Civil Code contains a general rule prohibiting unfair contract terms,⁴² a black list of contract terms which are considered unfair in all circumstances⁴³ and a grey list of contract terms which are (refutably) presumed to be unfair.⁴⁴ It so happens that the Dutch Civil Code expressly denies large enterprises the possibility to invoke the general rule on unfair contract terms against their counterparty,⁴⁵ thereby indicating that non-professional natural persons and SMEs can. A strict reading of the articles describing the black and grey list suggests that these articles can only be invoked by non-professional natural persons and not by SMEs, who are allowed to invoke only the general prohibition. Jurisprudence and legal doctrine however accept that the grey and black list *can* be used to interpret the general rule (*reflexwerking*), also in instances where these lists would normally not apply because of the capacity of the recipient parties.⁴⁶ SMEs are thus granted the possibility to invoke the black and grey list to interpret the general prohibition, but only if they are truly small and consumer-like.⁴⁷ In order to decide whether a small party has a consumer-like character the specialization criterion is eventually taken into

³⁹ G. Paisant, 'Essai sur la notion de consommateur en droit positif', *JCP* 1993, I, 3655.

⁴⁰ D. Mazeaud, 'Droit commun du contrat et droit de la consommation', in X., *Mélanges Calais-Auloy*, Paris, Dalloz, 2004, 707.

⁴¹ The definition given to LE and SMEs in Dutch law of course diverges from the definition given under the D.CESL, since the exact seizure seems to be of a rather arbitrary nature. Art. 6:235 DCC defines a large enterprise as a legal person which has made its yearly account public at the moment the contract is concluded and which employs, at that same moment, fifty persons or more. All other companies are small and medium-sized companies.

⁴² Arts. 233–234 DCC.

⁴³ Art. 236 DCC.

⁴⁴ Art. 237 DCC.

⁴⁵ Art. 6:235 DCC.

⁴⁶ E. Hondius, 'Commentaar bij artikel 236 boek 6 BW', in *Groene Serie Verbintenissenrecht*, aantekening 22; E. Hondius, 'Commentaar bij artikel 237 boek 6 BW', in *Groene Serie Verbintenissenrecht*, aantekening 54.

⁴⁷ Hoge Raad 14 September 2007, *RvdW* 2007, 793.

account,⁴⁸ but other factors are also taken into consideration.⁴⁹ In principle, large parties cannot rely on the lists. If a contractual party does not resemble a consumer, but is not to be considered a large party, then the possibility to invoke the grey and black list is limited to those parts of the list which do not specifically concern the consumer, but which aim at protecting the mutual interests and mutual confidence between the contracting parties (such as the section which prohibits a term according to which the supplier can himself access whether he has fulfilled his obligations).⁵⁰ Lower jurisprudence also has extended this reasoning on unfair contract terms to the regulation on off-premises contracts,⁵¹ but this extension is much debated.⁵²

1.3. Criticism

9. *Substantive versus procedural fairness.* The national attempts to extend detailed consumer protection to small or non-specialized businesses have been fiercely criticized by several authors, at least as far as unfair contract terms legislation is concerned.⁵³ The former French approach in particular was considered highly problematic, since it only focused on one criterion.⁵⁴ The view of these authors is that traditional consumer law focuses both on the degree of fairness respected throughout the negotiation process and on substantive fairness of the result which is eventually reached through negotiation,⁵⁵ whereas in a B2B context, legal protection should be restricted to procedural fairness in the process of concluding the contract on the one hand and the creation of requirements of business decency in the course of the execution of the contract on the other.⁵⁶ In a B2B

⁴⁸ See e.g. Hof Amsterdam 27 May 2004, *Prg.* 2004, 6249, with critical note P. Abas. For a case, where a small enterprise was refused this possibility, for acting in an area in which the company was specialized, see e.g. Hof 's-Gravenhage 1 April 2004, *Prg.* 2004, 6251, with critical note P. Abas; Kantonrechter Zupthen 25 April 2000, *Prg.* 2000, 5497, with critical note P. Abas.

⁴⁹ The level of prudence one might expect from certain categories of professionals is also taken into account. See e.g. Rechtbank Zwolle-Lelystad 13 July 2005, *NJF* 2006, 97.

⁵⁰ It mainly concerns Art. 6:236 b), c), d), h), k) and 6:237 a) to i) DCC.

⁵¹ Rechtbank Utrecht (kantonrechter) 20 January 2010, *RCR* 2010, 36; Rechtbank Rotterdam (kantonrechter) 11 January 2006, *NJF* 2006, 351.

⁵² Refusing the extension, see e.g. Hof Amsterdam 12 July 2011, *Prg.* 2011, 217, with critical note P. Ros; Rechtbank Roermond 14 December 2010, *Prg.* 2011, 61; Rechtbank 11 November 2009, LJN.BL 7301; Rechtbank Breda 12 August 2009, *Prg.* 2010, 28, with critical note P. Ros.

⁵³ An extension of consumer legislation on unfair commercial practices to B2B contracts is said to be less problematic since the rules on unfair commercial practices are far less detailed than the rules on unfair contract terms and thus leave more room for contextualization.

⁵⁴ See e.g. J. Ghestin, 'Rapport introductif', in C. Jamin and D. Mazeaud, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 14.

⁵⁵ C. Canaris, 'Wandlungen des Schuldvertragsrecht – Tendenzen zu seiner 'Materialisierung'', *AcP* 2000, 283; O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party – a comparative analysis of the constitutionalisation of contract law, with emphasis on risky financial transactions*, München, Sellier, 2007, 10–11; E. Swaenepoel, *Toetsing van het contractuele evenwicht*, Antwerp, Intersentia, 2011, 30–31.

⁵⁶ H. Beale, 'Exclusion and Limitation Clauses in Business Contracts: Transparency', in A. Burrows and E. Peel (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, 194; C. Brunner, *De billijkheid in het Nieuwe BW – Rechtsvinding onder het NBW*, Kluwer, Deventer, 1992, 92; H. Schelhaas, 'Pacta sunt servanda bij commerciële contracten: Over redelijkheid en objectieve uitleg bij handelscontracten',

contract contextualization is essential.⁵⁷ The law should not tackle the mere existence of an inequality of bargaining power between contracting companies; as it does for B2B contracts, ⁵⁸ only the abuse of such inequality in a particular case should be addressed, since one may expect of a company that it is more capable of protecting its own interests. For example the law should not prohibit the insertion of a particular contract term in a B2B contract altogether under any circumstances; it should only be checked whether the process leading up to the insertion of the term was fair. The consumer cannot and may not be considered the point of reference in B2B contracts, since business life is about taking risks. Businesses are presumed to act responsibly and not to enter into contracts lightly. If a business decides to take risks by entering into a contract which has been concluded on the basis of a fair procedure and is fully informed on the risks taken, then the law should not interfere. If all goes well, the business will make a profit; however the business will disappear if it goes wrong.⁵⁹

Consequently, many authors propose to tackle issues related to the inequality of bargaining power in B2B transactions not by means of specific and detailed rules, but by means of general and open norms which focus on the process and allow for jurisprudential differentiation in light of the specific circumstances of a case.⁶⁰ Since such norms imply

Nederlands Tijdschrift voor Burgerlijk Recht 2008, 150–160. See also mildly, M. Hesselink, *SMEs in European contract law – Background note for the European Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis – Final version – 5 July 2007*, 14–18, available at www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf.

⁵⁷ This explains why the Dutch *reflexwerking* is less problematic than the French extension of the consumer notion in the area of unfair contract terms. The Dutch approach allows for contextualization: the grey and black list are not applied automatically to a certain type of business, but only if this seems fair in light of the prevailing circumstances.

⁵⁸ ‘This example of binding the consumer to a protective role even against his own will illustrate the highly standardizing nature of European private law. Here the protection is not based on the need to balance the various interests in individual contracts, but finds its justification in the Macro-economic realization of the usual inferiority of the consumer.’ See H. Rössler, ‘Protection of the Weaker Party’, *ERPL* 2010, 739.

⁵⁹ H. Collins, ‘Good faith in European Contract Law’, *Oxford Journal of Legal Studies* 1994, 234–236; M. Fontaine, ‘La protection de la partie faible dans les rapports contractuels’, in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 621; H.W. Micklitz, J. Stuyck and E. Terryn, *Cases, Materials and Text on Consumer Law*, Oxford, Hart Publishers, 2010, 29.

⁶⁰ T. Hartlief, *De vrijheid beschermd*, Oegstgeest, E.M. Meijers Instituut, 1999, 4; E. Hondius, ‘De zwakke partij in het contractenrecht; over de verandering van de paradigma’s van het contractenrecht’, in T. Hartlief en J. Stolker, *Contractvrijheid*, Deventer, Kluwer, 1999, 392; M. Hesselink, *SMEs in European contract law – Background note for the European Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis – Final version – 5 July 2007*, 18; N. Huls, ‘Sterke argumenten om zwakke contractpartijen te beschermen’, in T. Hartlief and C. Stolker, *Contractvrijheid*, Deventer, Kluwer, 1999, 402; J. Rochfeld, ‘Du statut du droit contractuel ‘de protection de la partie faible’: les interférences du droit des contrats, du droit du marché et des droits de l’homme’, in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 837–838. Some authors have even advocated the adoption of such approach for B2C contracts, rather than maintaining the current approach of enacting more and more specific legislation. See e.g. B. Tilleman and B. du Laing, ‘Directives on consumer Protection as a Suitable Means of Obtaining a

a more subjective approach to the law, legislators are often reluctant.⁶¹ Nonetheless, it appears that over the past few decades many Member States have indeed been using such norms which derive from the general law of obligations in B2B contexts,⁶² although to a lesser extent than for B2C contracts,⁶³ thereby focusing – though not always exclusively⁶⁴ – on procedural fairness. Indeed, before the enactment of specific consumer legislation, these open norms were used to protect consumers dealing with businesses and still apply to B2C contracts in so far as no specific legislation has been enacted.⁶⁵ The abundance of protective consumer rules which legislators all over have adopted from the 1970s onwards, are often no more than a legislative specification of these norms. But by translating them into detailed hard law consumer legislation, and by combining this approach with a categorical approach to the consumer notion (cf. *supra*), the legislator has stripped these norms of their flexibility.⁶⁶

2. Protection through general principles

2.1. *Good faith, fair dealing and mutual cooperation*

10. *Protection through general principle of fairness.* Indeed, although most legislators did not adopt specific and detailed contract law rules for the protection of companies dealing with other more powerful companies, and most jurisprudential attempts to extent the scope of application of consumer law to small companies failed or met with fierce criticism (cf. *supra*), SMEs are not completely left out in the cold. In the past,

(More) Unified European Contract Law', in S. Grundmann and J. Stuyck, *An Academic Green Paper on European Contract Law*, Alphen aan den Rijn, Kluwer, 2002, 84.

⁶¹ See e.g. J. Rochfeld, 'Du statut du droit contractuel 'de protection de la partie faible': les interférences du droit des contrats, du droit du marché et des droits de l'homme', in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 840–841; G. Virassamy, 'Les relations entre professionnels en droit français', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 494–495.

⁶² D. Mazeaud, 'La protection par le droit commun', in C. Jamin and D. Mazeaud, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 33–54.

⁶³ D. Mazeaud, 'La protection par le droit commun', in C. Jamin and D. Mazeaud, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 51–54.

⁶⁴ e.g. national courts do also sometimes use the doctrine of *laesio (enormis)* to realize material fairness in a B2B context. See E. Swaenepoel, *De toetsing van het contractuele evenwicht*, Antwerp, Intersentia, 2011, 32.

⁶⁵ See Art. 4 (3) D.CESL; M. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?', *European Review of Private Law* 2007, 331.

⁶⁶ J. Drexel, 'Continuing Contract Law Harmonisation under the White Paper of 1985? – Between Minimum Harmonisation, Mutual Recognition, Conflict of Laws, and Uniform Law', in S. Grundmann and J. Stuyck, *An Academic Green Paper on European Contract Law*, Alphen aan den Rijn, Kluwer, 2002, 126–128; E. Hondius, 'The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis', *Journal of Consumer Law and Policy* 2004, 243–244; F. Willem Grosheide, 'Reflections on the Protection of the Weak Party in Dutch and EU Contract Law', in K. Boele-Woelki and W. Grosheide, *The Future of European Contract Law*, Alphen aan den Rijn, Wolters Kluwer, 2007, 247–248.

continental courts have often granted and still grant smaller companies some protection through the application of general contract law principles of fairness.⁶⁷

Whereas the continental contract law systems, as well as the DCFR, recognize a general principle of fairness, i.e. the principle of good faith and fair dealing,⁶⁸ English law is characterized by a more piecemeal approach to fairness.⁶⁹ For a long time, judicial intervention was limited to cases of fraud, deceit, misrepresentation, etc.⁷⁰ More recently, English courts reinforced the level of protection offered to the weaker party in a commercial relationship through the extensive application of several equitable doctrines.⁷¹ Nonetheless, one may state that in general English judges are far more reluctant to interfere with a contract as agreed upon by the contracting parties.⁷² In commercial contexts, English courts tend to stay strictly within the limits of only enforcing procedural fairness, while continental judges sometimes enter the area of substantial fairness.

11. Fairness as a body of good commercial practices. In a commercial context the idea of fairness is embodied by trade usages and good commercial practices: contracting parties operating in a professional capacity should respect all reasonable commercial standards of fair dealing.⁷³ These standards require that more powerful companies do not take

⁶⁷ B. Dubuisson and G. Tossens, 'Les relations entre professionnels en droit belge', in J. Ghestin and M. Fontaine, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 430–431; E. Hondius, 'De zwakke partij in het contractenrecht; over de verandering van de paradigma van het contractenrecht', in T. Hartlief and J. Stolker, *Contractvrijheid*, Deventer, Kluwer, 1999, 389; B. Lurger, 'Consumer Law – Forerunner for a Part of European contract Law Code? The Case of Austrian Consumer Law', in S. Grundmann and M. Schauer, *The Architecture of European Codes and Contract Law*, Alphen aan den Rijn, Kluwer, 2006, 211–212; J. Rochfeld, 'Du statut du droit contractuel "de protection de la partie faible": les interférences du droit des contrats, du droit du marché et des droits de l'homme', in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 836–837.

⁶⁸ See Art. III.-1:103 DCFR; Art. 1134 BCC; Art. 1134 FCC. For a comparable stance, see T. Hartlief, *De vrijheid beschermd*, Oegstgeest, E.M. Meijers Instituut, 1999, 36–37; M. Hesselink, *SMEs in European contract law – Background note for the European Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis – Final version – 5 July 2007*, 4–5, available at www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf; L. Koffman and E. MacDonald, *The Law of Contract*, Oxford, Oxford University Press, 2010, 5–6; F. Vermander, 'De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering', *TBBR* 2004, 572.

⁶⁹ N. Cohen, 'Pre-contractual Duties: Two Freedoms and the Contract to Negotiate', in J. Beatson and D. Friedmann, *Good Faith and Fault in Contract Law*, Oxford, Clarendon Press, 1995, 28; R. Zimmermann and R. Whittaker (eds.), *Good Faith in European Contract Law*, Cambridge, Cambridge University Press, 2000, 39–48.

⁷⁰ J. Cartwright, *Contract Law*, Oxford, Hart Publishing, 2007, 196.

⁷¹ P. Atiyah, *Essays on Contract*, Oxford, Clarendon Press, 1986, 329–330. See also *Euro London Appointments Ltd v Claessens International Ltd* [2006] WL 901069, no. 26; E. McKendrick, *Goode on Commercial Law*, Penguin Books, London, 2010, 103–107; C. Miller, B. Harvey and D. Parry, *Consumer and Trading Law – Text, Cases and Materials*, Oxford, Oxford University Press, 1998, 553–565.

⁷² See G. Howells and S. Weatherill, *Consumer Protection Law*, Ashgate, Aldershot, 2005, 263–264.

⁷³ Mannai Investment Co Ltd [1999] AC 749; C. Jarrosson, 'La bonne foi, instrument de moralisation des relations économiques internationales', in X., *L'éthique dans les relations économiques internationales. Hommage à Philippe Fouchard*, Paris, Pendone, 2006, 185.

advantage of the weaker economic situation of their counterparty.⁷⁴ Not surprisingly, observance of good faith and fair dealing is considered one of the basic values underlying both the UNIDROIT Principles of International Commercial Contracts⁷⁵ and the Vienna Sales Convention.⁷⁶ Some authors even consider the principle of good faith as the leading principle of the *lex mercatoria*.⁷⁷

12. *Fairness as cooperation.* Fairness provides for a general rule of conduct which parties have to adhere to, both in the process of concluding and executing a contract.⁷⁸ Fairness thus obliges contracting parties to behave solidary, honestly and in mutual cooperation.⁷⁹ Even English courts often read an implied term of cooperation in a contract.⁸⁰ Contracting parties are obliged to cooperate with one another in the different stages of the contracting process. Whereas most national contract law systems do not mention the principle of mutual cooperation, the principle being of a mere jurisprudential nature, the P.CESL explicitly recognizes the obligation in its article 3: 'The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.' National courts have translated the idea of mutual cooperation into more specific, though still open and flexible, rules which are intended to restore the equality of bargaining power between contracting parties.⁸¹

⁷⁴ J. Rochfeld, 'Du statut du droit contractuel "de protection de la partie faible": les interférences du droit des contrats, du droit du marché et des droits de l'homme', in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 835–836.

⁷⁵ Art. III-1:103 DCFR; International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, available at www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf, 19; P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 6.

⁷⁶ Art. 7 Vienna Sales Convention.

⁷⁷ P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 6.

⁷⁸ A. Hartkamp and C. Sieburgh, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, 3, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 333.

⁷⁹ A. Cathiard, *L'abus dans les contacts conclus entre professionnels: l'effort de l'analyse économique du contrat*, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2006, 373–470; R. Demogue, *Traité des obligations en général*, Tome VI, Paris, Rousseau & Cie, 1931, 9; C. Jamin, 'Plaidoyer pour le solidarisme contractuel', in X., *Le contrat au début du XXI^e siècle – Mélanges offerts à Jacques Ghestin*, Paris, LGDJ, 2001. See also International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 149–150; M. Fontaine, 'La protection de la partie faible dans les rapports contractuels', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 637; C. Jamin, 'Plaidoyer pour le solidarisme contractuel', in G. Goubleaux, *Etudes offertes à Jacques Ghestin – Le contrat au début du XXI^e siècle*, Paris, LGDJ, 2001, 441–472; P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 3; D. Mazeaud, 'La protection par le droit commun', in C. Jamin and D. Mazeaud, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 34; H. Schoordijk, 'Het gebruik van open normen naar Belgisch en Nederlands privaatrecht', in E. Dirix, W. Pintens, P. Senaevé and S. Stijns, *Liber amicorum Jacques Herbots*, Bruges, Kluwer, 2002, 326.

⁸⁰ H. Beale, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 895.

⁸¹ H. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer, *Cases, Materials and Text on Contract Law*, Oxford, Hart Publishing, 2010, 140–158; F. Willem Grosheide, 'Reflections on the Protection of the Weak Party in Dutch and EU Contract Law', in K. Boele-Woelki and W. Grosheide, *The Future of European Contract Law*, Alphen aan den Rijn, Wolters Kluwer, 2007, 251–253; J. Hijma, C. Van Dam, W. van Schendel and W. Valk, *Rechtshandelingen en overeenkomst*, Deventer, Kluwer, 2010, 17–18;

13. *Limited legislative operationalization of fairness.* These rules cover the different stages of the contracting process, from the time of pre-contractual negotiation to the termination of the contract.⁸² The comments to article 1.7 of the UNIDROIT Principles clearly state that ‘the parties’ behavior throughout the life of the contract, including the negotiation process, must conform to good faith and fair dealing.’⁸³ Some of the rules have remained of a pure jurisprudential nature, and are therefore not always applied in a consequential fashion, whereas others were explicitly confirmed by the legislator.⁸⁴ Several Member States have in the meanwhile introduced a general prohibition of unfair contract terms (see e.g. French, Dutch, German and English law)⁸⁵ and a prohibition of unfair commercial practices in B2B relationships (see e.g. Belgian and French law).⁸⁶ These prohibitions are to be considered *lex specialis* vis-à-vis the principle of good faith and possibly give weaker companies more possibilities to act against stronger companies.⁸⁷ Even when confirmed

B. Verschraegen, ‘The Dutch Civil Code and its Precedents (1990–1992)’, in S. Grundmann and M. Schauer, *The Architecture of European codes and Contract Law*, Alphen aan den Rijn, Kluwer, 2006, 112.

⁸² International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 19; B. Dubuisson and G. Tossens, ‘Les relations entre professionnels en droit belge’, in J. Ghestin and M. Fontaine, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 433; A. Hartkamp and C. Sieburgh, *Mr. C. Asser’s Handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, 3, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 339.

⁸³ International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 19.

⁸⁴ For Belgium, see specifically section 5 of proposal for an Economic Code.

⁸⁵ For French law, see Art. L-442–6, I, 2° CC. For Dutch law, see Art. 233–234 DCC. In English law, there are two different acts prohibiting (each of them different) unfair contract terms. The Unfair Terms in Consumer Contracts Regulations 1999, which is implementing a European Directive, only apply to B2C contracts which have not been individually negotiated upon (section 4 Unfair Terms in Consumer Contracts Regulations 1999). The Unfair Contract Terms Act 1977 however not only applies to B2C transactions; certain provisions of the act specifically stipulate that they also apply to B2B transactions in so far as one company is dealing on the other’s written standard terms of business (section 3 Unfair Contract Terms Act 1977; *Chester Grosvenor Hotel Co Ltd v. Alfred McAlpine Management Ltd* [1991] 56 *Build LR* 115; G. Howells and S. Weatherill, *Consumer Protection Law*, Ashgate, Aldershot, 2005, 270). If both companies have individually negotiated on the different clauses of their contract, the latter act does not apply. Once again it appears that jurisprudence is stricter when assessing whether a given contract term is unfair in B2B transactions than when it is making such assessments in B2C transactions, since companies are said to have a better foreknowledge than consumers (*Barclays Mercantile Business Finance Ltd v. Marsh* [2002] *WL* 31442486; *Photo Production Ltd v. Securicor Transport Ltd* [1980] *AC* 827).

⁸⁶ For Belgian law, see Art. 95 WMPC. For French law, see Art. L. 446–6 Code de Commerce. Dutch law did introduce a general rule prohibiting unfair contract terms, but did not introduce a general rule prohibiting unfair commercial practices. However, several authors are in favor of giving a reflexive function of the B2C prohibition in B2B contracts. See e.g. A. Castermans, ‘Misleidende omissie bij het aangaan van de overeenkomst. Reflexwerking van de regeling oneerlijke handelspraktijken’, *MvV* 2011, 202–208; L. Kroon and C. Mastenbroek, ‘Intellectuele Eigendom en Reclamerecht, De Richtlijn oneerlijke handelspraktijken en de implementatie daarvan in het BW: mogelijke complicaties in de praktijk’, *IER* 2008, 70; J. Verdel, ‘Bescherming voor niet-consumenten door het ontstaan van reflexwerking van de ‘zwarte lijsten’ uit de Wet oneerlijke handelspraktijken’, *TvCo* 2008, 34.

⁸⁷ A. Castermans, ‘Misleidende omissie bij het aangaan van de overeenkomst. Reflexwerking van de regeling oneerlijke handelspraktijken’, *MvV* 2011, 202–208; D. Dessard and A. De Caluwé, *Les usages honnêtes*, Brussels, Larcier, 2007, 9–10; J. Ligot, F. Vanbossele and O. Battard, *Les pratiques loyales*, Brussels, Larcier, 2012, 9.

by the legislator these rules have often retained their open character; they obviously lack the same level of detail as is the case for traditional consumer legislation.

2.2. *Good faith in the pre-contractual stage*

14. *Culpa in contrahendo*. The rules applicable to contracting parties in the pre-contractual stage perfectly illustrate how courts often use the principle of mutual cooperation and solidarity to restore a structural imbalance in bargaining power between those parties,⁸⁸ for solidarity entails that a party does not take advantage of the weaker economic position, or even economic dependence, of its counterparty so as to obtain a contract which would otherwise not be concluded or would be concluded under different circumstances. According to the continental legal orders, a party that infringes upon these principles is guilty of pre-contractual mistake (*culpa in contrahendo*) and will be held liable to pay damages.⁸⁹ Dutch law founded the theory of pre-contractual mistake on the obligation of good faith in the execution of the contract.⁹⁰ Belgium and France on the contrary base the theory on tortious liability (which is also an expression of the general principle of good faith)^{91, 92} although there is a clear tendency in both recent jurisprudence and legal doctrine to give the information obligation its foundations in the principle of good faith.⁹³ Both the principle of good faith and the doctrine of tortious liability are no more than particular expressions of the idea of fairness.

The theory of *culpa in contrahendo* first and foremost implies a prohibition for contracting parties to behave 'violently' or 'unfairly' during the bargaining process. Secondly, and linked to the first point, the parties are bound to supply each other with all information that is necessary for their counterparty in deciding whether or not to conclude the contract. Self-evidently, the theory is closely linked to other doctrines such as mistake, fraud, deceit, etc. The English legal order, which does not recognize the theory of pre-contractual mistake, exclusively uses the latter doctrines together with equitable doctrines (such as duress, abuse of confidence, undue influence, etc.) to address

⁸⁸ E. Swaenepoel, *De toetsing van het contractuele evenwicht*, Antwerp, Intersentia, 2011, 33.

⁸⁹ H. Geens, 'De grondslagen van culpa in contrahendo', *Jura Falconis* 2003–04, 433–460; M. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht*, s.l., Kluwer, 1999, 67–92; P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 9; H. Schoordijk, 'Het gebruik van open normen naar Belgisch en Nederlands privaatrecht', in E. Dirix, W. Pintens, P. Senaev and S. Stijns, *Liber amicorum Jacques Herbots*, Bruges, Kluwer, 2002, 330.

⁹⁰ M. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht*, s.l., Kluwer, 1999, 69.

⁹¹ P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 7.

⁹² See Cass. civ. 28 June 2006, D. 2006, 2322; Cass. Civ. 15 March 2005, D. 2005, 1462; D. Dessard and A. De Caluwé, *Les usages honnêtes*, Brussels, Larcier, 2007, 9–10; J. Ligoit, F. Vanbossele and O. Battard, *Les pratiques loyales*, Brussels, Larcier, 2012, 9; N. Dissaux, 'Fonds de commerce – Cession. Formation', *JurisClasseur Commercial*, 1 October 2010, n° 14–15; M. Santa-Croce, 'Contrats internationaux', *JurisClasseur Civil Code > 2^e App. Art. 1134 et 1135*, Fac. 60, 1 March 2008, n° 4.

⁹³ See e.g. P. Jourdain, 'Droit à réparation. – Responsabilité fondée sur la faute. – Applications de la notion de faute: imprudences et négligences; fautes commises à l'occasion d'un contrat', *JurisClasseur Civil Code > Art. 1382 à 1386*, Fasc. 130–10, n° 44–45 (with references); P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 8.

misconduct in the pre-contractual stage.⁹⁴ In other words, English judges will only interfere when the contract is vitiated (cf. *supra*).⁹⁵

15. *Prohibition of unfair commercial practices.* A company should thus abstain from all violent or unfair commercial practices towards other companies. This has all sorts of implications.⁹⁶ Of course a company is free to start negotiations with another company and may decide to end these negotiations at any given time. Also, it is not wrongful to conduct negotiations with several other companies at the same time.⁹⁷ However, the instigating company may not do so abusively. For example, a company may not start negotiations with another company with whom they have no intention whatsoever to conclude a contract.⁹⁸ They may not disclose or improperly use confidential information obtained from their counterparty during the negotiations.⁹⁹ Ongoing negotiations should not be broken off in a way which is, with the relevant circumstances in mind, clearly abusive or violates expectations, for example because negotiations are at a very advanced stage.¹⁰⁰ English law is somewhat stricter than the continental legal orders on the latter point: breaking off of negotiations by one of the negotiating parties is wrongful and entails tortious liability only if there was a negligent misstatement by that party leading the other party to believe that a contract would be concluded.¹⁰¹

⁹⁴ See e.g. Pitt v. Holt [2011] WL 674966, No. 165; P. Briks and C. Nyuk Yin, 'On the Nature of Undue Influence', in J. Beatson and D. Friedmann, *Good Faith and Fault in Contract Law*, Oxford, Clarendon Press, 1995, 57–97; J. Cartwright, *Contract Law*, Oxford, Hart Publishing, 2007, 65; E. McKendrick, *Goode on Commercial Law*, Penguin Books, London, 2010, 103–107; C. Miller, B. Harvey and D. Parry, *Consumer and Trading Law – Text, Cases and Materials*, Oxford, Oxford University Press, 1998, 371–373.

⁹⁵ J. Cartwright, *Contract Law*, Oxford, Hart Publishing, 2007, 66.

⁹⁶ F. X. Testu and J. Herzele, 'La formalisation contractuelle du résultat des négociations commerciales entre fournisseurs et distributeurs', *La semaine Juridique Entreprise et Affaires* 2008, 1113.

⁹⁷ P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 9–10.

⁹⁸ P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 9.

⁹⁹ Art. 2.1.17 Unidroit principles; International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 62–63; Seager v. Copydex Ltd. (No. 1) [1967] 1 WLR 923; H. Beale, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2004, 534; M. Bollen, 'Precontractuele aansprakelijkheid voor het afspringen van onderhandelingen, in het bijzonder m.b.t. een acquisitieovereenkomst', *TBBR* 2003, 150; P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 11–12.

¹⁰⁰ Art. 2.1.15 Unidroit Principles; International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 59–61. For Belgium, see M. Bollen, 'Precontractuele aansprakelijkheid voor het afspringen van onderhandelingen, in het bijzonder m.b.t. een acquisitieovereenkomst', *TBBR* 203, 136–160; H. Geens, 'De grondslagen van culpa in contrahendo', *Jura Falconis* 2003–04, 444–445. For French law, see Art. L. 446–6, 5°; Cass. com. 26 November 2003, *RJDA* 2004, n° 511; Cass. com. 11 July 2000, *CCC* 2000, no. 174; Cass. Com. 22 April 1997, *RTD Civ.* 1997, 651; N. Dissaux, 'Fonds de commerce – Cession. Formation', *JurisClasseur Commercial*, 1 October 2010, n° 12; J. Ghestin, 'La responsabilité délictuelle pour rupture abusive des pourparlers', *JCP G* 2007, I, 155. For Dutch law, see HR 29 October 2010, *NJB* 2010, 251; HR 21 September 2001, *NJ* 2002, 254, with critical note T. De Boer; Gerechtshof 's-Hertogenbosch 29 November 2005, *NJF* 2006, 249; Rb. 's-Hertogenbosch 15 August 2012, *LJN:BX4774*, nyr; Y. Blei Weissmann, 'Diligentieovereenkomst – Voorbereidende hulpovereenkomst', aantekening 44 bij artikel 217 Boek 6 BW, in *Groene Serie Verbintenissenrecht*, Kluwer, Deventer, 2010.

¹⁰¹ Walford v. Miles [1992] AC 128; Box v. Midland Bank Ltd. [1979] *Lloyd's Rep.* 391; J. Cartwright, *Contract Law*, Oxford, Hart Publishing, 2007, 72; N. Cohen, 'Pre-contractual Duties: Two Freedoms

Also companies may not try to acquire excessive advantages from the other company under threat of breaking existing contracts,¹⁰² or by taking advantage of the latter's unequal bargaining position. Such an unequal bargaining position may result from urgent needs or economic distress, its improvidence, ignorance, inexperience or a lack of bargaining skill (e.g. through excessive exemption clauses).¹⁰³

16. *Mutual information duty.* The continental principle of solidarity in the pre-contractual stage was also translated into a mutual information duty in the pre-contractual stage¹⁰⁴ – which continues through to the contractual stage – so as to restore any information asymmetry which might exist between contracting parties.¹⁰⁵ The supplier in particular has with various information requirements, both in B2C and B2B contracts, as he is generally more aware of the quality of the goods and services he is supplying.¹⁰⁶ Since the supplier is often more specialized than the buyer, the supplier enjoys a certain leeway in how he will execute the contracts, but this leeway is counterbalanced by an information duty.¹⁰⁷ If the supplier does not deliver all necessary information or gives the wrong information, then the customer can obtain damages or even, in the event of mistake or fraud, the contract which is ultimately concluded on the basis of that information will be void or voidable.¹⁰⁸ Once again, English law is more reticent and does not recognize a general duty to disclose information during the negotiation process; English law accepts tortious liability for lack of information only in case of deceit or negligence which has provoked misrepresentation.¹⁰⁹

and the Contract to Negotiate', in J. Beatson and D. Friedmann, *Good Faith and Fault in Contract Law*, Oxford, Clarendon Press, 1995, 32–42.

¹⁰² Art. L. 446–6, 4° French Code de Commerce; M. Bollen, 'Precontractuele aansprakelijkheid voor het afspringen van onderhandelingen, in het bijzonder m.b.t. een acquisitieovereenkomst', *TBBR* 203, 136–160; H. Geens, 'De grondslagen van culpa in contrahendo', *Jura Falconis* 2003–04, 444–445.

¹⁰³ Art. 3.2.7 Unidroit Principles. See e.g. for English law, *Royal Bank of Scotland Plc v. Chandra* [2011] *NPC* 26 (unconscionable bargain); *Silver Queen Maritime Ltd v. Persia Petroleum Services Plc* [2010] *WL* 4602351 (unconscionable bargain); *Borrelli v. Ting* [2010] *WL* 2898052 (economic duress); E. McKendrick, *Goode on Commercial Law*, Penguin Books, London, 2010, 107.

¹⁰⁴ Cf. Art. II.-9:402 DCFR.

¹⁰⁵ E. Swaenepoel, *De toetsing van het contractuele evenwicht*, Antwerp, Intersentia, 2011, 33.

¹⁰⁶ This is clearly demonstrated by English law, since English judges hold that the duty for the seller to provide information is encompassed within the implied term of quality and fitness. See e.g. E. McKendrick, *Goode on Commercial Law*, Penguin Books, London, 2010, 362.

¹⁰⁷ T. Tjong Tjin Tai, *Mr. C. Asser's Inleiding tot de beoefening van het Nederlands burgerlijk recht*, 7, *Bijzondere Overeenkomsten*, 4, *Opdracht incl. de geneeskundige behandelingsovereenkomst en de reisovereenkomst*, Deventer, Kluwer, 2009, 63.

¹⁰⁸ For Belgium, see A. De Boeck, *Informatierechten en -plichten bij de totstandkoming en uitvoering van overeenkomsten*, Antwerp, Intersentia, 2000, 221–223 and 246–247; B. Van Den Bergh, 'De overdracht van een handelszaak en de informatieplicht vanwege de overdrager: "spreken is zilver, zwijgen is goud"', *TBBR* 2009, 369–370. For France, see Cass. com. 13 March 2007, n° 05–51.564, nyr; Cour d'appel Lyon 7 September 2001, n° 2000/00355, nyr; N. Dissaux, 'Fonds de commerce – Cession. Formation', *JurisClasseur Commercial*, 1 October 2010, n° 16; P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 12–13. For the Netherlands, see Art. 6:228 DCC; HR 25 January 2002, *NJ* 2003, 31, with critical note J. van der Vranken.

¹⁰⁹ J. Cartwright, *Contract Law*, Oxford, Hart Publishing, 2007, 70–71.

If it turns out in a particular case that certain information is not available to or not deployable by the customer, a stronger information duty will be imposed upon the supplier and it will be easier for the customer to invoke defects in consent.¹¹⁰ One should always inform the buyer of the standard terms,¹¹¹ but the more unusual or onerous certain contract terms are, the more important the information duty of the professional supplier.¹¹² Elements such as the legibility and the readability of the clause will be taken into account to assess whether information requirements are being fulfilled.¹¹³ Thus courts often use information duties to attack unfair contract terms.¹¹⁴ It is in this context that one should situate the UNIDROIT Principle according to which a standard contract terms which is suggested by one of the contract parties and which is surprising to the other party is applicable only if the term has been expressly accepted by the latter party (and thus expressly indicated by the former party).¹¹⁵

The unusual or onerous character of a contract term is assessed by reference to the buyer's capacity. When the customer is a consumer for example, the information duties imposed upon the supplier are always far-reaching, the supplier being obliged by law to give practically all information about the good or the service and its price, irrespective of the concrete capacity and foreknowledge of the consumer. The consumer is considered to be ignorant. In B2B contracts the information duty is generally not as strong as it is the case for B2C contracts, since a customer dealing in a professional capacity is presumed to have some knowledge about the transactions at hand, to take initiative and to make the necessary inquiries into those aspects of the transaction he is unaware of.¹¹⁶ In B2B contracts, most national legal orders will make a concrete assessment of the prevailing information asymmetries so as to determine the extent of the information duties which should be imposed upon the supplier.¹¹⁷ For example, case law often burdens the supplier

¹¹⁰ G. Virassamy, 'Les relations entre professionnels en droit français', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 485–488.

¹¹¹ M. Loos, 'De algemene voorwaardenregeling in het voorstel voor een Gemeenschappelijk Europees kooprecht: een vergelijking met het Nederlandse recht', *NTBR* 2012, 24.

¹¹² Cf. Art. II.-9:402 DCFR. See also *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1988] 2 *WLR* 615; J. Cartwright, *Contract Law*, Oxford, Hart Publishing, 2007, 198; G. Howells and S. Weatherill, *Consumer Protection Law*, Ashgate, Aldershot, 2005, 278.

¹¹³ D. Mazeaud, 'La protection par le droit commun', in C. Jamin and D. Mazeaud, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 37.

¹¹⁴ J. Cartwright, *Contract Law*, Oxford, Hart Publishing, 2007, 198; D. Mazeaud, 'La protection par le droit commun', in C. Jamin and D. Mazeaud, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 36–38.

¹¹⁵ Cf. Art. 2.1.20 Unidroit Principles, with regard to surprising standard contract terms. International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 68–69.

¹¹⁶ A. De Boeck, 'De onderzoeksplichten onderzocht, in het bijzonder de aankoop van tweedehandswagens', *TBH* 2004, 281; G. Virassamy, 'Les relations entre professionnels en droit français', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 485–487.

¹¹⁷ For Belgian and French law, see e.g. Cass. 5 July 2003, *Arr. Cass.* 2003, 1337; D. Berthiau, *Le principe d'égalité et le droit civil des contrats*, Paris, LGDJ, 1999, 136; A. De Boeck, 'Enkele aspecten van de precontractuele informatie-uitwisseling. Noot n.a.v. Luik 24 April 2001 en Gent 27 juni 2001', *TBBR* 2004, 263–264; B. Dubuisson and G. Tossens, 'Les relations entre professionnels en droit belge', in

with stronger information duties when dealing with a professional customer who does not have any experience with regard to the goods or services being acquired (e.g. the pharmacist buying a cash till) than when he is selling to an experienced customer.¹¹⁸ Such an inexperienced customer, who does not receive all necessary information or receives wrong information, will often obtain damages or even the annulment of the contract in case of mistake or fraud.¹¹⁹

Even in B2B contracts, standard contract terms on which the buyer was not informed cannot be binding upon the customer.¹²⁰ As this was also the case for consumers, many judges believe that a professional inexperienced customer is intellectually incapable of asking for particular information and correctly using that information,¹²¹ but one should always make a concrete assessment of whether the inexperienced company should be aware of a particular piece of information. The specialization criterion (cf. *supra*) re-emerges. However, in the context of B2B contracts, and contrary to B2C contracts, this assumption made by many national judges is not held to be absolute. Some national cases attenuated the information duty of the seller for example when a professional inexperienced buyer has called upon the assistance of a specialist before concluding the contract with the seller,¹²² without it being obliged for the non-specialized customer to invoke such assistance.¹²³

2.3. *Good faith in the contractual stage*

17. *Three functions of good faith.* Contracting parties should not only respect the principles of good faith, fair dealing and mutual cooperation in the course of the

J. Ghestin and M. Fontaine, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 434. For Dutch law, see e.g. 24 February 2012, NJ 2012, 144.

¹¹⁸ For Belgian law, see e.g. Kh. Ieper 12 October 1998, RW 2001–02, 926. For French law, see e.g. Cass. civ. 17 June 2012, n° 09–15.843, nyr; Cass. com. 13 March 2007, n° 05–51.564, nyr; Cour d'appel Paris 18 January 2007, n° 04/24535, nyr; Cour d'appel Lyon 7 September 2001, n° 2000/00355, nyr; Cour d'appel Montpellier 24 April 2001, n° 00/00815, nyr. For Dutch law, see e.g. 24 February 2012, NJ 2012, 144; HR 28 November 1997, *oV* 1998, 42; Hof Arnhem 8 January 2002, BR 2002, 630.

¹¹⁹ For the specialized customer on the contrary it will not be so easy to invoke mistake since it will not be excusable (see Art. 6:228 DCC. See also B. Dubuisson and G. Tossens, 'Les relations entre professionnels en droit belge', in J. Ghestin and M. Fontaine, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 432; A. De Boeck, *Informatierechten en -plichten bij de totstandkoming en uitvoering van overeenkomsten*, Antwerp, Intersentia, 2000, 241–244) although it is likely that he will still be able to invoke fraud if applicable (Cass. 23 September 1977, *Arr. Cass.* 1978, 107) or to invoke mistake if the seller unintentionally gave wrong information (see e.g. C. Coudron, 'Culpa in contrahendo en verschoonbare dwaling: een toepassing', *TBBR* 2002, 355–357).

¹²⁰ F. Walschot, 'Algemene voorwaarden in een B2B relatie', in J.-F. Bellis, D. Blommaert, *tendensen in het bedrijfsrecht*, s.l., Instituut voor bedrijfsjuristen, 2011, 133–162.

¹²¹ See e.g. Cass. com. 20 February 1996, *RTD Civ* 1997, 119. See also B. Van Den Bergh, 'De overdracht van een handelszaak en de informatieplicht vanwege de overdrager: "spreken is zilver, zwijgen is goud"', *TBBR* 2009, 369–370; G. Virassamy, 'Les relations entre professionnels en droit français', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 485–488.

¹²² B. Dubuisson and G. Tossens, 'Les relations entre professionnels en droit belge', in J. Ghestin and M. Fontaine, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 436.

¹²³ A. De Boeck, *Informatierechten en -plichten bij de totstandkoming en uitvoering van overeenkomsten*, Antwerp, Intersentia, 2000, 244–245.

conclusion of the contract; once the contract is concluded, they are equally bound to execute the contract in light of the aforementioned principles. Jurisprudence has bestowed the principle in the contractual stage with an interpretative function, a supplementary function and to a certain extent also a derogating function.¹²⁴ Once again, these principles are often utilized in such way that protection is offered to a weaker contracting party dealing with a more powerful party.

18. *Interpretative function.* Where problems related to the interpretation of contractual clauses are concerned,¹²⁵ the general rule in continental law is that a clause should be interpreted in light of the common intention of the parties,¹²⁶ while taking into account the interpretation which reasonable contracting parties in similar circumstances would give to the contract's wording, rather than focusing exclusively on the contract's wording.¹²⁷ If it is not possible to deduce this common intention from the contract's wording or from its context, courts will thus interpret a B2B contract by referring to the principle of good faith,¹²⁸ though only insofar as doubt as to the exact interpretation of the contract appears to be rational and reasonable in light of the circumstances of the case.¹²⁹ In order to assess whether doubt is rational, elements such as the level of specialization of both parties, possible assistance by experts, the nature of the agreement, etc. are taken into account.¹³⁰ Specifically for mercantile contracts, it has been stated that

¹²⁴ Cf. Art. 6:2 and 6:248 DCC, which constitute a legislative recognition of the derogating function of the principle of good faith. See E. Dewitte, 'Spreken, zwijgen of liegen... U kiest maar! Of toch niet?! Welke verplichtingen brengt de goede trouw met zich mee voor werkgever en kandidaat-werknemer in de precontractuele fase van de arbeidsovereenkomst, en wanneer krijgen zij het deksel van de wilsgebreken op hun neus?', *Jura Falconis* 2010–11, 287–291; S. Stijns, *Verbintenissenrecht*, book 1, Bruges, die Keure, 2005, 51–53; A. Hartkamp and C. Sieburgh, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, 3, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 340; C. Sieburgh, 'Principles in Private Law: From Luxury to Necessity – Multi-layered Legal Systems and the Generative Force of Principles', *ERPL* 2012, 301–302; F. Vermader, 'De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering', *TBBR* 2004, 574–578.

¹²⁵ C. Jamin, 'Plaidoyer pour le solidarisme contractuel', in G. Goubleaux, *Etudes offertes à Jacques Ghestin – Le contrat au début du XXI^e siècle*, Paris, LGDJ, 2001, 450–451.

¹²⁶ Art. 4.1 Unidroit Principles; Art. II.-8:101 DCFR. A. Cruquenaire, 'L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle: réflexions à partir de l'exemple des contrats relatifs au droit d'auteur', *TBBR* 2008, 585; P. Malaurie, 'L'interprétation des contrats: hier et aujourd'hui', *La semaine juridique* 2011, 1402.

¹²⁷ HR 13 March 1981, *NJ* 1981, 635; N. Cornet, 'The interpretation, implication and supplementation of contracts in England and the Netherlands', in J. Smits and S. Stijns (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 55.

¹²⁸ Art. 8 Vienna Sales Convention; Art. 8:102 (1) (g) DCFR. A. Cruquenaire, 'L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle: réflexions à partir de l'exemple des contrats relatifs au droit d'auteur', *TBBR* 2008, 585; P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 14; International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts* 2010, Rome, s.n., 2010, 137–138.

¹²⁹ Cass. 23 March 2006, *RW* 2006–07, 874.

¹³⁰ See A. Cruquenaire, 'L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle: réflexions à partir de l'exemple des contrats relatifs au droit d'auteur', *TBBR* 2008, 599–600; J. Hijma, 'Uitleg contra proferentem', in T. Hartlief and C. Stolker, *Contractvrijheid*, Deventer, Kluwer, 1999, 469 and 471–473.

if their wording is unclear and ambiguous, they should be interpreted in a business fashion and receive a meaning that makes good commercial sense.¹³¹ In case of rational doubt courts shall often interpret clauses (especially exemption clauses) which deviate from general contract law rules restrictively.¹³² Also, clauses are often interpreted to the detriment of the party that stipulated that clause and thus in favour of other the party (*contra proferentem*).¹³³ Weaker contractual parties will most often benefit therefrom, as it is mostly – though not always – the stronger party that imposes all sorts of clauses upon its weaker counterpart and tries to deviate from the general rules,¹³⁴ for example through standard contracts.¹³⁵ It is not by coincidence that the *contra proferentem* rule is often used as a way of mitigating exemption clauses.¹³⁶ The *contra proferentem* rule dates back a long way and is obviously flexible enough to take into account the specific circumstances of a certain case. However, more recently, a European directive has forced Member States to interpret a B2C contract in favour of the consumer in all circumstances,¹³⁷ even if it is a clause which has been stipulated by the consumer that is unclear.¹³⁸

Whereas continental judges tend to be very creative in applying the *contra proferentem* rule to the benefit of weaker parties, and sometimes even apply it in cases where the wording of the contract is fairly clear, English judges, although applying the principle as

¹³¹ Rainy Sky S.A. and others v. Kookmin Bank [2011] UKSC 50; Sirius International Insurance (Publ) v. FAI General Insurance Ltd [2004] 1 WLR 325; Antaios Compania Neviera SA v. Salen Rederierna AB [1985] 1 AC 191, 201; Society of Lloyd's v. Robinson [1999] 1 All ER 551. See also J. Waelkens, 'Belgian Perspective on Rainy Sky S.A. and others (Appellants) v. Kookmin Bank (Respondent)', to appear in *ERPL* 2013.

¹³² Brussels 18 November 1999, *TBH* 2000, 680, with critical note J.P. Buyle and M. Delierneux; B. Tilleman, *Beginnselen van Belgisch privaatrecht*, X, *Overeenkomsten*, Part 2, *Bijzondere overeenkomsten*, A, *Verkoop*, part 2, *Gevolgen van de koop*, Mechelen, Kluwer, 2012, 323; M. Fontaine, 'La protection de la partie faible dans les rapports contractuels', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 638; Y.-M. Laithier, 'L'avenir des clauses limitatives et exonératoires de responsabilité contractuelle', *Revue des contrats* 2010, 1091; S. Stijns, *Verbintenissenrecht*, book 1, Bruges, die Keure, 2005, 58.

¹³³ Art. 1162 and 1602 BCC; Art. 1162 and 1602 FCC; Art. 6:238 (2) DCC; Art. 4.6 Unidroit Principles; Mons 6 May 2003, *JLMB* 2003, 41; Tekrol Ltd v. International Insurance Co of Hannover Ltd [2005] 2 *Lloyd's Rep.* 701. See H. Beale, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 911; A. Cruquenaire, 'L'interprétation du contrat de vente', *TBBR* 2008, 307–318; J. Hijma, 'Uitleg contra proferentem', in T. Hartlief and C. Stolker, *Contractvrijheid*, Deventer, Kluwer, 1999, 461 and 468; P. Malaurie, 'L'interprétation des contrats: hier et aujourd'hui', *La semaine juridique* 2011, 1402.

¹³⁴ Cf. Art. II.-8:103 DCFR (interpretation against dominant party). See A. Cruquenaire, 'L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle: réflexions à partir de l'exemple des contrats relatifs au droit d'auteur', *TBBR* 2008, 584.

¹³⁵ A. Cruquenaire, 'L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle: réflexions à partir de l'exemple des contrats relatifs au droit d'auteur', *TBBR* 2008, 586; S. Stijns, *Verbintenissenrecht*, book 1, Bruges, die Keure, 2005, 58.

¹³⁶ J. Cartwright, *Contract Law*, Oxford, Hart Publishing, 2007, 187.

¹³⁷ Art. 10 Directive 93/13/EEG. See also Art. 40 §2 WMP.

¹³⁸ A. Cruquenaire, 'L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle: réflexions à partir de l'exemple des contrats relatifs au droit d'auteur', *TBBR* 2008, 602–603.

well,¹³⁹ again appear to use the rule with more restraint.¹⁴⁰ This should not be surprising. Rather than interpreting starting from the common intention of the parties and the principle of good faith, English lawyers primarily stick to the literal wording used by the parties in their contract and only in the second instance take into account the context in which the contract was concluded.¹⁴¹ However, one cannot deny that in practice common law judges have also reverted to interpretation as a means of realizing fairness.¹⁴²

19. *Supplementary function.* Continental legal orders do not merely use the principle of good faith as a guideline for interpreting contracts; they also use the principle to supplement the express provisions of a contract. Terms are added to the contract, or more precisely said to be already implicitly included in the contract, when this is considered reasonable in light of the circumstances of a certain case.¹⁴³ In a commercial context, trade usages are often referred to so as to supplement the contract.¹⁴⁴ English law also has a tradition of implied terms, but its test for reading such terms in a contract is stricter: a term is implied in the contract only if it is necessary for reasons of efficacy or because an officious bystander would necessarily read these terms into the contract,¹⁴⁵ not merely because it would be reasonable.¹⁴⁶

Several of these implied terms are capable of protecting the weaker mercantile party. For example, all the legal orders under consideration have held that a goods or services contract (explicitly or implicitly) contains an obligation for the supplier to execute the contract with reasonable care. This implies amongst others an obligation to inform the buyer in the course of the execution of the contract, to warn him about obstacles which might hinder the execution of the contract, to give guidance, etc. (and vice versa).¹⁴⁷ Once again, the information duty imposed upon a professional supplier is often judged more burdensome if he is contracting with a non-specialized commercial buyer.¹⁴⁸ In some instances, where new information upsets the contract as it was originally concluded,

¹³⁹ See e.g. *Hollier v. Rambler Motors Ltd* [1972] 2 QB 71.

¹⁴⁰ H. Beale, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 858–860; G. Howells and S. Weatherill, *Consumer Protection Law*, Ashgate, Aldershot, 2005, 278.

¹⁴¹ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; H. Beale, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2004, 838–842 and 852.

¹⁴² P. Atiyah, *Essays on Contract*, Oxford, Clarendon Press, 1986, 337–341.

¹⁴³ See on this topic, N. Kornet, *Contract interpretation and gap filling: comparative and theoretical perspectives*, Antwerp, Intersentia, 2006.

¹⁴⁴ J. Adams and H. MacQueen, *Atiyah's Sale of Goods*, London, Longman, 2010, 207.

¹⁴⁵ *The Moorcock* [1889] LR 14 PD 64; *Shirlaw v. Southern Foundries Ltd* [1939] 2 KB 206.

¹⁴⁶ H. Beale, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 889–892.

¹⁴⁷ Vred. Oudenaarde – Kruishoutem 16 November 2006, *JJP* 2009, 323; N. Cornet, ‘The interpretation, implication and supplementation of contracts in England and the Netherlands’, in J. Smits and S. Stijns (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 74; A. Hartkamp and C. Sieburgh, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, 3, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 342; P. le Tourneau and M. Poumadère, ‘Bonne foi’, *Rép. Civ. Dalloz* 2009, 20–21; E. McKendrick, *Goode on Commercial Law*, Penguin Books, London, 2010, 362; F. Vermader, ‘De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering’, *TBBR* 2004, 577.

¹⁴⁸ Cass. com. 21 November 2006, *RJDA* 2007, no. 337.

courts have even held that a commercial contract contains an implied term according to which parties are under an obligation to renegotiate the contract.¹⁴⁹

It has also been held that a supplier who is dealing in a professional capacity is liable for any lack of conformity in the goods or services he is supplying, since he is presumed to be aware of all defects in the goods or services concerned and thus to be in bad faith.¹⁵⁰ Such a presumption does not automatically exist for the buyer. Even when the buyer is buying professionally, no such automatic presumption exists.¹⁵¹ However, when the professional buyer is specialized in the goods he is acquiring, this element will be taken into account in order to assess whether a certain defect is either visible or hidden for him:¹⁵² what is hidden for a non-specialized buyer is not necessarily hidden for a professional buyer. If a defect is hidden, then the seller will be held liable. If however a defect is held to be visible for the buyer, then the seller cannot be held liable once the buyer has accepted the delivery of the goods or services concerned; the buyer should protest before accepting delivery. The possibilities for the professional seller to insert exoneration terms in the contract will hence be more extensive when he is dealing with a specialized buyer,¹⁵³ at least as far as hidden defects are concerned.¹⁵⁴ Other elements such as sectorial usages, disposable technical means, the prevailing circumstances at the

¹⁴⁹ P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 15–16; G. Virassamy, 'Les relations entre professionnels en droit français', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 498–500.

¹⁵⁰ For sales contracts, see e.g. for Belgium, Cass. 4 May 1939, *Pas.* 1939, I, 224; Cass. 18 October 2001, *Arr. Cass.* 2001, 1721; Ghent 18 June 1999, *RW* 2002–03, 1060. See also B. Dubuisson and G. Tossens, 'Les relations entre professionnels en droit belge', in J. Ghestin and M. Fontaine, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 437–438; B. Stroobants, 'De aansprakelijkheid voor verborgen gebreken voor de professionele verkoper van onroerende goederen', *Nieuwbrieff Notariaat* 2009, No. 07; B. Tilleman, *Beginnselen van Belgisch privaatrecht*, X, *Overeenkomsten*, Part 2, *Bijzondere overeenkomsten*, A, *Verkoop*, part 2, *Gevolgen van de koop*, Mechelen, Kluwer, 2012, 372. For France, see Cass. Civ. 17 May 1965, *Bull. civ.* 1965, I, n° 62–12790; A. Bénabent, 'La qualification du 'vendeur professionnel'', *Revue des contrats* 2009, 111; M.-A. Houtmann, 'La mauvaise foi effective des vendeurs professionnels en matière de garantie d'éviction et des vices cachés', *Petites affiches* 1 August 2002, n° 153, 6; C. Normand, 'Le professionnel de l'immobilier et la garantie des vices cachés dans la jurisprudence', *Petites affiches* 28 January 2010, n°20, 6. For the Netherlands, see e.g. HR 27 April 2001, *NJ* 2002, 213; Rb. 's-Gravenhage 4 June 2008, *Prg.* 2008, 191.

¹⁵¹ Cass. Com. 23 June 1992, *CCC* 1992, n° 220; L. Leveneur, *Droit des contrats – 10 ans de jurisprudence commentée – La pratique en 400 décisions*, Parijs, Litec, 2002, 69–71; B. Tilleman, *Beginnselen van Belgisch privaatrecht*, X, *Overeenkomsten*, Part 2, *Bijzondere overeenkomsten*, A, *Verkoop*, part 2, *Gevolgen van de koop*, Mechelen, Kluwer, 2012, 323.

¹⁵² G. Virassamy, 'Les relations entre professionnels en droit français', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 501.

¹⁵³ T. De Graaf, *Exoneraties in (ICT-)contracten tussen professionele partijen*, Deventer, Kluwer, 2006, 45–47.

¹⁵⁴ One can always exonerate himself for visible defects. See Cass. com. 22 June 1993, *Bull. civ.* 1993, IV, 188; G. Virassamy, 'Les relations entre professionnels en droit français', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 504–505.

moment of acceptance, etc. are also taken into account when assessing the visible or hidden nature of a defect.¹⁵⁵

20. *Moderating function.* Thirdly, and lastly, case law and legal scholarship have endowed the principle of good faith with the possibility of mitigating express contract terms, or, to be more correct, the possibility of mitigating the execution of a contract term. In other words, good faith and fairness preclude a party from executing a contract in a manner which is clearly unreasonable in light of specific circumstances of a certain case. If a party invokes contract terms in a manner which is unreasonable, the judge might decide to mitigate these contractual provisions to the normal level of execution of the contract, to reject the possibility for that party to invoke the term at all or to order reparation of damages inflicted by the abuse.¹⁵⁶ Self-evidently, the moderating function of good faith is applied with the necessary reticence.¹⁵⁷ Only in cases of clear disproportionality will a judge decide to intervene.¹⁵⁸ Belgium and France for example chose to link the moderating function of good faith with the doctrine of abuse of rights.¹⁵⁹

The moderating function of good faith has been used on numerous occasions to protect the weaker party in a B2B relationship (cases of hardship,¹⁶⁰ abuse of sanctions,¹⁶¹

¹⁵⁵ B. Dubuisson and G. Tossens, 'Les relations entre professionnels et droit belge', in J. Ghestin and M. Fontaine, *Les relations entre professionnels et droit belge*, Paris, LGDJ, 1996, 439.

¹⁵⁶ See e.g. Kh. Ieper 29 June 1998, RW 1999–2000, 21; A. Hartkamp and C. Sieburgh, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, 3, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 368–369; S. Lindbergh, 'Bescherming van de "zwakkere": regel en uitzondering', in T. Hartlief and C. Stolker, *Contractvrijheid*, Deventer, Kluwer, 1999, 406–407; S. Stijns, 'De matigingsbevoegdheid van de rechter bij misbruik van contractuele rechten in de Belgische rechtspraak van het Hof van Cassatie', J. Smits and S. Stijns (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 94–97; F. Vermander, 'De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering', *TBBR* 2004, 576.

¹⁵⁷ HR 8 February 2002, NJ 2002, 284; A. Hartkamp and C. Sieburgh, *Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, III, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, no. 412–413.

¹⁵⁸ P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 22–23.

¹⁵⁹ International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 20; Cass. 19 September 1983, RW 1983–84, 1480; A. Cathiard, *L'abus dans les contrats conclus entre professionnels L'apport de l'analyse économique du contrat*, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2006, 471–518; A. Hartkamp and C. Sieburgh, *Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, III, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, no. 413; S. Stijns, 'De matigingsbevoegdheid van de rechter bij misbruik van contractuele rechten in de Belgische rechtspraak van het Hof van Cassatie', in J. Smits and S. Stijns (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 79–100; F. Vermander, 'De interpretatie en aanvulling van een overeenkomst naar Belgisch recht', in J. Smits and S. Stijns (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 38–40.

¹⁶⁰ International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 212–222; A. Hartkamp and C. Sieburgh, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, 3, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 369–373.

¹⁶¹ W. De Bondt, 'Uitlegging van overeenkomsten naar de geest: mogelijkheden, grenzen en alternatieven', RW 1996–97, 1010–1012; P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 22;

abuse of non-competition clauses,¹⁶² etc.). Once again, exemption clauses provide us with an excellent example. All member states have incorporated into their national legislations rules which limit the possibility of introducing exemption clauses in B2C contracts, so as to comply with European legislation. With the exception of English law which contains an express provision clearly stating that a party to a B2B contract can invoke an exemption clause only if such is reasonable,¹⁶³ such specific B2B provision does not exist in other Member States, the doctrine on exemption clauses in B2B contracts being purely based on case law.

Since exemption clauses which are too extensive and therefore undermine the essence of the contract cannot be addressed by simply reverting to the principle of interpretation in good faith, judges will often have to act more invasively in order to limit their scope.¹⁶⁴ For example in the case of a sales contract, courts often revert to good faith and related doctrines to attack an exemption clause in which a seller altogether exonerates himself for warranty against eviction or for delivery of the goods.¹⁶⁵ Belgian and French courts go even further and state that, since a professional seller is aware of all hidden defects (cf. *supra*), he cannot exonerate himself for hidden defects. Strangely enough, the rule applies to both B2C and B2B sales.¹⁶⁶ In other Member States on the contrary, exemption clauses in B2B contracts are not prohibited *tout court*, but only insofar as they are unreasonable in light of the specific circumstances of a certain case. In order to assess the reasonable character of an exemption clause in a B2B contract, the level of specialization of the parties involved, the size of their business, etc. are taken into account.¹⁶⁷ The French-Belgian austerity towards exemption clauses has thus been criticized, especially in the

F. Vermader, 'De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering', *TBBR* 2004, 578.

¹⁶² P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 22.

¹⁶³ Section 5 UCTA; H. Beale, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 963–968. Before the provision was introduced in UCTA, English judges reverted to the doctrine of unconscionability, the doctrine of fundamental breach etc. in order to attack unreasonable exemption clauses. See J. Adams and H. MacQueen, *Atiyah's Sale of Goods*, London, Longman, 2010, 216; M. Bridge, *Benjamin's Sale of Goods*, London, Thomson Reuters, 2010, 696.

¹⁶⁴ J. Adams and H. MacQueen, *Atiyah's Sale of Goods*, London, Longman, 2010, 216; H. Beale, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 911.

¹⁶⁵ Art. 6 (1) UCTA. M. Bridge, *Benjamin's Sale of Goods*, London, Thomson Reuters, 2010, 696; B. Tilleman, *Beginselen van Belgisch privaatrecht*, X, *Overeenkomsten*, Part 2, *Bijzondere overeenkomsten*, A, *Verkoop*, part 2, *Gevolgen van de koop*, Mechelen, Kluwer, 2012, 416.

¹⁶⁶ For France, see Cass. civ. 17 May 1965, *Bull. civ.* 1965, I, n° 62–12790; A. Bénabent, 'La qualification du "vendeur professionnel"', *Revue des contrats* 2009, 111; M.-A. Houtmann, 'La mauvaise foi effective des vendeurs professionnels en matière de garantie d'éviction et des vices cachés', *Petites affiches* 1 August 2002, n° 153, 6; C. Normand, 'Le professionnel de l'immobilier et la garantie des vices cachés dans la jurisprudence', *Petites affiches* 28 January 2010, n° 20, 6. For Belgium, see Cass. 4 May 1939, *Pas.* 1939, I, 223; Luik 2 June 2004, *JLMB* 2004, 1729; B. Tilleman, *Beginselen van Belgisch privaatrecht*, X, *Overeenkomsten*, Part 2, *Bijzondere overeenkomsten*, A, *Verkoop*, part 2, *Gevolgen van de koop*, Mechelen, Kluwer, 2012, 411–416.

¹⁶⁷ Rb. 's- Gravenhage 4 June 2008, nyr; Balmoral Group Ltd v. Borealis UK Ltd [2006] 2 *Lloyd's Rep* 629; Photo Productions Ltd v. Securicor Transport Ltd [1980] AC 827; H. Beale, *Chitty on Contracts*, vol. 2, *Specific contracts*, London, Sweet & Maxwell, 2008, 1453.

context of B2B contracts, for being simply too categorical and for going beyond the demands of procedural fairness (cf. *supra*).¹⁶⁸

Another excellent example of how the moderating function of good faith is used in a commercial context is the case law on price setting in cases where the price was fixed by one of contracting parties. Many commercial contracts concluded between two businesses contain an express or implicit term giving the supplier the authority to fix the price of the goods or services he is supplying unilaterally. In most Member States, with the exception of Belgian sales law, such a clause is not prohibited in itself. If, however, the supplier abuses the right conferred on him by the contract and acts in a grossly unreasonable and unfair manner, a judge may intervene.¹⁶⁹

21. *Different degrees of judicial intervention.* The demarcation lines between the three functions of good faith are often blurry.¹⁷⁰ It is for this reason that some authors have proposed to merge the three functions in one general notion of interpretation.¹⁷¹ Let me give an example which I have already briefly touched upon earlier. In theory, the supplementary and derogating function of good faith starts where the interpretative function ends.¹⁷² However, continental judges often tend to protect weaker contract parties by depicting their intervention as a matter of interpretation, whereas they are in reality adding terms to the contract or mitigating express terms for reasons of good faith, and are thus often infringing upon the principle that the principle of good faith can only be referred to for interpreting a contract when there is doubt as to the meaning of its words (cf. *supra*).¹⁷³ English judges will recognize more easily that they are reading implied terms into the contract. In the end, however, the results are the same.

¹⁶⁸ Cf. I. Claeys and K. Van Strydonck, 'Contractuele aansprakelijkheidsbeperkingen van de professionele verkoper bij verborgen gebreken in het gemeen kooprecht: elk argumenten pro', in H. Bocken, C. Caufmann, a.o., *Bijzondere overeenkomsten*, 2008, Mechelen, Kluwer, 309–334; Y.-M. Laithier, 'L'avenir des clauses limitatives et exonératoires de responsabilité contractuelle', *Revue des contrats* 2010, 1091.

¹⁶⁹ Art. 7:904 DCC; *Lymington Marina Ltd v MacNamara* [2007] *EWCA Civ* 151; H. Beale, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 9020; A. Hartkamp and C. Sieburgh, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, 3, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 364; P. le Tourneau and M. Poumadère, 'Bonne foi', *Rép. Civ. Dalloz* 2009, 15–16; D. Mazeaud, 'La protection par le droit commun', in C. Jamin and D. Mazeaud, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 38–39; G. Virassamy, 'Les relations entre professionnels en droit français', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 498–500.

¹⁷⁰ See M.E. Storme, *De invloed van de goede trouw op de kontraktuele schuldvordering*, 118.

¹⁷¹ A. Hartkamp and C. Sieburgh, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, 3, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 340–341; M. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht*, s.l., Kluwer, 1999, 131–172; M.E. Storme, *De invloed van de goede trouw op de kontraktuele schuldvordering*, 118.

¹⁷² F. Vermander, 'De interpretatie en aanvulling van een overeenkomst naar Belgisch recht', in J. Smits and S. Stijns (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 31–34.

¹⁷³ N. Korinet, *Contract interpretation and gap filling: comparative and theoretical perspectives*, Antwerp, Intersentia, 2006.

3. P.CESL accepts procedural fairness and contextualization in a B2B context

22. *Conclusion.* It should be clear by now that, as far as B2B contracts are concerned, none of the Member States revert to the level of formalism and the intensive mania for organization which often seem to prevail in a B2C context.¹⁷⁴ Furthermore, none of them has accepted either a general principle or specific rules of relief against inequality of bargaining power. In general national courts will act only when one company *abuses* such inequality of bargaining power to the detriment of another company, by referring to general principles of fairness (such as good faith, mutual cooperation, etc.).¹⁷⁵

23. *What about the P.CESL?* Since the P.CESL aims to cover the entire lifecycle of a contract, the introduction of such a general behavioural guideline was inevitable, not only for B2B contracts but even for B2C contracts. 'The main advantage of an overarching general clause for consumer contracts in the horizontal instrument would be the creation of a tool which would provide guidance for the interpretation of more specific provisions and would allow the courts to fill gaps in the legislation by developing complementary rights and obligations. It could therefore provide a safety net for consumers and create certainty for producers by filling gaps in legislation. In addition, a general provision may also be a useful tool when interpreting clauses contained in offers or contracts and it may as well respond to the criticism that certain directives or provisions are not time-proof. A general provision could be built round the phrase "good faith and fair dealing". This includes the idea that they show due regard to the interests of the other party, considering the specific situation of certain consumers.'¹⁷⁶ One cannot constrict an entity to its capacity of consumer/customer and protect them through an exhaustive list of detailed rules; other values have to be taken into account as well.¹⁷⁷ The P.CESL thus contains both a general principle of good faith and fair dealing (article 2) and a general principle of cooperation (article 3). According to the preamble to the CESL 'the principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of the parties as set out in the specific rules. The concrete requirements resulting from the principle of good faith and fair dealing should depend, amongst others, on the relative

¹⁷⁴ M. Fontaine, 'La protection de la partie faible dans les rapports contractuels', in J. Ghestin and M. Fontaine, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 627; H. Schoordijk, 'Het gebruik van open normen naar Belgisch en Nederlands privaatrecht', in E. Dirix, W. Pintens, P. Senaevé and S. Stijns, *Liber amicorum Jacques Herbots*, Bruges, Kluwer, 2002, 348–350.

¹⁷⁵ See H. Beale, 'Exclusion and Limitation Clauses in Business Contracts: Transparency', in A. Burrows and E. Peel (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, 195–198; J. Cartwright, *Contract Law*, Oxford, Hart Publishing, 2007, 169–170.

¹⁷⁶ Green Paper on the Review of the Consumer Acquis COM(2006) 744 final, Brussels, 8 February 2007.

¹⁷⁷ M. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice', *European Review of Private Law* 2007, 330–332.

level of expertise of the parties and should therefore be different in business-to-consumer transactions and in business-to-business transactions. In transactions between traders, good commercial practice in the specific situation concerned should be a relevant factor in this context.’

24. *Clear parallel with national approaches.* The P.CESL subsequently puts these general principles into operation by introducing more specific provisions which find themselves in a *lex specialis* relation towards that general principle. Whereas these specific rules are extensive, fairly detailed and often categorical for contracts concluded with consumers, they remain fairly open, vague and limited in number for B2B contracts. The similarities between the P.CESL and the national approaches are striking (though not surprising, since the P.CESL was drafted with the national approaches in mind). Let me give three examples.

Article 23 imposes a pre-contractual information duty upon a company that wishes to supply goods or services to another company. Whereas the proposal contains a detailed list of elements on which a consumer has to be informed, this is not the case if the customer is another company. In a B2B contract, the information duty is not considered to be absolute and automatic. In order to determine the extent of the information duty, the expertise of both companies, the nature of the information, good commercial practices, etc. have to be taken into account.

The P.CESL introduces a general prohibition of unfair terms in contracts between traders (article 86).¹⁷⁸ In order to assess whether a contract term is unfair, the nature of the goods or services, the prevailing circumstances at the time of the conclusion of the contract, etc. are taken into account. There is no grey and black list of terms which are considered to be unfair in all circumstances as this is the case for contracts concluded with consumers.

According to article 104 P.CESL, in a contract between traders, the seller is not liable for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity. If the buyer is specialized, chances are that courts will more easily accept that he should have known about the defect. If the customer is a consumer he is always considered to be unknowing; the trader will only be able to exonerate himself for a lack of conformity if he can prove that the consumer knew of the lack of conformity and accepted it (article 99 (3)).

25. *Contextualization.* As the Commission pointed out in the last sentence, one of the main advantages of applying norms to ensure protection of weaker contract parties is that they allow for contextualization, for a concrete assessment of who is the stronger and who is the weaker party in a contractual relationship.¹⁷⁹ Contrary to the categorical approach towards consumer protection sometimes taken by specific consumer legislation (cf. *supra*), the traditional approach of the Member States towards B2B contracts allows for contextualization and only confers protection upon persons and entities who

¹⁷⁸ Cf. Art. II-9:405 DCFR.

¹⁷⁹ T. Hartlief, *De vrijheid beschermd*, Oegstgeest, E.M. Meijers Instituut, 1999, 41; P. le Tourneau and M. Poumadère, ‘Bonne foi’, *Rép. Civ. Dalloz* 2009, 5.

effectively find themselves in a weaker position than their counterparty.¹⁸⁰ The examples in the previous paragraph are numerous. SMEs are not protected merely by the fact of being an SME; all relevant circumstances are taken into account when assessing the bargaining position of the SME in its dealings with another company. Elements such as business sophistication, size, monopoly power, shortage, the public nature of an industry, nature of the contract which is concluded, duration of the contract, etc. are taken into account.¹⁸¹ This allows for distinguishing between different SMEs and thus solves the problem of SMEs being a very diverse category.¹⁸²

It is not inconceivable that in certain circumstances an SME has a stronger bargaining position than a LE it is dealing with. Recently, the European Law Institute has therefore advocated to abandon the restriction to SMEs and therefore to apply the B2B rules of the D.CESL in all commercial transactions, irrespective of the size of the parties involved.¹⁸³

26. Contextualization versus internal market? However, since the interpretation of the principle of good faith and of fair commercial practices can differ extensively from one country to another and the CESL will have to be enforced through national courts, critics have raised the question of whether the CESL will really be able to remove obstacles to the internal market if it heavily relies on principles of good faith and good commercial practices. It will not be possible to safeguard the internal market without a true European interpretation of these principles.¹⁸⁴ The question is, however, whether this really is desirable, especially in the area of B2B contracts, where the interpretation of good faith and good commercial practices not only differs from one country to another, but also from one sector to another.

¹⁸⁰ N. Huls, 'Sterke argumenten om zwakke contractpartijen te beschermen', in T. Hartlief and C. Stolker, *Contractvrijheid*, Deventer, Kluwer, 1999, 402.

¹⁸¹ K. Cseres, 'Competition and contract law', in A. Hartkamp, M. Hesselink, E. Hondius, C. Mak and E. du Perron, *Towards a European Civil Code*, Alphen aan de Rijn, Kluwer, 2011, 215; F. Vermader, 'De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering', *TBBR* 2004, 577.

¹⁸² For a comparable point of view, see M. Hesselink, *SMEs in European contract law – Background note for the European Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis – Final version – 5 July 2007*, 4–5 and 18, available at www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf.

¹⁸³ See Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, available at www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf. See also O. Lando, 'Comments and Questions Relating to the European Commission's Proposal for a Regulation in a Common European Sales Law', *European Review of Private Law* 2011, 720–721.

¹⁸⁴ L. Bernstein, 'An (Un)Common Frame of Reference: An American Perspective on the Jurisprudence of the CESL', forthcoming in *Common Market Law Review* 2012, electronic copy available at <http://ssrn.com/abstract=2067196>, 13; S. Troiano, 'To What Extent can the Notion of Reasonableness Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective', *ERPL* 2009, 749.

27. *A consumer law for professionals?* It is in the light of all the foregoing that it is, in my view, particularly unfortunate to label the CESL rules as a ‘consumer law for professionals’. By labelling them as such, one creates a wrong impression, as these rules do not constitute a separate body of rules which deviate from general contract law, but are an integral part of general contract law and are no more than a refinement thereof.¹⁸⁵ In other words, the protection of weaker companies from more powerful companies is no more than a consequence of the application of general contract law rules in a B2B context.

¹⁸⁵ E. Terryn, ‘Codificatie in het economisch recht’, in B. Tilleman and E. Terryn, *Beginselen van Belgisch privaatrecht*, XIII, *Handels- en economisch recht*, part 1, *Ondernemingsrecht*, volume A, Mechelen, Kluwer, 2011, 61–62.

THE CESL AND ITS UNFAIR TERMS PROTECTION FOR SMEs

Josse Klijnsma*

1. Introduction

On a policy level the European Union has concerned itself with small and medium-sized enterprises (SMEs) for some time now, as is witnessed by the Small Business Act for Europe and the ‘Think Small First’ principle.¹ In EU contract law, however, there exist practically no rules specifically concerned with SMEs. The proposed regulation on a Common European Sales Law (CESL) aims to change this.² In only the first two pages of the Explanatory Memorandum, SMEs are mentioned seven times and Article 7(2) of the proposed Regulation determines that the CESL may be used even in B2B situations if at least one party is an SME. Interestingly enough, however, SMEs are not mentioned once in Annex I, which contains the material rules of the CESL. To conclude that the CESL would not change anything for the position of SMEs, however, would be a big mistake.

The CESL includes a section on unfair terms in contracts between traders. Accordingly, the terms of a contract between an SME and another business can be tested on its unfairness under the CESL.³ It is the first time that would be the case in a EU context, as the Unfair Terms Directive⁴ only included an unfairness test for B2C contracts. The extension of an unfairness test to B2B situations is not uncontroversial.

In this chapter I will first argue that an extension of the unfairness test of contractual terms is justified in contracts where at least one party is an SME. Two paradigms lie at the basis of much of European contract law: the creation of a well-functioning internal market and the protection of weaker parties.⁵ These aim respectively at removing barriers to trade and the prevention of taking advantage of weaker parties. The Commission

* Josse Klijnsma is a PhD candidate at the CSECL, UvA.

¹ COM(2008) 394 final.

² COM(2011) 635 final. In the remainder of this chapter I will use European contract law to mean contract law coming from the EU legislator.

³ In this chapter I will not discuss C2SME contracting but focus on SME2B relations.

⁴ Directive 93/13/EC.

⁵ See e.g. E. Hondius, ‘The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis’, *Journal of Consumer Policy* 27, 2004; H. Micklitz, ‘Social Justice and Access Justice in Private Law’, *EUI Working Papers Law*, electronic copy available at: <http://ssrn.com/abstract=1824225>, 2011/02.

identifies these two rationales as underlying the CESL and captures both concerns when it says in its Explanatory Memorandum: ‘in their relations with larger companies, SMEs generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of foreign law applicable to the contract.’⁶ I will not discuss the (relative) merits of these – sometimes overlapping, sometimes conflicting – paradigms. Instead I will argue that both paradigms justify an unfair terms test for SMEs.

Secondly, I will discuss Chapter 8 of the proposed CESL and assess to what extent it provides an appropriate unfair terms test for SMEs. I will not make this assessment in the abstract, but rather I will take the unfairness test for consumers as a starting point and then evaluate whether the paradigms discussed justify differences in the test for SMEs and the test for consumers as proposed in the CESL.⁷ In particular I will discuss the proposed test of Article 86, the black and grey lists and their possible *Indizwirkung*, and information duties. In doing so I will – where useful – compare the rules of the CESL with the Unfair Terms Directive 93/13, national laws and the DCFR. One caveat should be made: I will not discuss what exactly counts or should count as an SME. The Commission defines SMEs as any trader employing less than 250 persons and an annual turnover not exceeding €50 million (Article 7 CESL). This of course is still a very heterogeneous group and whether or not further differentiation would be beneficial is an important matter. However, for the fundamental argument of whether SMEs (however they are defined exactly) should be protected, this otherwise important question can be left unanswered.

2. The case for unfair terms protection for SMEs

2.1. *An internal market argument*

As the Commission notes ‘the overall objective of the [CESL] is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers.’⁸ SMEs are particularly vulnerable to the difficulties associated with cross-border trade as they often lack the expertise necessary to deal with a multitude of national systems.⁹ On top of that, the added cost for SMEs may be particularly high relative to their turnover and prevent them from entering into cross-border trade (see recitals 2 and 7 CESL). There are two ways in which extending protection against unfair terms to SMEs can help strengthen the internal market: (1) by creating confidence and reducing complexity and (2) by correcting market failures.

⁶ COM(2011) 635 final, p. 3.

⁷ The purpose of this chapter is also modest in the sense that it identifies the two rationales put forward by the Commission as underlying the CESL and then assesses the CESL from these perspectives. That means that certain reasons that might be given for excluding SMEs from protection, like the fact that they are legal persons or that they aim at making a profit, only factor in to the extent they are relevant within these two paradigms.

⁸ COM(2011) 635 final, p. 4. The fact that the Commission stresses this is of course influenced by the fact that the legal basis of article 114 TFEU requires there to be a benefit to the internal market. In this chapter I will not argue the actual benefit the CESL might have for the internal market but rather more modestly that given that rationale the rules on unfair terms should also be extended to SMEs.

⁹ COM(2011) 635 final, p. 3.

SMEs entering into cross-border transactions have to deal with multiple systems of contract law. This adds to the complexity and costs of such transactions. Accordingly, companies have indicated that dealing with foreign contract law ranks among the greatest barriers to cross-border trading.¹⁰ SMEs will often be unsure what rights they have under foreign law as well as what duties. The legal landscape across Europe is especially complicated with regard to unfair terms. Directive 93/13 on Unfair Terms is restricted to contracts between a trader and a consumer so it might seem that there simply is no unfair terms test for SMEs in their dealings with other traders. However, Member States are allowed to extend the scope of the protection to businesses like SMEs as well.¹¹ A number of Member States have in fact, under certain circumstances, used this opportunity, like Belgium, France, Spain and the Netherlands.¹²

Having an unfair terms test applying to SMEs that is the same throughout the internal market can stimulate cross-border trade both by creating confidence and by reducing complexity. It can bolster the confidence for SMEs to cross the border, knowing they will not be the victims of unfair terms supplied by the other trader. Much like consumers that are assured of a high level of protection might be more willing to shop abroad, an SME that is confident that it will not be subject to unfair terms that might be allowed under foreign law will more readily engage in cross-border trade. Furthermore, a uniform unfair terms test can reduce the complexity for SMEs so that they know whether or not their standard terms, as well as the other trader's standard terms, are policed and on the basis of what norm.¹³ That means that when an SME supplies the standard terms (for example in dealing with another SME), it could use the same set of terms throughout Europe.¹⁴

Another way that unfair terms protection for SMEs can strengthen the internal market is by correcting a market failure. The market failure in question is that competition on the terms of the contract fails.¹⁵ For most contracts SMEs, just like consumers, will not have the incentive to analyse the terms and hence the other trader cannot charge a higher price for better terms, leading to a market of lemons for contract terms.¹⁶ Note that this argument is not based on the perceived weakness of one of the parties, but rather at a specific market failure. That market failure applies as much to SMEs as it does to consumer and accordingly there is no ground for a distinction between the two in this regard.¹⁷

¹⁰ Eurobarometer 320, p. 7.

¹¹ H. Micklitz, J. Stuyck and E. Terryn (eds), *Cases, Materials and Texts on Consumer Law*, Portland: Hart Publishing, 2010.

¹² H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds), *EC Consumer Law Compendium*, Munich: Sellier, 2008, pp. 458–461.

¹³ Technically prohibiting Member States to test the unfairness of terms between traders could similarly achieve that goal, but that does not seem to be on the table and the legal basis for such a prohibition would be highly questionable at best.

¹⁴ Interestingly, there are no special rules for SMEs with regard to a 'battle of the forms' as dealt with in Article 39 CESL.

¹⁵ O. Lando, 'Liberal, Social and "Ethical" Justice in European Contract Law', *Common Market Law Review* 43, 2006, pp. 830–831.

¹⁶ H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmerman, 'Towards a Revision of the Consumer Acquis', *Common Market Law Review* 48, 2011, p. 1087.

¹⁷ H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmerman, 'Towards a Revision of the Consumer Acquis', *Common Market Law Review* 48, 2011, pp. 1092–1093.

2.2. *A weaker party protection argument*

Aside from the internal market argument, also the rationale of weaker party protection provides a compelling reason to extend unfair terms protection to SMEs. The Court of Justice of the European Union (CJEU) has made clear in a line of cases that the unfair terms policing of Directive 93/13 is based on the relative weakness of consumers. In its *Océano* case the Court already stated that: ‘the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.’¹⁸ This reasoning was confirmed and expanded in a number of decisions and is now well-established case law.¹⁹

This is embedded in a more general paradigm of weaker party protection that has developed in European contract law.²⁰ As is clear from the *Océano* case, the weakness of the consumer relative to the trader is located primarily in his lack of bargaining power and lack of information.²¹ Because of his economic position the consumer is powerless to bargain with the trader and hence will not be able to influence the contract terms. In other words, a product is typically offered on a take-it-or-leave-it basis with regard to the contractual terms. This allows businesses to impose unfair terms.

On top of that there often exists an information asymmetry between the consumer and the business.²² The business is a repeat player with regard to its own products and standard terms while the consumer often contracts for a certain product only every so often. The effect of this is enhanced by the weakness in bargaining position, because when the consumer cannot influence the terms anyway it is more likely he will not attempt to gather more information. Finally, consumers are prone to make mistakes because their rationality is limited.²³

Weaker party protection rules – and more specifically the rules on unfair terms protection – aim at correcting these problems. This can be appealing both from a freedom of contract perspective as well as a social justice perspective. An imbalance in the contractual relation results in a lack of self-determination and hence in flawed consent.²⁴ Weaker party protection rules can also be seen to help social justice goals by improving

¹⁸ C-240/98 to C-244/98, 27 June 2000 (*Océano*), par. 25.

¹⁹ 26 October 2006, *Mostaza Claro* (C-168/05, par. 25); 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, par. 29); 14 June 2012, *Banco Español de Crédito* (C-618/10, par. 39); and most recently in the Opinion of Advocate General J. Kokott in the *Aziz* case (C-415/11, par. 39) of 8 November 2012.

²⁰ E. Hondius, ‘The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis’, *Journal of Consumer Policy* 27, 2004, pp. 245–246. Again here I will not defend the strength or usefulness of the paradigm itself but rather argue that given the paradigm it should include SMEs.

²¹ O. Lando, ‘Liberal, Social and “Ethical” Justice in European Contract Law’, *Common Market Law Review* 43, 2006, p. 827.

²² M.W. Hesselink, ‘Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive’, *ERPL* 18 (1), 2010, pp. 94–95. This could also be characterized as a market failure, but one caused by the relative weakness of the consumer.

²³ B.B. Duivenvoorde, ‘De “gemiddelde consument” als rationele actor’, *WPNR* 141 (6849), 2010.

²⁴ H. Rösler, ‘Protection of Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law’, *ERPL* 18 (4), 2009, p. 733.

the social and economic position of the worst off.²⁵ One of the characteristics of the way the EU has approached weaker party protection is that it protects categorical weakness instead of particular weakness.²⁶ The question with regard to SMEs is then whether they could be qualified as weaker parties, i.e. whether they fall within the category that should be protected.²⁷

With regard to both bargaining power and information asymmetry, SMEs are often very similar to consumers.²⁸ A small company dealing with a larger company will have the same difficulties in influencing the terms of the contract since it is not in the economic position to do so. This was already realised by the Commission in its 2003 Action Plan: 'SMEs often have to accept their co-contractor's standard terms and the law of the latter as the applicable law due to their weaker negotiating power.'²⁹ The same goes for information asymmetry and limited rationality. Small companies also lack the resources to gather more information, especially in the case of atypical contracts.³⁰ On top of that, the people working at companies will make the same sort of mistakes that they would as a consumer. A large company can be expected to organise its business in such a way as to minimise the effect of such mistakes, but a small company will not be in a position to do the same. Accordingly, the paradigm of weaker party protection also provides compelling reasons to extend unfair terms protection to SMEs.

3. Unfair terms protection for SMEs in the CESL

All in all it can be concluded that both from the perspective of the internal market as well as that of weaker party protection, an unfair terms test should also be extended to SMEs. On top of that neither paradigm provides a reason for clearly differentiating between SMEs and consumers, as the rationales underlying the paradigms apply similarly to SMEs as to consumers with regard to an unfair terms test. So how does the CESL deal with unfair terms in the contractual relation between an SME and another business? And do the formulated rules conform to the rationales of the previously discussed paradigms?

Chapter 8 of Annex I of the proposed Regulation contains the rules on unfair contract terms. The chapter consists of three sections. First comes a section with general provisions. This section determines that an unfair term is not binding (Article 79), that the main subject matter of the contract is excluded from the unfairness test (Article 80) and that the chapter has a mandatory nature (Article 81). The second

²⁵ H. Micklitz, 'Social Justice and Access Justice in Private Law', *EUI Working Papers Law*, electronic copy available at: <http://ssrn.com/abstract=1824225>, 2011/02, p. 1.

²⁶ H. Rösler, 'Protection of Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-Level Private Law', *ERPL* 18 (4), 2009, p. 743.

²⁷ M.W. Hesselink, 'Unfair Terms in Contract between Businesses', in: R. Schulze and J. Stuyck (eds), *Towards a European Contract Law*, Munich: Sellier, 2011, pp. 132–134.

²⁸ M.W. Hesselink, 'SMEs in European Contract Law', in: K. Boele-Woelki and W. Grosheide (eds), *The Future of European Contract Law*, Alphen aan de Rijn: Kluwer Law International, 2007, p. 359.

²⁹ Action plan COM(2003) 68 final, p. 30.

³⁰ M.W. Hesselink, 'Towards a Sharp Distinction between b2b and b2c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive', *ERPL* 18 (1), 2010, pp. 93–95.

section contains the rules on unfair contract terms between traders and consumers (Article 82–85) while the third section contains the rules on unfair contract terms between traders (Article 86). As already mentioned in the introduction, this is the first time that an unfairness test for contractual terms between businesses is incorporated in (proposed) European legislation.³¹ Here it is important to note that Article 7 of the Regulation provides that the CESL can only be used between two traders if at least one of the traders is an SME. This means that Article 86 refers to a situation where there is a contract between an SME and another business (either also an SME or a large enterprise).

This division of sections already shows the good and the bad elements of the CESL with regard to unfair terms for SMEs. The good is that an unfairness test also exists for SMEs in their contractual relationships with other traders. The bad is that there still is an unjustified distinction between the test for consumers and the test for SMEs. To understand exactly what this distinction entails I will discuss in some further detail the rules of Chapter 8 CESL.

3.1. *Definition of the consumer and mixed contracts*

To understand the distinction between section 2 and section 3 of Chapter 8 we must first see exactly what the definition of a consumer and of a trader is under the CESL. Article 2 of the Regulation determines that ‘trader’ means any natural or legal person who is acting for purposes relating to that person’s trade, business, craft or profession, while consumer means any natural person who is acting for purposes which are outside that person’s trade, business, craft or profession. There are three important elements of the consumer definition to notice. First of all, only natural persons can be qualified as consumers. This is in conformity with previous EU directives and the DCFR (Book I.-1:105), even though some Member States have extended the definition of consumer to certain legal persons.³² Secondly, the definition excludes business persons concluding atypical contracts, i.e. contracts outside of the normal trade or profession of the business person. For example France extends the notion of consumer to a business person who concludes a contract that does not have a direct relation to his business activity.³³ So under the CESL a lawyer buying lamps for his office would always be excluded from the definition of consumer. Finally, the consumer definition in the CESL excludes mixed contracts, i.e. contracts with both a private and a professional use, from consumer protection. In the *Gruber* case³⁴ the CJEU ruled that Articles 15–17 of the Brussels I Regulation³⁵ could only be invoked if the professional use was negligible, but it was not clear whether this was also the case for Directive 93/13. The DCFR’s definition of consumer included persons who act *primarily* for purposes outside of their trade.

³¹ It was also already proposed in the DCFR, Book II.-9:405.

³² H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds), *EC Consumer Law Compendium*, Munich: Sellier, 2008, pp. 460–461.

³³ H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds), *EC Consumer Law Compendium*, Munich: Sellier, 2008 pp. 458–459.

³⁴ CJEU 20 January 2005, C-464/01 *Johann Gruber*.

³⁵ Brussels I Regulation (EC) No 44/2001.

However, the CESL has not included this qualification, indicating that any mixed contracts should be regarded as falling under section 3 of Chapter 8 CESL. In conclusion, the CESL has a narrow definition of a consumer on all three accounts.³⁶ This means that the test of Article 86 CESL is even more important for SMEs, as in no circumstances can they rely on the test for consumers.

3.2. *The unfairness test of Article 86 CESL*

So what does the unfairness test of Article 86 look like and in what ways does it differ from the test for trader to consumer contracts? Article 86 determines that:

- ‘In a contract between traders, a contract term is unfair for the purposes of this Section only if:
- (a) it forms part of not individually negotiated terms within the meaning of Article 7; and
 - (b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.’

There are a number of ways in which this test differs from the test for consumer to trader contracts. The general test of Article 83 determines that a term between a trader and a consumer is unfair if it causes a significant imbalance to the detriment of the consumer contrary to good faith. The criterion of grossly deviating from good commercial practice that is used in Article 86 is derived from Article 3 Directive 2000/35 and is meant to be harsher than the significant imbalance test of Article 83.³⁷ Given the conclusions of the previous paragraph, such a difference seems unjustified.³⁸ A harsher test neither creates more confidence for SMEs to engage in cross-border trading (internal market rationale), nor does it seem justified because of a stronger bargaining position against other traders than consumers would have (weaker party protection rationale).

Article 86(2) outlines a number of considerations to be taken into account in determining the unfairness of a contract term: the nature of what is to be provided, the circumstances prevailing during the conclusion of the contract, the other contract terms and terms of other contracts on which the contract depends. These are identical to the criteria outlined in Article 83(2), except that the latter also includes a transparency test. The transparency test refers to a duty of transparency as formulated in Article 82, which requires traders to draft and communicate contract terms in plain and intelligible language. This duty is expressly only applicable to consumer contracts, unlike the duty of transparency as formulated in Book II.-9:402 DCFR. This is particularly unsatisfactory because both the internal market rationale as well as the weaker party rationale identify a lack of information as something to be remedied. On top of that, the duty of transparency

³⁶ M.B.M. Loos, ‘Standard Contract Terms Regulation in the Proposal for a Common European Sales Law’, *Zeitschrift für Europäisches Privatrecht* (4), 2012, p. 792.

³⁷ DCFR notes p. 642.

³⁸ See also M.B.M. Loos, ‘Standard Contract Terms Regulation in the Proposal for a Common European Sales Law’, *Zeitschrift für Europäisches Privatrecht* 4, 2012, pp. 788–790.

aims at remedying the problems arising from limited rationality from which SMEs also suffer.

Another element of the substantive unfairness test that differs between section 2 and section 3 of Chapter 8 CESL is the lack of a grey list and a black list. The two lists included in Articles 84 and 85 indicate a number of absolute unfair terms (black list) and a number of presumed unfair terms (grey list). These lists are significantly more extensive than the list in Directive 93/13.³⁹ In a number of Member States, e.g. Germany and the Netherlands, such lists have so-called *Indizwirkung* for trader-to-trader contracting. This means that the terms on the black and grey lists can be indicative of what is to be considered unfair under the more general open norm. However, such a *Indizwirkung* is not mentioned in the factors that are to be considered under Article 86(2) CESL. Accordingly this is another way in which SMEs face a harsher test than consumers do in a way that is not justified by either of the rationales. A black and grey list would provide more certainty and hence a less complex system (internal market rationale). On top of that, especially given the restrictive notion of a consumer, even when an SME is in an almost identical situation it could still not rely on the norms of the black and grey list.

The last element in which the unfairness test for SMEs differs is in the not individually negotiated requirement. In principle, terms that are individually negotiated are excluded from the unfairness test. However, where Article 83 determines that a term that is not individually negotiated can be tested, Article 86 determines that a term *that forms part of not individually negotiated terms* can be tested. This might be read as implying that as soon as one of the terms of the contract has been individually negotiated, all the other terms are exempted from the unfairness test. As it is not even necessary that the negotiations are successful this seems particularly harsh for SMEs.⁴⁰ Finally, there is a difference concerning the duty to raise awareness of not individually negotiated terms as specified in Article 70 CESL. This Article determines that such terms may only be invoked if the party supplying them took reasonable steps to draw the other party's attention to them. Article 70(2) determines explicitly that for consumer contracts this is not the case if the terms are merely mentioned in the contract itself. This explicit mention seems to imply that a contrario in contracts between an SME and another business such a mention might be sufficient to comply with the duty to raise awareness. Again, such a distinction between consumers and small businesses does not seem justified.

4. An autonomous interpretation as the way forward?

So what can we conclude from all of this? First of all, the inclusion of an unfairness test for SMEs is an improvement compared to the current *acquis*. This is the first time (not counting the DCFR) that such a rule has been proposed on a European Union level. The adoption of a similar test is supported both by an internal market rationale and a weaker

³⁹ M.B.M. Loos, 'Standard Contract Terms Regulation in the Proposal for a Common European Sales Law', *Zeitschrift für Europäisches Privatrecht* 4, 2012, pp. 790–792. Which also only had an 'indicative' – not even presumptive – value.

⁴⁰ M.B.M. Loos, 'Standard Contract Terms Regulation in the Proposal for a Common European Sales Law', *Zeitschrift für Europäisches Privatrecht* 4, 2012, pp. 784–786.

party rationale. However, the CESL introduces different tests for consumer contracts and for SMEs contracting with other businesses. Neither of the rationales justifies such a distinction between consumers and SMEs with regard to an unfair terms test. In comparing the two tests it looks as if the CESL has a much harsher test for SMEs than it does for consumers.

However, with open norms like the one of Article 86 CESL the devil is in the detail, or more positively phrased, the angel in the interpretation. How courts will interpret this norm will determine to a large extent how great the differences will eventually be and how successful protection from unfair terms for SMEs will be. Here the CJEU could take a leading role much like it did in much of its case law concerning Directive 93/13. To do so it would have to depart from its *Freiburger Kommunalbauten* case.⁴¹ Here the Court refused to give an autonomous interpretation of what qualifies as unfair under Article 3 of the Unfair Terms Directive.⁴² Instead it ruled that the determination of whether a certain term is unfair also depends on national law and hence should be decided by national courts. I think, however, that the CESL differs significantly from the Directive in this regard. The CESL aims to stand in place of national law as much as possible and the explicit goal of the Commission is that it should be as far as possible a freestanding optional instrument.⁴³ That ambition would to a large extent be undermined if the determination of unfairness were to depend to such an extent on national law that the CJEU would refrain from ruling on it. Given that situation I think there is a good chance that the CJEU will give an autonomous interpretation of the open norm of Article 86. For SMEs this will be crucial as within the system of the CESL, Member States will not be able to extend additional protection like they did under Directive 93/13.

How could such an interpretation help the situation of SMEs? The central determining factor of both Articles 83 and 86 is that a contract term must be contrary to good faith for it to be considered unfair. Article 2 of the Regulation defines good faith as a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or *relationship in question*. This expressly gives the Court the opportunity to consider the nature of the parties and the relation in which they stand to each other. Hopefully the Court will take that opportunity to do justice to the situation of SMEs by, for example, introducing some form of *Indizwirkung*. That would truly be a way forward for SMEs, justified by both an internal market as well as a weaker party protection rationale.

⁴¹ CJEU 1 April 2004, Case C-237/02 (*Freiburger Kommunalbauten*).

⁴² M.W. Hesselink and M.B.M. Loos, 'Unfair Contract Terms in B2C Contracts', *CSECL Working Paper Series* No. 2012-07, 2012, p. 13.

⁴³ COM(2011) 635 final, Explanatory Memorandum.

UNFAIR TERMS IN CONTRACTS BETWEEN BUSINESSES A COMPARATIVE OVERVIEW IN LIGHT OF THE COMMON EUROPEAN SALES LAW

Sander Van Loock*

1. Introduction

‘On fête à peine le centenaire du Code civil, et pourtant, dans bien des cas, il apparaît déjà comme une législation désorientée au milieu de générations nouvelles, incapable de comprendre leurs goûts ou d’interpréter leurs aspirations. C’est que, depuis un siècle, bien des révolutions se sont produites, bien des évolutions aussi: économiques, politiques ou sociales.’¹

This quote comes from the introduction of a French PhD thesis published in 1905. It reveals that already at the start of the previous century, at least some scholars considered the *Code civil* to be outdated. The author continues by giving examples of these inventions: the steam engine, electricity, trains,² etc. It goes without saying that our society has evolved at even a much faster pace since then. So which was true in 1905 is *a fortiori* true in 2012. The contention that (at least some parts of) the French and Belgian *Code civil* are outdated, amounts to kicking in an open door.

One striking example of the way contracting has evolved is the use of standard terms. Standard terms are sets of contract terms which are drafted in advance, independently of any specific contractual negotiation and to be used in multiple contracts. The codifications of the 19th century, however, envisage a contract which is concluded between two parties after individual negotiations.³ Together with the industrial revolution and the corresponding development of a mass society came the mass use of standard contracts

* Sander Van Loock LLM (Cantab), PhD Researcher Institute for the Law of Obligations, IWT Bursary, KU Leuven.

¹ E. Bourdon, *Des contrats d’utilité générale passés au profit d’une collectivité*, Paris, Arthur Rousseau, 1905, 3.

² Which he calls ‘*monstres aux mille têtes*.’

³ G. Dereux, ‘De la nature juridique des contrats d’adhésion’, *RTD Civ* 1910, (503) 503; F. Gras, *De sociale werkelijkheid van het standaardkontraakt*, Amsterdam, Kobra, 1984, 6; L. Jossereard, *Cours de droit civil positif français*, II, Paris, Sirey, 1933, 19, nr. 32; S. Stijns, *Verbintenissenrecht*, I, Bruges, die Keure,

and standard contract terms.⁴ Standard terms are therefore sometimes called a child of the 19th century,⁵ but that is not entirely correct. While it is true that at that time the mass application of standard terms began, its origins lie much further back in history. Already in the ancient world, standard terms appeared in rental agreements.⁶ In the Middle Ages, pilgrims for the Holy Land often took a boat from Venice. For some time, they could only choose between two shipping companies that used standard terms which were drafted for their sole benefit. To make matters worse, those companies executed their remaining duties poorly. The Mediterranean legislatures of Venice and Genoa therefore intervened with mandatory law.⁷

The European legislature has regulated the use of standard terms. Until now, however, the initiatives of the European legislature in the field of standard terms (and general contract law) were mainly restricted to business-to-consumer (B2C) contracts.⁸ It is thus

2005, 31, nr. 41; E. Swaenepoel, *Toetsing van het contractuele evenwicht*, Antwerp, Intersentia, 2011 (Swaenepoel 2011), nr. 772.

⁴ J. Basedow, 'Vorbemerkung §305' in *Münchener Kommentar BGB* §§241–432 BGB, Munich, Beck, 2012, (MünchKommBGB/Basedow Vor §305), nr. 1; M. Coester, 'Allgemeine Geschäftsbedingungen' in *J. von Staudingers Eckpfeiler des Zivilrechts*, Berlin, Sellier, 2005 (Coester in Staudinger/Eckpfeiler (2005)), (153) 154; G. Dereux, 'De la nature juridique des contrats d'adhésion', *RTD Civ* 1910, (503) 503–504; W. Friedman, *Law in a Changing Society*, Berkeley, University of California Press, 1959, 101; J. Ghestin, *La formation du contrat* in *Traité de droit civil*, Paris, LGDJ, 1993, 77, nr. 96; L. Josserard, 'Tendances actuelles de la théorie des contrats', *RTD Civ* 1937, (1) 8 nr. 7; T. Pfeiffer, 'Einleitung' in M. Wolf, W. Lindacher and T. Pfeiffer, *AGB-Recht Kommentar*, Munich, Beck, 2009 (Pfeiffer in Wolf/Lindacher/Pfeiffer Einleitung), nr. 1; P. Schlosser, 'Vorbemerkungen zu §§305 ff' in *J. von Staudingers Kommentar BGB* §305–310, Berlin, Sellier, 2006 (Staudinger/Schlosser Vorbem zu §§305 ff), nr. 2; P. Ulmer and M. Habersack, 'Einleitung – §§305–310 BGB' in Ulmer, Brandner and Hensen, *AGB-Recht*, Köln, Otto Schmidt, 2011 (Ulmer/Habersack in Ulmer/Brandner/Hensen Einleitung), nr. 4.

⁵ H. Kötz, 'Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträge?' in *Gutachten für den 50. Deutschen Juristentag*, Munich, Beck, 1974 (Kötz 1974), A23: 'Allgemeine Geschäftsbedingungen sind ein Kind der industriellen Revolution des 19. Jahrhunderts.'

⁶ e.g. Labeo D.19.2.60.6: poster by which the owner of a warehouse made clear that he did not accept to store gold, silver and pearls at his own risk; Ulpian D.4.9.7: exclusion clauses in maritime transport contracts.

⁷ Ph. Hellwege, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre*, Tübingen, Mohr Siebeck, 2010, 2.

⁸ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises; Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Unfair Contract Terms Directive); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial

important to note that business-to-business (B2B) contracts are excluded from the scope of the Unfair Contract Terms Directive (Art. 1(1)). Only a few Directives sought to protect businesses in B2B contracts.⁹ In its proposal for a Regulation on a Common European Sales Law, the European Commission departs from this strategy.¹⁰ The CESL, which contains rules on standard terms, may not only be opted for in B2C contracts, but also in B2B contracts, where at least one party is a small or medium-sized enterprise (SME).¹¹ As a result, SMEs are introduced as a novel concept in European contract law and standard terms in B2B contracts to which the CESL is applicable will be subjected to judicial scrutiny.

This shift in strategy begs the question how unfair (standard) terms in B2B contracts are dealt with in Europe. In this contribution, it is unfortunately impossible to discuss all legal systems of the Member States in detail. I will therefore only discuss the Unfair Contract Terms Directive, the DCFR and the CESL at the European level, and in Germany, the Netherlands, France, Belgium and the United Kingdom. I will start with a discussion and evaluation of the introduction of the concept of SME in European contract law. Then, I will look to the concept of standard terms and the possible justifications for the introduction of a judicial control of unfair standard terms. I will continue with a discussion of which concepts are used to shape the control on unfair terms. Afterwards, I will examine how the judicial control on unfair terms operates. I will thereby pay attention to the position of SMEs in B2B contracts. I will end with a conclusion.

2. SMEs as a novel concept in European contract law

According to Article 7 of the Proposal, the Common European Sales Law may only be used if the seller of goods or the supplier of digital content is a trader. Where all the parties to a contract are traders, the Common European Sales Law may be used if at least one of those parties is a small or medium-sized enterprise. However, Article 13(2) of the Proposal offers Member States the possibility of making the Common European Sales

practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. Most recently: the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

⁹ Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents; Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (Late Payment Directive 2000), repealed by the Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (Late Payment Directive 2011).

¹⁰ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 2011/0284 (COD) (the Proposal). It consists of the Regulation itself, annex I which contains the Common European Sales Law (CESL), and annex II with a standard information notice for consumers.

¹¹ Article 7 of the Proposal.

Law available for B2B contracts where none of them is an SME. In European contract law, SMEs are a novel concept. Up until now, SMEs were only aimed at in instruments of European economic law, in particular concerning EU and Member State subsidies.¹² While it is true that both Late Payment Directives explicitly refer to small and medium-sized businesses,¹³ those Directives do not contain specific rules which apply only to SMEs.

The European Commission found it necessary to open up the scope of the CESL to SMEs because differences in contract law would dissuade them from expanding into markets of other Member States. These differences would make it more complex to engage in cross-border trade because of the transaction costs they entail. Their deterrent effect is particularly strong for SMEs for which the costs of entering multiple foreign markets are often particularly high in relation to their turnover (Recital 2). According to the European Commission, the barriers to cross-border trade may jeopardise competition between SMEs and larger companies. In view of the significant impact of the transaction costs in relation to turnover, an SME is much more likely to refrain from entering a foreign market than a larger competitor (Recital 7).

2.1. Definition

The definition of an SME draws upon Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. Only Recital 21 of the Proposal refers to this Recommendation, but not the Proposal itself. This leaves room for speculation as to what extent the criteria set out in the Recommendation are binding for the interpretation of the concept of SME in Article 7.¹⁴

According to Article 7(2) of the Proposal, an SME is a trader which:

- ‘(a) employs fewer than 250 persons; and
- (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country.’

To qualify as an SME, a trader has to meet two requirements cumulatively: headcount and financial ceilings. When a trader employs 250 or more persons or breaks both financial ceilings, it does not qualify anymore as an SME. The financial ceilings are alternative requirements: one refers to turnover and the other to the balance sheet. In order to be an SME, a trader may not have an annual turnover exceeding €50 million or a balance sheet total exceeding €43 million. In Recital 4, the Commission Recommendation considered

¹² Chr. Wendehorst, ‘Article 7. Parties to the contract’ in R. Schulze (ed.), *Common European Sales Law (CESL) – Commentary*, Baden-Baden, Nomos, 2012 (CESL/Wendehorst Art. 7), nr. 2.

¹³ Cf. Recital 7 of the Late Payment Directive 2000 and Recitals 6–7 of the Late Payment Directive 2011. Article 1 of the latter underlines that one of the aims of the Directive is ‘fostering the competitiveness of undertakings and in particular of SMEs.’

¹⁴ CESL/Wendehorst 2012 nr. 5.

the criterion of staff numbers to be the most important criterion. A financial criterion was introduced, however, in order to grasp the real scale and performance of an enterprise and its position compared to its competitors. The European Commission found it not desirable to use turnover as the sole financial criterion, in particular because enterprises in the trade and distribution sector have by their nature higher turnover figures than those in the manufacturing sector. The turnover criterion is therefore combined with that of the balance sheet total, a criterion which reflects the overall wealth of a business, with the possibility of either of these two criteria being exceeded.¹⁵

According to Article 4 of the Annex to Commission Recommendation 2003/361/EC, the data to apply to the headcount of staff and the financial amounts are those relating to the latest approved accounting period and calculated on an annual basis. They are taken into account from the date of closure of the accounts (Art. 4(1)). Where, at the date of closure of the accounts, a trader finds that, on an annual basis, it has exceeded or fallen below the headcount or financial ceilings stated in Article 2, this will not result in the loss or acquisition of the status of SME unless those ceilings are exceeded over two consecutive accounting periods (Art. 4(2)). In the case of newly established enterprises whose accounts have not yet been approved, the data to apply is to be derived from a *bona fide* estimate made in the course of the financial year (Art. 4(3)).

2.2. Criticism

The restriction of the CESL in a B2B context to contracts where at least one of the traders is an SME is heavily criticised. It makes the choice for the CESL in a B2B contract more complicated and uncertain and thus less attractive.¹⁶ First of all, there are many practical issues relating to the restriction. Other traders will have to assess whether or not their counterparty is an SME and check their number of employees, annual turnover, balance sheet total, etc. This is in most cross-border mass contracts virtually impossible and in many other situations embarrassing and difficult.¹⁷ Secondly, it is not clear why traders which do not qualify as SMEs should not be able to choose to apply the rules of the CESL in contracts between themselves. They should also be able to apply the CESL to their contracts if they want to do so.¹⁸ Many commentators have thus argued in favour of

¹⁵ CESL/Wendehorst 2012 nr. 7.

¹⁶ H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner and R. Zimmermann, 'Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht', *JZ* 2012, (269) 270; G. Wagner, 'Transaktionskostensenkung durch Europäisches Kaufrecht? – Der Blue Botton klemmt', *ZEuP* 2012, (455) 457–458; CESL/Wendehorst Art. 7 nr. 22.

¹⁷ European Law Institute, *Statement on the Proposal for a Regulation on a Common European Sales Law*, COM(2011) 635 final, 2012, 18, nr. 8; L. DiMatteo, 'Common European Sales Law: a critique of its rationales, functions, and unanswered questions', *JITL & P* 2012, (222) 225–226; H.-P. Mansel, 'Der Verordnungsvorschlag für ein Gemeinsames Europäisches Kaufrecht', *WM* 2012, (1253) 1259–1260; T. Pfeiffer, 'Anwendungsbereich – Vertragsparteien und Vertragsgegenstand' in O. Remien, S. Herrler and P. Limmer (eds.) *Gemeinsames Europäisches Kaufrecht für die EU?*, Munich, Beck, 2012, (35) 38, nrs. 21–23; R. Illescas Ortiz and P. Peralus Viscasillas, 'The scope of the Common European Sales Law: B2B, goods, digital content and services', *JITL & P* 2012, (241) 243; CESL/Wendehorst Art. 7 nr. 22.

¹⁸ O. Lando, 'Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law', *ERPL* 2011, (717) 721; Law Commission and Scottish Law

widening the personal scope of the CESL to all B2B sale contracts.¹⁹ Article 13(b) gives the Member State the possibility to make the CESL available for B2B contracts where none of them is an SME. In their Advice to the UK Government, the Law Commission and the Scottish Law Commission take the view that the UK Government should consider exercising this option to extend the availability of the CESL to large businesses between themselves.²⁰

The reason for this restriction to SMEs was to insure that there is a basis in the TFEU. This seems unnecessary, as the principles of subsidiarity and proportionality do not require (or even allow) a restriction of a legislative measure in such a way that it seriously risks to call into question its suitability to achieve the aim which is pursued. This is even more so, as more than 90% of all businesses in the EU qualify as SME. It is argued that a mere statement in the first Article clarifying the aim of SME protection would suffice.²¹

As a result, the rules on unfair standard terms in B2B sale contracts are restricted to contracts where at least one party is an SME. It is questionable whether the path of providing special rules for SMEs, as the CESL does, is worth following. Providing a different contractual regime for SMEs, alongside consumer law, which deviates from general contract law might lead to a further fragmentation of contract law. In what follows, I will examine how different European jurisdictions have dealt with standard terms in B2B contracts.

3. Theory of unfair contract terms

3.1. Benefits and risks of standard terms

As already indicated in the introduction, standard terms are omnipresent in our present mass society with standardised, large-scale production and mass consumption.²² That

Commission, *An Optional Common European Sales Law: Advantages and Problems*, 2012, 88, nr. 6.43; G. Wagner, 'Transaktionskostensenkung durch Europäisches Kaufrecht? – Der Blue Botton klemmt', *ZEuP* 2012, (455) 458–459.

¹⁹ H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner and R. Zimmermann, 'Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht', *JZ* 2012, (269) 270; O. Lando, 'Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law', *ERPL* 2011, (717) 721; T. Pfeiffer, 'Anwendungsbereich – Vertragsparteien und Vertragsgegenstand' in O. Remien, S. Herrler and P. Limmer (eds.) *Gemeinsames Europäisches Kaufrecht für die EU?*, Munich, Beck, 2012, (35) 42, nr. 51; M. Piers and C. Vanleenhove, 'Gemeenschappelijk Europees kooprecht. Een nieuw instrument van uniform toepasselijk recht', *NjW* 2012, (2) 12, nr. 50. In favour of a broad scope, discussing the Green Paper of the European Commission of 1 July 2010, COM(2010) 348 final: Max Planck Institute for Comparative and International Private Law, 'Policy Options for Progress Towards a European Contract Law', *RebelsZ* 2011, (371) 414–415, nr. 109.

²⁰ Law Commission and Scottish Law Commission, *An Optional Common European Sales Law: Advantages and Problems*, 2012, 90, nr. 6.50.

²¹ European Law Institute, *Statement on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final*, 2012, 18, nr. 9; CESL/Wendehorst Art. 7 nr. 32. Critical of this: H.-P. Mansel, 'Der Verordnungsvorschlag für ein Gemeinsames Europäisches Kaufrecht', *WM* 2012, (1253) 1259.

²² H. De Page, *Traité élémentaire de droit civil belge*, II, Brussels, Bruylant, 1964, 537, nr. 550; E. Dirix, 'De bezwarende bedingen in de W.H.P.', *RW* 1991–1992 (562) 562; J. Ghestin, *La formation du contrat* in

does not come as a surprise. When similar goods are produced and similar services rendered on a massive scale, it seems logical that producers or service providers seek to use contracts with a similar structure and content.²³ Obviously, the use of standard terms is much more cost-efficient than spending time on developing and negotiating terms and conditions in detail for each transaction separately.²⁴ If all the terms of a contract had to be newly settled for each separate transactions, the work of, e.g. insurers, bankers, etc. would be extremely time-consuming and impossibly complicated.²⁵ As a result of using standard terms, parties can focus on the essential parts of the contract (*essentialia negotii*). This acceleration of legal transactions results in a reduction of transaction costs.²⁶ Another reason to rely on standard terms is the fact that not every specific contract is regulated in depth by the legislature and legislation is often fragmented. In such cases, the general contract law rules may not provide for a sufficient legal framework, as these do not always cover all relevant issues.²⁷ Standard terms can be used to fill that gap. They can address future difficulties and create legal certainty as the solutions for these difficulties can be established in advance.²⁸ Standard terms can, as 'self-created economic law', furthermore form an instrument to outline new and legally not regulated contracts and offer it a coherent normative framework.²⁹

Traité de droit civil, Paris, LGDJ, 1993, 77, nr. 96; Kötz 1974, A25; D. Slawson, 'Standard form contracts and democratic control of lawmaking power', *Harv. L. Rev.* 1970–1971, (529) 530.

²³ C. Del Marmol, 'Les clauses contractuelles types, facteur d'unification du droit commercial' in *Liber amicorum baron Louis Fredericq*, I, Ghent, Story-Scientia, 1966, (307) 309–310; F. Gras, *De sociale werkelijkheid van het standaardkontraakt*, Amsterdam, Kobra, 1984, 13; S. Stijns, *Verbintenissenrecht*, I, Bruges, die Keure, 2005, 32, nr. 42; Ulmer/Habersack in Ulmer/Brandner/Hensen Einleitung, nr. 4; E. von Hippel, 'Der Schutz des Verbrauchers vor Unlauteren Allgemeinen Geschäftsbedingungen in den EG-Staaten', *RabelsZ* 1977, (237) 238.

²⁴ C. Del Marmol, 'Les clauses contractuelles types, facteur d'unification du droit commercial' in *Liber amicorum baron Louis Fredericq*, I, Ghent, Story-Scientia, 1966, (307) 309–310; F. Gras, *De sociale werkelijkheid van het standaardkontraakt*, Amsterdam, Kobra, 1984, 4 and 38; Kötz 1974, A25; E. Hondius, *Standaardvoorwaarden*, Deventer, Kluwer, 1978, 276, nr. 148; H. Kötz, *Europäisches Vertragsrecht*, I, Tübingen, Mohr Siebeck, 1996, 210; S. Stijns, *Verbintenissenrecht*, I, Bruges, die Keure, 2005, 32, nr. 42; Swaenepoel 2011, nr. 772. Adde: W. Friedman, *Law in a Changing Society*, Berkeley, University of California Press, 1959, 102: 'The working out of thousands of individual contract terms for substantially similar transactions would be as uneconomical as the use of antiquated machinery.'

²⁵ E. Peel, *The Law of Contract*, Sweet & Maxwell, London, 2007 (Peel 2007), 238, 7-001;

²⁶ R. Cooter and T. Ulen, *Law & Economics*, Boston, Pearson, 2012, 365; M. Kahan and M. Klausner, 'Standardization and innovation in corporate contracting', *Va. L. Rev.* 1997, (713) 718; H.-B. Schäfer and P. Leyens, 'Judicial Control of Standard Terms and European Private Law' in P. Larouche and F. Chirico (eds.), *Economic Analysis of the DCFR*, Munich, Sellier, 2010 (Schäfer and Leyens 2010), (97) 99; Swaenepoel 2011, nr. 772.

²⁷ MünchKommBGB/Basedow Vor §305 nr. 2; E. Hondius, *Standaardvoorwaarden*, Deventer, Kluwer, 1978, 280, nr. 151; J. Nieuwenhuis, *Drie beginselen van contractenrecht*, Deventer, Kluwer, 1979, 134.

²⁸ E. Dirix, 'De bezwarende bedingen in de W.H.P.', *RW* 1991–1992 (562) 562–563; F. Gras, *De sociale werkelijkheid van het standaardkontraakt*, Amsterdam, Kobra, 1984, 38; A. Hartkamp and C. Sieburgh, *Verbintenissenrecht, Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010 (Hartkamp and Sieburgh 2010), 388, nr. 459; Peel 2007, 7-001.

²⁹ MünchKommBGB/Basedow Vor §305 nr. 2; Coester in Staudinger/Eckpfeiler (2005) 154; Pfeiffer in Wolf/Lindacher/Pfeiffer Einleitung nr. 2; L. Raiser, *Das Recht der Allgemeinen Geschäftsbedingungen*, Hamburg, Hanseatische Verlagsanstalt, 1935, 20; Ulmer/Habersack in Ulmer/Brandner/Hensen Einleitung, nr. 4.

A clear and present danger of standard terms is their one-sidedness. There is a risk that the user will draft them solely in his own interests while neglecting the lawful interests and expectations of his counterparty.³⁰ The content of the contract thus risks deviating from the fair balance between the interests of the parties which dispositive law provides.³¹ Moreover, standard terms are usually drafted by lawyers that have sufficient time to assess their content. The other party, on the contrary, does not always have this legal expertise and does not have the time necessary to study the terms. He will mostly avoid the costs and expenses of legal advice, because these are not worth the trouble for a single transaction, while the user of the standard terms only has to pay these costs once and is able to use those terms in multiple other contracts.³²

3.2. Justification of judicial control

The dangers which are involved with the use of standard terms render judicial control necessary. This necessity can be examined from two different perspectives. Lord Reid famously stated why legislative and judicial intervention to offer protection against unfair standard terms is needed. In the *Suisse Atlantique*, he argued: 'In the ordinary way the customer has no time to read [the standard terms], and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.'³³ This quote allows us to track down the two main theories or paradigms which justify such intervention. The first model, the abuse theory, refers to the inequality of bargaining power which is abused by the user of the standard terms to the detriment of the other party. The second model, the transaction costs theory, refers to a market failure which is caused by information asymmetries.³⁴

3.2.1. Abuse of bargaining power

The classical view is that the control of unfair standard terms is justified as a form of weaker party protection. It should compensate for the unequal bargaining position of the weaker party. The economic, social, psychological or intellectual superiority of the party

³⁰ MünchKommBGB/Basedow Vor §305 nr. 3; J. Ghestin, *La formation du contrat* in *Traité de droit civil*, Paris, LGDJ, 1993, 77, nr. 97; F. Gras, *De sociale werkelijkheid van het standaardkontraat*, Amsterdam, Kobra, 1984, 44; Hartkamp and Sieburgh 2010, nr. 459; J. Hijma, *Algemene voorwaarden*, Deventer, Kluwer, 2010 (Hijma 2010), 2, nr. 1; H. Kötz, *Europäisches Vertragsrecht*, I, Tübingen, Mohr Siebeck, 1996, 210; Pfeiffer in Wolf/Lindacher/Pfeiffer Einleitung nr. 3; S. Stijns, *Verbintenissenrecht*, I, Bruges, die Keure, 2005, 32, nr. 42; Ulmer/Habersack in Ulmer/Brandner/Hensen Einleitung, nr. 5; E. von Hippel, 'Der Schutz des Verbrauchers vor Unlauteren Allgemeinen Geschäftsbedingungen in den EG-Staaten', *RabelsZ* 1977, (237) 238; Swaenepoel 2011, nr. 770.

³¹ Coester in Staudinger/Eckpfeiler (2005) 155; W. Friedman, *Law in a Changing Society*, Berkeley, University of California Press, 1959, 103.

³² H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds.), *EC Consumer Law Compendium*, Munich, Sellier, 2007, 203–204; Pfeiffer in Wolf/Lindacher/Pfeiffer Einleitung nr. 3.

³³ *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 406.

³⁴ P. Cambie, *Onrechtmatige bedingen*, Gent, Larcier, 2009, 3, nr. 3; Swaenepoel 2011, nr. 768.

has the result that the other party accepts the standard terms on a take-it-or-leave-it basis.³⁵ Kessler famously wrote that: ‘Standard contracts are typically used by enterprises with strong bargaining power. (...) Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.’³⁶ We have seen that the Unfair Contract Terms Directive of 1993 explicitly refers to this model. Its Recital 9 provides that acquirers of goods and services should be protected against the abuse of power by the seller or supplier. In its case law on the Directive, the ECJ also mainly relies on this model.³⁷ In *Océano Grupo*, it ruled that ‘the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.’³⁸ In *Mostaza Claro*, the ECJ added that Article 6(1) of the Directive is ‘a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.’³⁹ It is worth noting that these judgments can be reconciled with the transaction costs theory.⁴⁰ We will see that French and Belgian law follow the abuse theory in their legislation.⁴¹

This justification is not entirely convincing. One of the main problems of this theory is its doubtful empirical premise. First of all, unfair terms are often used in B2B contracts against economically stronger parties.⁴² They are also used in situations where there is

³⁵ J. Goddaer, E. Terryn and J. Vannerom, ‘Invloed van het Europese recht op het consumenten(contracten) recht’ in I. Samoy, V. Sagaert and E. Terryn (eds.), *Invloed van het Europese recht op het Belgische privaatrecht*, Cambridge, Intersentia, 2012, (467) 523–524, nr. 64; M. Hesselink, ‘Unfair Terms in Contracts Between Businesses’ in R. Schulze and J. Stuyck (eds.), *Towards a European Contract Law*, Munich, Sellier, 2011 (Hesselink 2011), (131) 132; F. Kessler, ‘Contracts of Adhesion—Some Thoughts about Freedom of Contract’, *Colum. L. Rev.* 1943, (629) 632; H. Kötz, ‘Der Schutzzweck der AGB-Kontrolle – Eine rechtsökonomische Skizze’, *JuS* 2003, (209) 210; P. Nebbia, *Unfair Contract Terms in European Law*, Oxford, Hart, 2007, 34; H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds.), *EC Consumer Law Compendium*, Munich, Sellier, 2007, 204.

³⁶ F. Kessler, ‘Contracts of Adhesion—Some Thoughts about Freedom of Contract’, *Colum. L. Rev.* 1943, (629) 632 and 640.

³⁷ M. Schillig, ‘Inequality of bargaining power versus market for lemons: legal paradigm change and the Court of Justice’s jurisprudence on Directive 93/13 on unfair contract terms’, *ELR* 2008 (Schillig 2008), (336) 339; H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds.), *EC Consumer Law Compendium*, Munich, Sellier, 2007, 205; Swaenepoel 2011, nr. 783.

³⁸ ECJ C-240/98 to C-244/98, *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98), *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98) and *Emilio Viñas Feliú* (C-244/98), 2000, at 25.

³⁹ ECJ C-168/05, *Mostaza Claro v Centro Móvil Milenium SL*, 2006, at 36.

⁴⁰ Schillig 2008, 350; Swaenepoel 2011, nr. 784.

⁴¹ P. Cambie, *Onrechtmatige bedingen*, Gent, Larcier, 2009, 3–4, nr. 3; H. Kötz, ‘Der Schutzzweck der AGB-Kontrolle – Eine rechtsökonomische Skizze’, *JuS* 2003, (209) 210; Swaenepoel 2011, nr. 776.

⁴² Hesselink 2011, 133; H. Kötz, ‘Der Schutzzweck der AGB-Kontrolle – Eine rechtsökonomische Skizze’, *JuS* 2003, (209) 211.

fierce competition amongst the different users of standard terms.⁴³ Law and economics research has furthermore demonstrated that even for a monopolist it would not be rational to apply standard terms to shift all risks to its counterparty (except where that party is the cheapest cost avoider).⁴⁴ Shifting risks against the cheapest cost avoider principle results in a decrease in demand and a reduction of the producer surplus.⁴⁵ Also, even lawyers and law professors will mostly not negotiate the standard terms with which they are confronted, even if they are economically and intellectually capable of doing so.⁴⁶ Secondly, this paradigm cannot justify why the judicial review of unfairness is restricted to standard terms and not open to the core terms of the contract (*essentialia negotii*).⁴⁷ A party which is in a superior position is in the first place expected to use its power to extort a better price.⁴⁸

3.2.2. Transaction costs

A more convincing justification can be found in considering the consequences of information asymmetries between the parties. These asymmetries can exist with respect to the possible reasons for, probability of and the extent and avoidance costs of a particular damage and the optimal contractual risk allocation.⁴⁹

Akerlof demonstrated in his famous paper “The market for “lemons”” how information asymmetries can lead to market failure.⁵⁰ He makes that clear with an hypothetical example of the market for second hand cars (‘lemon’ is American slang for a bad car). In that market, the buyers would have to incur disproportionate costs to assess whether a car is a lemon or not. So they will assume that the quality of the car offered is average. The sellers, on the contrary, know whether they are selling a lemon or not. This information asymmetry leads to market failure. Sellers cannot compete on quality on this market, because the buyers do not notice it, and they will therefore have incentives to offer below average quality. This leads to a race to the bottom where the lemons will drive out the good cars because they sell at the same price as good cars. In the end, the market may collapse altogether.⁵¹

⁴³ M. Adams, ‘Ökonomische Begründung des AGB-Gesetzes’, *BB* 1989, (781) 783; H. Kötz, *Europäisches Vertragsrecht*, I, Tübingen, Mohr Siebeck, 1996, 212; H. Kötz, ‘Der Schutzzweck der AGB-Kontrolle – Eine rechtsökonomische Skizze’, *JuS* 2003, (209) 210–211.

⁴⁴ The cheapest cost-avoider is the party which is best able to avoid the costs involved, e.g. by taking an insurance.

⁴⁵ K. Cseres, ‘Consumer protection in the European Union’ in R. Van den Bergh and A. Paccès (eds.), *Regulation and Economics*, Cheltenham, Edward Elgar, 2012, (163) 185; Hesselink 2011, 133–134; Schäfer and Leyens 2010, 100–103. Implicitly: J. Flour, E. Savaux, J.-L. Aubert, *Les obligations. 1. L’acte juridique*, Paris, Dalloz, 2012, 154–155, nr. 180.

⁴⁶ Schillig 2008, 339.

⁴⁷ Schillig 2008, 339.

⁴⁸ Hesselink 2011, 133.

⁴⁹ Schäfer and Leyens 2010, 103.

⁵⁰ G. Akerlof, ‘The market for “lemons”: quality uncertainty and the market mechanisms’, *QJE* 1970, 488–500.

⁵¹ G. Akerlof, ‘The market for “lemons”: quality uncertainty and the market mechanisms’, *QJE* 1970, (448) 489–499. *Add:* M. Adams, ‘Ökonomische Begründung des AGB-Gesetzes’, *BB* 1989, (781) 784;

This outcome can be transposed on the market for standard terms.⁵² The party that drafts the standard terms will usually be better informed about the content of the terms than the other party. By drafting standard terms once for multiple transactions, this party can spread its costs on a number of contracts.⁵³ For the party which is confronted with these standard terms, it is too expensive and time-consuming to obtain the information which is required to negotiate the conditions of the transaction. In other words the transaction costs for the other party are too high.⁵⁴ For that party, it is rational not to try to understand or negotiate the standard terms. He will only compare and negotiate up to the point where the expected marginal benefits from doing so will equal the marginal costs related to the time and money incurred thereby.⁵⁵ The expected results of the negotiations must outweigh the costs and energy related to these negotiations. Lord Denning described this situation which we have all experienced: 'No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.'⁵⁶ Users of standard terms may (ab)use this situation to the detriment of their contractual parties. By doing so, they can increase their profits, while not having to fear the loss of contracts as there is no competition on the quality of the standard terms.⁵⁷ Like in the market for lemons, bad standard terms are likely to drive out the good ones (adverse selection) which could on the long run lead to the a collapse of the standard term market.⁵⁸ To overcome this problem, a control mechanism is needed. First of all, mandatory information requirements on the part of the user of the standard terms can reduce the transaction costs to compare and negotiate better terms. The user will have to provide its terms visibly and in clear and accessible language.

Hesselink 2011, 136; H. Kötz, 'Der Schutzzweck der AGB-Kontrolle – Eine rechtsökonomische Skizze', *JuS* 2003, (209) 212; Swaenepoel 2011, nr. 1115.

⁵² M. Adams, 'Ökonomische Begründung des AGB-Gesetzes', *BB* 1989, (781) 784; Hesselink 2011, 136; H. Kötz, 'Der Schutzzweck der AGB-Kontrolle – Eine rechtsökonomische Skizze', *JuS* 2003, (209) 212.

⁵³ Kötz 1974, A31–32.

⁵⁴ M. Adams, 'Ökonomische Begründung des AGB-Gesetzes', *BB* 1989, (781) 784; MünchKommBGB/ Basedow Vor §305 nr. 5; K. Cseres, 'Consumer protection in the European Union' in R. Van den Bergh and A. Paces (eds.), *Regulation and Economics*, Cheltenham, Edward Elgar, 2012, (163) 185; S. Grundmann, 'Privatautonomie im Binnenmarkt', *JZ* 2000, (1133) 1137; E. Hondius, *Standaardvoorwaarden*, Deventer, Kluwer, 1978, 304–305, nr. 163; Kötz 1974, A33; H. Kötz, 'Der Schutzzweck der AGB-Kontrolle – Eine rechtsökonomische Skizze', *JuS* 2003, (209) 211; T. Miethaner, *AGB-Kontrolle versus Individualvereinbarung*, Tübingen, Mohr Siebeck, 2010, 72; P. Nebbia, *Unfair Contract Terms in European Law*, Oxford, Hart, 2007, 34; H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds.), *EC Consumer Law Compendium*, Munich, Sellier, 2007, 203–204; U. Wackerbarth, 'Unternehmer, Verbraucher und die Rechtfertigung der Inhaltskontrolle vorformulierter Verträge', *AcP* 2000, (45) 70; Swaenepoel 2011, nr. 773.

⁵⁵ Schillig 2008, 341.

⁵⁶ *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, at 169.

⁵⁷ M. Adams, 'Ökonomische Begründung des AGB-Gesetzes', *BB* 1989, (781) 784; D. Slawson, 'Standard form contracts and democratic control of lawmaking power', *Harv. L. Rev.* 1970–1971, (529) 531; Ulmer/ Habersack in Ulmer/Brandner/Hensen Einleitung, nr. 8; U. Wackerbarth, 'Unternehmer, Verbraucher und die Rechtfertigung der Inhaltskontrolle vorformulierter Verträge', *AcP* 2000, (45) 70.

⁵⁸ K. Cseres, 'Consumer protection in the European Union' in R. Van den Bergh and A. Paces (eds.), *Regulation and Economics*, Cheltenham, Edward Elgar, 2012, (163) 185; Hesselink 2011, 137; T. Miethaner, *AGB-Kontrolle versus Individualvereinbarung*, Tübingen, Mohr Siebeck, 2010, 73–74; Schillig 2008, 341; H. Kötz, 'Der Schutzzweck der AGB-Kontrolle – Eine rechtsökonomische Skizze', *JuS* 2003, (209) 213.

Secondly, as these information requirements as such are not sufficient, these standard terms should be subjected to a review procedure, e.g. judicial control.⁵⁹

This paradigm has been followed in Germany and the Netherlands.⁶⁰ The Directive also provides traces of it as its protection is restricted to terms which have not been individually negotiated (Art. 3(1)). Whereas this restriction could not be justified by the abuse of power theory (or only indirectly), it can be reconciled with the market failure theory. Furthermore, it can explain why the essentials of the contract (the price and the main subject matter) are excluded from judicial control. There is no information asymmetry between the parties as to those aspects.⁶¹ More importantly for our present purposes, if this approach is taken, there is no reason to exclude B2B contracts from the scope of a review procedure for unfair standard terms. From the perspective of the described market failure, it is irrelevant whether a contract is B2C or B2B.⁶² In light of this justification, a restriction to standard terms in B2B contracts where at least one of the parties is an SME is also questionable.

4. Conceptual analysis of unfair terms

4.1. European Union: Unfair Contract Terms Directive, DCFR and CESL

4.1.1. Unfair Contract Terms Directive

According to its first Article, the purpose of the Unfair Contracts Terms Directive is ‘to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.’ The scope is thus restricted to B2C contracts. But given its importance for European contract law, I will briefly expand on it.

The Directive does not give a definition of ‘standard term’ nor ‘standard contract.’ The approach towards unfair standard terms is a compromise between the French and German position.⁶³ The German position is reflected in the restriction of its scope in

⁵⁹ Hesselink 2011, 137; Schillig 2008, 342; T. Miethaner, *AGB-Kontrolle versus Individualvereinbarung*, Tübingen, Mohr Siebeck, 2010, 74; Swaenepoel 2011, nr. 774.

⁶⁰ P. Nebbia, *Unfair Contract Terms in European Law*, Oxford, Hart, 2007, 34; H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds.), *EC Consumer Law Compendium*, Munich, Sellier, 2007, 203–204; U. Wackerbarth, ‘Unternehmer, Verbraucher und die Rechtfertigung der Inhaltskontrolle vorformulierter Verträge’, *AcP* 2000, (45) 63; Swaenepoel 2011, nr. 777.

⁶¹ K. Cseres, ‘Consumer protection in the European Union’ in R. Van den Bergh and A. Paces (eds.), *Regulation and Economics*, Cheltenham, Edward Elgar, 2012, (163) 187.

⁶² S. Grundmann, ‘Privatautonomie im Binnenmarkt’, *JZ* 2000, (1133) 1137; Hesselink 2011, 138; Schillig 2008, 357.

⁶³ H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds.), *EC Consumer Law Compendium*, Munich, Sellier, 2007, 204–205; Swaenepoel 2011, nr. 780. The initial proposal followed the French system and did not distinguish between standard terms and individually negotiated terms. This was heavily criticized in H. Brandner and P. Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts: some critical remarks on the proposal submitted by the EC Commission’, *CMLR* 1991, 347–662.

Article 3 to terms ‘which have not been individually negotiated.’⁶⁴ I will come back to this. The fact that it is unnecessary for the contract terms to be pre-formulated for multiple contracts and that the Directive is only applicable to B2C contracts corresponds with the French approach.⁶⁵ This compromise is emphasised in Recital 9 of the Directive, which both refers to one-sided standard contracts and potential abuse: ‘acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.’

Article 3(2) contains important nuances to the exclusion of individually negotiated contract terms. A term will be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract ((Art. 3(2) para 1). Furthermore, the fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of Article 3 to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract (Art. 3(2) para 2). Lastly, the seller or supplier bears the burden of proof that a standard has been individually negotiated (Art. 3(2) *in fine*).

4.1.2. DCFR

The DCFR makes a difference between ‘standard terms’ and ‘terms which are not individually negotiated.’ A ‘standard term’ is a term which has been formulated in advance for several transactions involving different parties and which has not been individually negotiated by the parties (Art. II – 1:109). This definition draws upon the definition of ‘general conditions of contract’ in Article 2:209(3) of the Principles of European Contract.⁶⁶ That definition was stricter, however, in the sense that general conditions of contracts were to be formulated in advance for an indefinite number of contracts. A term supplied by one party is considered to be ‘not individually negotiated’ if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms (Art. II – 1:110(1)).

4.1.3. CESL

The CESL also distinguishes between ‘standard contract terms’ and ‘not individually negotiated terms.’ This distinction has been questioned and some have argued to leave the concept of ‘standard contract terms’ altogether.⁶⁷ Article 2(d) of the Proposal defines

⁶⁴ H. Kötz, *Europäisches Vertragsrecht*, I, Tübingen, Mohr Siebeck, 1996, 221; P. Nebbia, *Unfair Contract Terms in European Law*, Oxford, Hart, 2007, 118–120.

⁶⁵ H. Kötz, ‘Der Schutzzweck der AGB-Kontrolle – Eine rechtsökonomische Skizze’, *JuS* 2003, (209) 210; H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds.), *EC Consumer Law Compendium*, Munich, Sellier, 2007, 204–205.

⁶⁶ Chr. von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law*, Munich, Sellier, 2009, 160.

⁶⁷ W. Ernst, ‘Das AGB-Recht des Gemeinsamen Europäischen Kaufrechts’ in O. Remien, S. Herrler and P. Limmer (eds.), *Gemeinsames Europäisches Kaufrecht für die EU?*, Munich, Beck, 2012 (Ernst 2012), (93) 97, nr. 10.

‘standard contract terms’ as contract terms which have been drafted in advance for several transactions involving different parties, and which have not been individually negotiated by the parties within the meaning of Article 7 CESL. According to Article 7(1) CESL, a contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content. It is not clear why the definition of not individually negotiated contract terms is in the CESL itself and not in the list of Article 2 of the Proposal.⁶⁸ Article 7(3) CESL refers, in a circular way,⁶⁹ back to the concept of ‘standard terms’, providing that a party who claims that a contract term supplied as part of standard contract terms has since been individually negotiated bears the burden of proving that it has been.⁷⁰

4.2. Germany

German doctrine already realised the potential difficulties with standard terms at the beginning of the last century.⁷¹ In the absence of any specific legislation, German courts applied general legal requirements and principles of law to develop an embryonic control on standard terms.⁷² In its important decision of 1974, the Bundesgerichtshof (BGH) recapitulated the principles and structures which were developed over time.⁷³ This case law was consolidated and worked out in the 1977. In that year, the German legislature introduced rules on standard contracts terms by enacting the Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen. When the German law of obligations was modernized in 2002, its material rules were incorporated into the Bürgerliches Gesetzbuch (BGB) in §§305–310 BGB. It now takes a prominent place in the BGB amongst the provisions of general contract law.

4.2.1. Standard terms

According to §305(1) BGB, standard terms (*Allgemeine Geschäftsbedingungen*) are all contract terms which are formulated in advance for multiple contracts which one party to the contract suggests to the other party at the conclusion of a contract.⁷⁴ This definition

⁶⁸ Ernst 2012 nr. 5; Chr. Wendehorst, ‘Article 2. Definitions’ in R. Schulze (ed.), *Common European Sales Law (CESL) – Commentary*, Baden-Baden, Nomos, 2012 (CESL/Wendehorst Art. 2), (13) nr. 11.

⁶⁹ CESL/Wendehorst Art. 2 nr. 10.

⁷⁰ D. Mazeaud and N. Sauphanor-Brouillaud, ‘Article 7. Not individually negotiated terms’ in R. Schulze (ed.), *Common European Sales Law (CESL) – Commentary*, Baden-Baden, Nomos, 2012, (105) nr. 9.

⁷¹ e.g. H. Grossmann-Doerth, *Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht*, Freiburg im Breisgau, Wagner, 1933, 31 p; L. Raiser, *Das Recht der Allgemeinen Geschäftsbedingungen*, Hamburg, Hanseatische Verlagsanstalt, 1935, 333 p.

⁷² e.g. §138 BGB (*Sittenwidriges Rechtsgeschäft – Public policy*), §242 BGB (*Treu und Glauben – Good faith*) and abuse of monopoly. For a historical overview, see: Ph. Hellwege, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre*, Tübingen, Mohr Siebeck, 2010, 677 p.

⁷³ BGH 27 November 1974, BGHZ 63, 256.

⁷⁴ §305(1) first sentence BGB: ‘Allgemeine Geschäftsbedingungen sind alle für eine Vielzahl von Verträgen vorformulierten Vertragsbedingungen, die eine Vertragspartei (Verwender) der anderen Vertragspartei bei Abschluss eines Vertrags stellt.’

mentions three conditions for a contract term to qualify as a standard term under German law. It must be formulated in advance, for multiple contracts and suggested by a party. The point of reference for these conditions is not necessarily the contract as a whole. It suffices that one of the contract terms of an otherwise individually negotiated contract meets the requirements of §305(1) BGB to be considered a standard term.⁷⁵

Contract terms are considered to be formulated in advance when they are drafted before the conclusion of the contract and when they are not negotiated upon entering into the contract.⁷⁶ With respect to this condition, it is irrelevant in which form they are drafted in advance. They can be printed, photocopied, put on the wall of the business, etc. Standard terms do not have to be put down in writing, it even suffices that they are merely saved 'in the head' of the user for future use.⁷⁷ Also the use of text blocks which are drafted in advance (e.g. from a model contract) and are combined with otherwise individually negotiated terms or with other similar text blocks will be considered as using standard terms.⁷⁸ It is not even necessary that the contract uses the exact wording as provisions of the model contract.⁷⁹ It suffices that the material content of the clauses corresponds.⁸⁰ It is irrelevant who drafted the standard terms in advance: the user or a third party such as business associations. It is enough that the terms which are used are drafted by or ordered by an association to be used by its members.⁸¹

The second requirement is that the contract terms must be drafted to be used in multiple contracts (*eine Vielzahl von Verträge*) or other legal acts. These contracts can be closed between different persons or between the same persons.⁸² Decisive is the intended use in multiple contracts. It is thus not necessary that the terms are actually used in multiple contracts. This intention is assessed at the moment the contract is entered into.⁸³

⁷⁵ BGH 8 June 1979, *NJW* 1979, 2387; BGH 26 September 1996, *NJW* 1997, 135; BGH 3 April 1998, *NJW* 1998, 2600; Coester in Staudinger/Eckpfleiler (2005) 160–161.

⁷⁶ BGH 7 November 1995, *NJW* 1996, 249; J. Basedow, '§305 Einbeziehung Allgemeiner Geschäftsbedingungen in den Vertrag' in *Münchener Kommentar BGB §§241–432 BGB*, Munich, Beck, 2012 (MünchKommBGB/Basedow §305), nr. 13; T. Pfeiffer, '§305 Einbeziehung Allgemeiner Geschäftsbedingungen in den Vertrag' in M. Wolf, W. Lindacher and T. Pfeiffer, *AGB-Recht Kommentar*, Munich, Beck, 2009 (Pfeiffer in Wolf/Lindacher/Pfeiffer §305), nr. 14; P. Ulmer and M. Habersack, '§305 Einbeziehung Allgemeiner Geschäftsbedingungen in den Vertrag' in P. Ulmer, E. Brander and H.-D. Hensen (eds.), *AGB-Recht*, Cologne, Otto Schmidt, 2011 (Ulmer/Habersack in Ulmer/Brandner/Hensen §305), nr. 21.

⁷⁷ BGH 30 September 1987, *NJW* 1988, 410; BGH 19 May 2005, *NJW* 2005, 2543; MünchKommBGB/Basedow §305 nr. 13; Pfeiffer in Wolf/Lindacher/Pfeiffer §305 nr. 14.

⁷⁸ OLG Frankfurt 22 November 1990, *NJW* 1991, 1489; J. Becker, '§305 Einbeziehung Allgemeiner Geschäftsbedingungen in den Vertrag' in H. Bamberger and H. Roth (eds.), *Kommentar zum Bürgerlichen Gesetzbuch*, Munich, Beck, 2007 (Bamberger/Roth/Becker BGB §305), nr. 16.

⁷⁹ BGH 3 November 1999, *NJW* 2000, 1110; OLG Dresden 8 July 1998, *BB* 1999, 228.

⁸⁰ P. Schafer, 'Facility agreements in view of the German General Terms and Conditions Law', *JIBLR* 2011, (484) 486.

⁸¹ BGH 2 November 1983, *NJW* 1984, 360; MünchKommBGB/Basedow §305, nr. 14; Ulmer/Habersack in Ulmer/Brandner/Hensen §305 nr. 20.

⁸² BGH 11 December 2003, *NJW* 2004, 1454; Pfeiffer in Wolf/Lindacher/Pfeiffer §305 nr. 15; Ulmer/Habersack in Ulmer/Brandner/Hensen §305 nr. 23.

⁸³ BGH 4 May 2000, *NJW* 2000, 2988; BGH 13 September 2001, *NJW-RR* 2002, 13; MünchKommBGB/Basedow §305 nr. 18; Pfeiffer in Wolf/Lindacher/Pfeiffer §305, nr. 15; Staudinger/Schlosser §305 nr. 19.

If this intention is present, then these terms are already considered to be standard terms when they are used for the first time.⁸⁴ The text of §305 BGB does not require a precise number of contracts. Contract terms are usually considered to be intended for multiple use if the terms are to be used in at least three contracts.⁸⁵ Standard terms also exist when they are drafted for a precise number of contracts, e.g. the sale of multiple houses⁸⁶ or multiple flats within an apartment building.⁸⁷ The intention to be used in multiple contracts can be present with the user or the third party that drafted the standard terms. In the latter case, these terms will be considered standard terms, even if the user itself only uses them once.⁸⁸ It is not necessary that the terms which are used in multiple contracts are literally identical. It suffices that their content is essentially the same.⁸⁹

The third and fundamental requirement to qualify as standard term is that the term formulated in advance for multiple contracts is suggested (*stellt*) by one party to the other party.⁹⁰ This requirement should not be strictly interpreted as meaning merely that one party imposes the standard terms on the other party, because of his unwillingness to negotiate or superior position. It should rather be seen as attributing the role of user to the party that suggested the inclusion of that standard term in the contract. In that sense, it should be seen as an element of attribution of standard terms. The user is that party to whom the incorporation of the standard terms is attributable.⁹¹ That means that he suggested to include the standard terms in the contract, but not necessarily that he unilaterally imposed them on the other party.⁹² The user does not have to be in an economically or intellectually superior position: the user can also be a party in an economically weaker position.⁹³ The user of the terms must not necessarily suggest the terms directly. It can also take place indirectly by the acts of persons which are attributable to the user, such as notaries or agents. When a party appoints a notary to draft a contract, these acts are attributable to that party. The terms will be considered to be suggested by him.⁹⁴ However, terms are not standard terms according to §305(1) BGB when independent third parties incorporate terms which have been drafted in advance into the contract. This can be the case, e.g. when a notary uses a merely internal model contract

⁸⁴ BGH 4 June 1981, NJW 1981, 2343; Bamberger/Roth/Becker BGB §305 nr. 24; MünchKommBGB/Basedow §305 nr. 18.

⁸⁵ BGH 27 September 2001, NJW 2002, 138; BGH 11 December 2003, NJW 2004, 1454; Bamberger/Roth/Becker BGB §305 nr. 24; MünchKommBGB/Basedow §305, nr. 18; Pfeiffer in Wolf/Lindacher/Pfeiffer §305, nr. 16; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 25a.

⁸⁶ OLG Celle 9 October 1990, NJW-RR 1991, 667.

⁸⁷ Pfeiffer in Wolf/Lindacher/Pfeiffer §305, nr. 16.

⁸⁸ BGH 24 November 2005, WM 2006, 247; BGH 4 May 2000, NJW 2000, 2988; BGH 16 November 1990, NJW 1991, 843; BGH 7 May 1987, NJW 1987, 2373; MünchKommBGB/Basedow §305, nr. 19.

⁸⁹ BGH 8 June 1979, NJW 1979, 2387; Pfeiffer in Wolf/Lindacher/Pfeiffer §305, nr. 17.

⁹⁰ Bamberger/Roth/Becker BGB §305 nr. 25; MünchKommBGB/Basedow §305, nr. 20; Staudinger/Schlosser §305 nr. 26; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 26.

⁹¹ BGH 22 July 2009, NJW-RR 2010, 39; MünchKommBGB/Basedow §305, nr. 21; Staudinger/Schlosser §305 nr. 27; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 27.

⁹² OLG Düsseldorf 5 April 1990, NJW-RR 1990, 1311.

⁹³ BGH 17 February 2010, NJW 2010, 1131; BGH 24 May 1995, BB 1995, 2129; Bamberger/Roth/Becker BGB §305 nr. 26.

⁹⁴ BGH 10 November 1989, NJW 1990, 576; MünchKommBGB/Basedow §305, nr. 22; Staudinger/Schlosser §305 nr. 28.

while drafting the contract.⁹⁵ The introduction is then not attributable to one of the parties, so the terms ought not to be considered as standard terms.⁹⁶

4.2.2. Individually negotiated terms (*im Einzelnen ausgehandelt*)

Standard terms are to be contrasted to individually negotiated terms. According to §305(1) *in fine* BGB, terms are not standard terms to the extent that they are negotiated in detail between the parties.⁹⁷ This reiterates the idea that is already present in the first sentence of §305(1) BGB.⁹⁸ It is, however, more than a mere repetition of that idea. The BGH and the majority of German doctrine read this sentence as a limitation of the definition of standard terms.⁹⁹ It is thus possible for the user of the standard terms to prove that the term in question has been negotiated in detail.¹⁰⁰ Even where the terms which are used in a contract are identical as those which have been proposed by one of the parties, that party can still deliver the proof that the terms are negotiated in detail.¹⁰¹

Germans courts are nevertheless very strict in applying §305(1) *in fine* BGB: *‘Aushandeln bedeutet mehr als verhandeln.’*¹⁰² Negotiating requires much more than merely discussing.¹⁰³ Not only must the user of the terms be genuinely willing to change its terms, he must also be open to real negotiations, where the terms are negotiated and

⁹⁵ BGH 16 November 1990, NJW 1991, 843; Bamberger/Roth/Becker BGB §305 nr. 26; Pfeiffer in Wolf/Lindacher/Pfeiffer §305, nr. 37.

⁹⁶ Bamberger/Roth/Becker BGB §305 nr. 26; MünchKommBGB/Basedow §305, nr. 22; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 31.

⁹⁷ §305(1) *in fine* BGB: *‘Allgemeine Geschäftsbedingungen liegen nicht vor, soweit die Vertragsbedingungen zwischen den Vertragsparteien im Einzelnen ausgehandelt sind.’*

⁹⁸ MünchKommBGB/Basedow §305, nr. 34.

⁹⁹ BGH 15 December 1976, NJW 1977, 624; Bamberger/Roth/Becker BGB §305 nr. 33; MünchKommBGB/Basedow §305, nr. 39; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 44.

¹⁰⁰ Pfeiffer in Wolf/Lindacher/Pfeiffer §305, nr. 38; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 40.

¹⁰¹ BGH 15 December 1976, NJW 1977, 624. See also: BGH 17 May 1982, NJW 1982, 2309; BGH 3 April 1998, NJW 1998, 2600. Bamberger/Roth/Becker BGB §305 nr. 33; Staudinger/Schlosser §305 nr. 44; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 41.

¹⁰² BGH 3 November 1999, NJW 2000, 1110: *“Aushandeln” i.S. des §AGBG §1 AGBG §1 Absatz II AGBG bedeutet mehr als verhandeln. Es genügt nicht, dass das gestellte Formular dem Verhandlungspartner bekannt ist und nicht auf Bedenken stößt, dass der Inhalt lediglich erläutert oder erörtert wird und den Vorstellungen des Partners entspricht. Von einem Aushandeln in diesem Sinne kann vielmehr nur dann gesprochen werden, wenn der Verwender zunächst den in seinen AGB enthaltenen “gesetzesfremden Kerngehalt”, also die den wesentlichen Inhalt der gesetzlichen Regelung ändernden oder ergänzenden Bestimmungen, inhaltlich ernsthaft zur Disposition stellt und dem Verhandlungspartner Gestaltungsfreiheit zur Wahrung eigener Interessen einräumt mit zumindest der realen Möglichkeit, die inhaltliche Ausgestaltung der Vertragsbedingungen zu beeinflussen. Er muss sich also deutlich und ernsthaft zur gewünschten Änderung einzelner Klauseln bereit erklären. In aller Regel schlägt sich eine solche Bereitschaft auch in erkennbaren Änderungen des vorformulierten Texts nieder. Allenfalls unter besonderen Umständen kann ein Vertrag auch dann als Ergebnis eines “Aushandelns” gewertet werden, wenn es schließlich nach gründlicher Erörterung bei dem gestellten Entwurf verbleibt.’*

¹⁰³ Bamberger/Roth/Becker BGB §305 nr. 34; Chr. Grüneberg, ‘§305’ in Palandt Bürgerliches Gesetzbuch, Munich, Beck, 2011, (Palandt/Grüneberg §305), nr. 20; MünchKommBGB/Basedow §305, nr. 35; Pfeiffer in Wolf/Lindacher/Pfeiffer §305, nr. 37; Staudinger/Schlosser §305 nr. 36; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 48.

potential alternatives enter into the discussion.¹⁰⁴ The other party must have a genuine possibility to influence the content of the contractual terms. The user must be clearly and seriously willing to alter the terms which the other party likes to be changed. It is therefore not sufficient that the other party agrees explicitly after being informed of the clauses to his detriment or that a notary explains them.¹⁰⁵ The terms must have been entered '*into the contractual freedom*' of the other party.¹⁰⁶

Contract terms can be considered to be negotiated in detail, even when they are incorporated into the contract without any changes.¹⁰⁷ It is enough that the term has been negotiated in detail and the other party accepted it.¹⁰⁸ This will, however, only be the case in special circumstances where the user had declared that he was open to altering the content of the terms and the other party was at the time the contract was concluded aware of the fact that he could influence the content of the clause.¹⁰⁹ The mere formulary statement of the user that he was willing to change his standard terms or that the terms were the result of an individual agreement will not be sufficient.¹¹⁰

When the content of the terms drafted in advance was changed, there is a strong indication that the terms were negotiated in detail.¹¹¹ Negotiations which have resulted in a change in the content of some of contract terms will generally not affect the nature of the other standard terms. So terms which have nothing to do with the negotiated terms will still remain standard terms.¹¹² However, when there are many terms of which the content is changed, it could be argued that terms which have remained unaltered can also be considered to be negotiated in detail, to the extent that they really have been the object of negotiations.¹¹³

A decision of the BGH of early 2010 nuanced the requirement of negotiating in detail.¹¹⁴ The BGH held that terms will not be considered to be standard terms when the incorporation of the terms formulated in advance is founded upon the free decision of the parties. It suffices that one party suggests the use of a model contract, but offers the other party the possibility to come up with an alternative contract. When that party does not take advantage of this opportunity and accepts the suggested model contract, then

¹⁰⁴ F. Graf von Westphalen, '30 Jahre AGB-Recht – Eine Erfolgsbilanz', *ZIP* 2007, (149) 151; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 48.

¹⁰⁵ F. Graf von Westphalen, '30 Jahre AGB-Recht – Eine Erfolgsbilanz', *ZIP* 2007, (149) 152; Pfeiffer in Wolf/Lindacher/Pfeiffer §305, nr. 37; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 48.

¹⁰⁶ BGH 19 May 2005, *NJW* 2005, 2543.

¹⁰⁷ Bamberger/Roth/Becker BGB §305 nr. 36; Palandt/Grüneberg §305 nr. 20; MünchKommBGB/Basedow §305, nr. 39; Staudinger/Schlosser §305 nr. 44.

¹⁰⁸ BGH 30 September 1987, *NJW* 1988, 410; BGH 26 February 1992, *NJW* 1992, 2283; BGH 3 April 1998, *NJW* 1998, 2600.

¹⁰⁹ BGH 3 November 1999, *NJW* 2000, 1110; Bamberger/Roth/Becker BGB §305 nr. 35; MünchKommBGB/Basedow §305, nr. 39; R. Koch, 'Das AGB-Recht im unternehmerischen Verkehr', *BB* 2010, (1810) 1811; Staudinger/Schlosser §305 nr. 44.

¹¹⁰ BGH 26 February 1992, *NJW* 1992, 2283; Palandt/Grüneberg §305 nr. 21; MünchKommBGB/Basedow §305, nr. 39; Staudinger/Schlosser §305 nr. 47; Ulmer/Habersack in Ulmer/Brandner/Hensen §305 nr. 49.

¹¹¹ BGH 26 February 1992, *NJW* 1992, 2283; Bamberger/Roth/Becker BGB §305 nr. 37.

¹¹² BGH 16 June 1996, *VIZ* 1996, 527; Staudinger/Schlosser §305 nr. 41.

¹¹³ Erman/Roloff BGB §305 nr. 22; MünchKommBGB/Basedow §305, nr. 43.

¹¹⁴ BGH 17 February 2010, *NJW* 2010, 1131.

the provisions of that model contract are not standard terms in the sense of §305(1) BGB.¹¹⁵ For standard terms which have not been altered during negotiations to be considered as negotiated in detail, it is therefore no longer necessary that there are special circumstances. It suffices that the other party had the opportunity to influence the content of the terms, which is the expression of its free decision.¹¹⁶

4.3. *The Netherlands*

Since 1992, the new Dutch Civil Code (Burgerlijk Wetboek, hereafter NBW) contains provisions on unfair standard terms in the Articles 6:231–247. According to Article 6:231 NBW, standard terms (*algemene voorwaarden*) are one or more terms which have been drafted to be included into a number of contracts, with the exception of terms going to the essence of the performance, to the extent that the latter terms are in plain intelligible language.¹¹⁷ This definition embodies a destination criterion. What is relevant is not whether the terms have been used in a number of contracts, but rather whether they were drafted for that purpose.¹¹⁸ For example draft model standard terms, drafted by an organization of businesses to be used by its members, are included.

It is worth noting that the rules on standard terms apply irrespective whether they have been individually negotiated or not.¹¹⁹ If negotiations have taken place, there are however two possible outcomes: the counterparty manages to negotiate a change of the content of the suggested terms or he accepts after negotiations the standard terms as they were suggested. In the first situation, the terms of which the content has been changed, become individually negotiated and lose their nature of standard term. In the second situation, the terms still remain standard terms. This approach should avoid tactical manoeuvring by parties and uncertainty of the applicable legal regime.¹²⁰ Where the terms in question remain the same, but there is concession by the user of the terms with regard to other suggested terms, Hijma argues that those terms should still be considered to be standard terms. The fact that the user made concessions can, however, be taken into account in assessing their fairness (as long as they do not appear in the black list).¹²¹

4.4. *France*

The French Code civil does not contain any express rules on standard terms or standard contracts. Legal doctrine has still discussed this issue. Already at the start of the 20th

¹¹⁵ MünchKommBGB/Basedow §305, nr. 21; Palandt/Grüneberg §305 nr. 10.

¹¹⁶ R. Koch, 'Das AGB-Recht im unternehmerischen Verkehr', *BB* 2010, (1810) 1813.

¹¹⁷ Article 6: 231 NBW: '*algemene voorwaarden: een of meer bedingen die zijn opgesteld teneinde in een aantal overeenkomsten te worden opgenomen, met uitzondering van bedingen die de kern van de prestaties aangeven, voor zover deze laatstgenoemde bedingen duidelijk en begrijpelijk zijn geformuleerd.*'

¹¹⁸ Hartkamp and Sieburgh 2010, nr. 464; Hijma 2010, nr. 13.

¹¹⁹ Hijma 2010, nr. 15.

¹²⁰ Hijma 2010, nr. 15; R. Jongeneel, 'Werkingsfeer Afdeling 6.5.3' in B. Wessels, R. Jongeneel and M. Hendrikse (eds.), *Algemene voorwaarden*, Deventer, Kluwer, 2006, (83) 96.

¹²¹ Hijma 2010, nr. 15.

century, Saleilles coined the term *contrat d'adhésion*.¹²² These are contracts which are drafted unilaterally by one of the parties and to which the other party adheres without any possibility to modify its content.¹²³ These contracts mainly contain standard terms which can be imposed because the user enjoys an economic superior position. According to him, these were not genuine contracts because the source of the obligations is not the mutual agreement of the parties, but the unilateral will of the party that drafted the standard terms.¹²⁴ The majority of legal doctrine did not agree with this anti-contractual thesis and defended the contractual nature of *contrats d'adhésion*.¹²⁵ The courts have also refused to treat *contrats d'adhésion* as a different category with its own legal nature and have always applied the general rules of contract law.¹²⁶ The Cour de cassation has made clear that a court cannot dismiss such contracts on the sole ground that it has not been freely negotiated.¹²⁷ This does not, however, mean that the courts have not taken into account the inequality of the bargaining position of the parties. But they did so within the contractual framework.¹²⁸

The French Code de consommation has provisions on unfair terms, but does not expressly refer to standard terms. When the French legislature implemented the Unfair Contract Terms Directive into the Code de consommation, it did not transpose into Article L132-1 Code de consommation the restriction of Article 3(1) to those terms which are not individually negotiated. Therefore, the material scope of the rules on unfair contract terms is much wider than the Directive requires, as all contract terms can be controlled, whether they are individually negotiated or not (cf. Art. L132-1(4) Code de consommation). The French legislature wanted to avoid endless discussions of whether terms were individually negotiated or not. Whether a term is individually negotiated can nevertheless be a relevant element in assessing its fairness. Article L132-1(5) Code de consommation expressly provides that reference should be

¹²² R. Saleilles, *De la déclaration de volonté*, Paris, Pichon, 1901, 229, nr. 891. Adde: E. Patterson, 'The interpretation and construction of contracts', *Colum L Rev* 1964, (833) 856.

¹²³ A. Bénabent, *Droit des obligations*, Paris, Montchrestien, 2012, 21, nr. 26; J. Ghestin, *La formation du contrat* in *Traité de droit civil*, Paris, LGDJ, 1993, 76, nr. 95; L. Josserard, *Cours de droit civil positif français*, II, Paris, Sirey, 1933, 20, nr. 32; G. Marty and P. Raynaud, *Droit civil. Les obligations*, I, Paris, Sirey, 1988, 126–127, nr. 129; G. Ripert and J. Boulanger, *Traité élémentaire de droit civil de Marcel Planiol*, II, Paris, LGDJ, 1943, 21–22, nr. 54.

¹²⁴ Adde: L. Duguit, *Les transformations générales du droit privé depuis le code Napoléon*, Paris, Alcan, 1912, 12 ff.

¹²⁵ A. Colin and H. Capitant, *Cours élémentaire de droit civil français*, II, Paris, Dalloz, 1932, 10, nr. 9; L. Josserard, *Cours de droit civil positif français*, II, Paris, Sirey, 1933, 20–21, nr. 32; G. Marty and P. Raynaud, *Droit civil. Les obligations*, I, Paris, Sirey, 1988, 131, nr. 130; G. Ripert and J. Boulanger, *Traité élémentaire de droit civil de Marcel Planiol*, II, Paris, LGDJ, 1943, 22, nr. 54; F. Terré, Ph. Simler and Y. Lequette, *Droit civil. Les obligations*, Paris, Dalloz, 2009, 210, nr. 199.

¹²⁶ A. Bénabent, *Droit des obligations*, Paris, Montchrestien, 2012, 21, nr. 26; J. Flour, E. Savaux, J.-L. Aubert, *Les obligations. 1. L'acte juridique*, Paris, Dalloz, 2012, 155, nr. 181; G. Ripert and J. Boulanger, *Traité élémentaire de droit civil de Marcel Planiol*, II, Paris, LGDJ, 1943, 22, nr. 54; G. Ripert, *La règle morale dans les obligations civiles*, Paris, LGDJ, 1949, 99–100, nr. 57.

¹²⁷ Cass. 19 January 1982, D 1982.457, note C. Larroumet, *JCP* 1984, II, 20215, note F. Chabas.

¹²⁸ F. Terré, Ph. Simler and Y. Lequette, *Droit civil. Les obligations*, Paris, Dalloz, 2009, 211, nr. 200.

made to all circumstances surrounding the conclusion of the contract. Terms which have been negotiated will be less likely to be considered unfair by a court.¹²⁹

The recent modernization projects might change this situation. According to Article 1102-5 of the Catala project, standard contracts or '*contrats d'adhésion*' are contracts of which the conditions, withdrawn from the discussion, are accepted by one of the parties as the other party unilaterally determined them in advance. Such a contract can, however, contain specific conditions which have been negotiated.¹³⁰ The reform project of the Ministry of Justice in its version of July 2008 contains in its Article 10 a narrower definition and describes standard contracts as contracts of which the essential stipulations, withdrawn from the discussion, have been unilaterally determined in advance. It has been questioned what the use of this definition was as the project does not attach any special legal consequences to it.¹³¹ The governmental reform project of May 2009 reiterates that definition in Article 11 and contains an interpretation rule for '*contrats d'adhésion*' in Article 129.

4.5. Belgium

The legal situation in Belgium is similar to the one in France. The Belgian Burgerlijk Wetboek/Code civil (BW) does not contain express rules on standard terms, but Belgian legal doctrine has also discussed this issue.¹³² As a starting point, Belgian courts treat standard terms in the same way as terms which have been negotiated between the parties.¹³³ The absence of negotiations does not affect the validity nor the binding force of the contract.¹³⁴ This has, however, not prevented the courts from taking action against abuses within the limits of the adage *pacta sunt servanda* (Art. 1134 BW).¹³⁵

In consumer law, the situation is slightly different. The Unfair Contract Terms Directive has been implemented in two separate acts, reflecting the historical, but outdated, division between traders and liberal professionals.¹³⁶ The Act on Trade

¹²⁹ J. Calais-Auloy and H. Temple, *Droit de la consommation*, Paris, Dalloz, 2010, 217, nr. 180.

¹³⁰ Art. 1102-5: '*Le contrat d'adhésion est celui dont les conditions, soustraites à la discussion, sont acceptées par l'une des parties telles que l'autre les avait unilatéralement déterminées à l'avance. Un tel contrat peut, cependant, leur adjoindre des conditions particulières sujettes à négociation.*'

¹³¹ D. Fenouillet, 'Regards sur un projet en quête de nouveaux équilibres', *RDC* 2009, (279) nr.10.

¹³² M. Bosmans, 'Standaardbedingen', *TPR* 1984, 33–94; H. De Page, *Traité élémentaire de droit civil belge*, II, Brussels, Bruylant, 1964, 537, nr. 551; S. Stijns, *Verbintenissenrecht*, I, Bruges, die Keure, 2005, 32, nr. 42.

¹³³ P.-H. Delvaux, 'Les contrats d'adhésion et les clauses abusives en droit belge' in J. Ghestin and M. Fontaine (eds.), *La protection de la partie faible dans les rapport contractuels*, Paris, LGDJ, 1996, (73) 73, nr. 1; S. Stijns, *Verbintenissenrecht*, I, Bruges, die Keure, 2005, 32, nr. 42.

¹³⁴ Antwerp 20 January 1987, *RW* 1986–87, 2722, note E. Dirix; P. Van Ommeslaghe, *Droit des obligations*, I, Brussels, Bruylant, 2010, 187, nr. 106; P. Wéry, *Droit des obligations*, I, Brussels, Larcier, 2011, 102, nr. 78.

¹³⁵ P.-H. Delvaux, 'Les contrats d'adhésion et les clauses abusives en droit belge' in J. Ghestin and M. Fontaine (eds.), *La protection de la partie faible dans les rapport contractuels*, Paris, LGDJ, 1996, (73) 79, nr. 12 ff; S. Stijns, *Verbintenissenrecht*, I, Bruges, die Keure, 2005, 32, nr. 42; P. Wéry, *Droit des obligations*, I, Brussels, Larcier, 2011, 102–103, nr. 78.

¹³⁶ This division has been criticized by legal doctrine and the Constitutional Court. In two preliminary rulings, the Constitutional Court first held that the exclusion of liberal professionals from the scope of

Practices and Consumer Protection of 1991 was recodified and updated in 2010 into the Act on Market Practices and Consumer Protection (AMP).¹³⁷ The provisions on unfair contract terms are applicable to all contract terms in B2C contracts, whether or not they were individually negotiated.¹³⁸ For liberal professionals, there is a specific act, the Act on Liberal Professions (ALP).¹³⁹ This act refers expressly to terms which have not been individually negotiated (Art. 7 §2 ALP). Only those terms are subject to the general fairness test. However, contract terms which figure on the black list are subject to judicial control, even if they are individually negotiated (Art. 7 §4 ALP).¹⁴⁰

4.6. United Kingdom

With regards to standard terms in a B2B context, the Unfair Contract Terms Act 1977 (UCTA) must be examined. Contrary to the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) which is only applicable to B2C contracts, the UCTA is applicable to both B2C and B2B contracts.¹⁴¹ Although its name could suggest otherwise, the UCTA does not apply to all unfair terms in contracts, but to exclusion, limitation and indemnity clauses.¹⁴² The UCTA does generally not distinguish between standard terms and terms which has been individually negotiated.¹⁴³

Section 3 UCTA constitutes an important exception.¹⁴⁴ It is *inter alia* applicable where one party enters a contract on the basis of 'the other's written standard terms of business.' Judge Stannard said in *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd*¹⁴⁵ that 'what is required for terms to be standard is that they should be so regarded by the party which advances them as its standard terms and that it should habitually contract in those terms.' Section 3(1) UCTA does not require that the parties

the AMP was unconstitutional: Constitutional Court 6 April 2011, No. 55/2011, *OJ* 8 June 2011, *A.GrwH* 2011, 1135, *DAOR* 2011, 448, note P. Brulez, *DCCR* 2011, 185, note F. Judo and J. Stuyck, *RW* 2011–12, 903, note D. Mertens; Constitutional Court 15 December 2011, No. 192/2011, *OJ* 7 March 2012, *A.GrwH* 2011, 3249, *Ius & Actores* 2012, 37, *JLMB* 2012, 83, *RW* 2013–14, 160. In the summer of 2013, the Constitutional Court finally annulled the provision which excludes liberal professions from the scope of the AMP: Constitutional Court 9 July 2013, No. 99/2013, July 2013, *OJ* 16 September 2013, 65570, *JLMB* 2013, 1919, note M.R., *NJW* 2013, 793, note R. Steennot. The proposed Code of Economic Law (cf. *infra*) will nevertheless continue this outdated division between traders and liberal professions and will contain a specific Book XVI on liberal professions. For a critique: B. Ponet and H. Lamon, 'Is een vrije beroeper geen ondernemer zoals een andere?', *RW* 2013–14, (562) 562..

¹³⁷ Wet van 6 april 2010 betreffende marktpraktijken en consumentenbescherming, *OJ* 12 April 2010. *OJ* 20 November.

¹³⁸ Swaenepoel 2011, nr. 810.

¹³⁹ Wet van 2 augustus 2002 betreffende de misleidende en vergelijkende reclame, de onrechtmatige bedingen en de op afstand gesloten overeenkomsten inzake de vrije beroepen, *OJ* 20 November 2002.

¹⁴⁰ Swaenepoel 2011, nr. 812.

¹⁴¹ Peel 2007, 7-094.

¹⁴² A. Guest, 'Exemption Clauses' in *Chitty on Contracts. General Principles*, London, Thomson Reuters, 2008 (Guest 2008), (909) 947, nr. 14-059; Peel 2007, 7-049.

¹⁴³ Peel 2007, 7-002.

¹⁴⁴ Guest 2008, nr. 14-072.

¹⁴⁵ [1991] 56 Build LR 115.

have not negotiated over the terms to be dealing on the other's written terms.¹⁴⁶ Where, however, meaningful negotiations have taken place and a number of standard terms have been modified as to fit the particular circumstances of the other party's case, section 3 UCTA will no longer apply.¹⁴⁷ This is a question of fact.¹⁴⁸ It is not required that the business terms were drafted by a party to be considered as its terms of business. Where standard terms have been produced by a third party, it is essential for the application of the UCTA that the model contract is invariably or at least usually used by the party in question.¹⁴⁹

4.7. Conclusion

The DCFR, the CESL and the modernised civil codes of Germany and the Netherlands cover unfair terms in a B2B context. The Unfair Contract Terms Directive only applies to terms which have not been individually negotiated in B2C contracts. The DCFR and the CESL provide for definitions on standard terms and terms which are not individually negotiated, but the usefulness of the distinction between both concepts has been questioned. In Germany and in the Netherlands the civil codes only contain definitions of standard terms. Important in all definitions of standard terms is that they have been drafted in advance with the intention to be used in future contracts. Contrary to the DCFR, the CESL and in the Netherlands, standard terms in Germany do not have to be drafted for multiple contracts between *different parties*. The DCFR and the CESL expressly provide that a term will cease to be a standard term if it has been individually negotiated. In Germany, §305(1) BGB also provides that terms will not be considered to be standard terms to the extent that they are negotiated between the parties. For the DCFR and the CESL it is important that the counterparty of the user was able to influence the content of the terms, otherwise they will be considered to be not individually negotiated. This is also the case in Germany, where the courts make high demands on negotiating: mere discussing is not enough. In the Netherlands, standard terms which have been negotiated will only be treated as individually negotiated when the content of these terms has been altered. Even when the terms remain the same and negotiations result in concessions at a different place, it is argued that the terms will still be standard terms.

France and Belgium do not have express rules in their civil codes on unfair terms. The problems of '*contrats d'adhésion*' or standard contracts are discussed in legal doctrine, but they have not led to a change of general contract law. In consumer law, there are provisions on unfair terms. The Code de consommation and the AMP went further than the Unfair Contract Terms Directive demanded and extended the scope of the judicial control in a B2C context to individually negotiated terms as well. These differences between Germany and the Netherlands (only standard terms) and France

¹⁴⁶ *St Albans City and DC v International Computers Ltd* [1996] 4 All ER 481.

¹⁴⁷ *The Flamar Pride* [1990] 1 Lloyd's Rep 434; *Salvage Association v CAP Financial Services Ltd* 1995 FSR 654.

¹⁴⁸ Guest 2008, nr. 14-072.

¹⁴⁹ *British Fermentation Products Ltd v Compair Reavell Ltd* [1999] 2 All ER (Comm) 389.

and Belgium (all contract terms) can be explained by looking to different policy choices underlying legislation on the fairness of (standard) contract terms. The transaction costs paradigm focusses on the fact that the terms were not negotiated, where the abuse of bargaining position theory can explain why individually negotiated terms can also be held to be unfair. The latter theory can still not justify why the core elements of a contract are excluded from judicial scrutiny. Only the Belgian ALP followed the Unfair Contract Terms Directive and excludes individually negotiated terms (as long as they do not appear on the black list). The modernisation projects for the French Code civil, which contain definitions on '*contrats d'adhésion*', seem to constitute a rapprochement with the transaction costs theory.

The United Kingdom seems to have taken a middle position. Many provisions of the UCTA are also applicable on individually negotiated exclusion clauses. Only section 3 UCTA contains a specific rule for standard terms. It is only applicable in B2B contracts when the other party enters a contract on the basis of the other's written standard terms of business. There is a subjective and objective test: the user must regard them as its standard terms and must habitually contract on those terms. Section 3 UCTA only ceases to apply where meaningful negotiations have taken place and the terms have been changed to suit the specific circumstances of the transactions.

5. Judicial control

After analysing the conceptional framework which is used in the judicial assessment of whether certain contract terms should be considered unfair, it is necessary to have a closer look to the judicial control itself and how it operates.

5.1. European Union: Unfair Contract Terms Directive, DCFR and CESL

5.1.1. Unfair Contract Terms Directive

Article 3(1) of the Unfair Contract Terms Directive considers a not individually negotiated contract term to be 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.' In referring to concepts of good faith and significant imbalance between the rights and obligations of the parties, this Article merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated.¹⁵⁰ In the assessment of the unfairness of a contractual term, the courts must take into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent (Art. 4(1)). The national court must assess the fairness of a contractual term *inter alia* in light of all the terms

¹⁵⁰ ECJ C-478/99, *Commission v Sweden*, ECR 2002, I-4147, at 17; ECJ C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter*, ECR 2004, I-3403, at 19.

appearing in the general business conditions of a B2C contract, and in the light of the national legislation setting out rights and obligations which could supplement those provided by the general business conditions at issue.¹⁵¹ It is for the national court to decide on the application of these general criteria to a specific term, which must be considered in relation to all the circumstances of the particular case.¹⁵²

Article 4(2) contains an important exception to the fairness test. The test does not relate to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration as against the services or goods supplied in exchange. This exclusion is only applicable in so far as these terms are in plain intelligible language. When this is not the case, then these terms can still be tested on their fairness.¹⁵³

5.1.2. DCFR

The section on unfair terms contains three standards for assessing the fairness: Article II – 9:403 for B2C contracts, Article II – 9:404 for C2C contracts and Article II – 9:405 for B2B contracts. This split is unfortunate. It might have been more coherent to draft a single definition of unfairness and good faith, while adding necessary modifications for specific situations in the following provisions.¹⁵⁴ A term in a B2B contract is unfair if it is a term forming part of standard terms supplied by one party and of such a nature that its use *grossly* deviates from good commercial practice, contrary to good faith and fair dealing (Art. II – 9:405). The use of the adverb '*grossly*' indicates that the appreciation of the unfairness in B2B dealings should not be as stringent as in B2C contracts, where the terms 'significantly disadvantages' are used. From an economic perspective, this difference has been criticised. It is argued that the problem of information asymmetries requires a uniform treatment.¹⁵⁵ The approach taken in the Principles of European Contract Law was therefore more appropriate as it only contained a uniform, but flexible provision on the unfairness of not individually negotiated terms in Article 4:110.¹⁵⁶

The criterion of good commercial practice has been criticised as it does not indicate what has to be done when there is no such commercial practice. It is true that Article 3 of the Late Payment Directive 2000 also refers to good commercial practice, but there it is not the only criterion to determine whether the deviation is unfair.¹⁵⁷ It furthermore creates the false impression that unfair standard terms in B2B contracts are acceptable to

¹⁵¹ ECJ C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, ECR 2012 nyr, at 18.

¹⁵² ECJ C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter*, ECR 2004, I-3403, at 19–22; ECJ C-453/10, *Jana Pereničová, Vladislav Perenič v SOS financ spol. s r. o.*, ECR 2012, nyr.

¹⁵³ J. Goddaer, E. Terryn and J. Vannerom, 'Invloed van het Europese recht op het consumenten(contracten) recht' in I. Samoy, V. Sagaert and E. Terryn (eds.), *Invloed van het Europese recht op het Belgische privaatrecht*, Cambridge, Intersentia, 2012, (467) 526, nr. 67.

¹⁵⁴ H. Eidenmüller, 'Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR', *ERCL* 2009, (109) 129–130; T. Pfeiffer, 'Non-Negotiated Terms' in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law*, Munich, Sellier, 2008, (177) 178–179.

¹⁵⁵ Schäfer and Leyens 2010, 114–115.

¹⁵⁶ N. Jansen, 'Klauselkontrolle im europäischen Privatrecht', *ZEuP* 2010 (69) 91.

¹⁵⁷ M. Maugeri, 'Is the DCFR ready to be adopted as an Optional Instrument?', *ERCL* 2011, (219) 221.

the extent that the unfairness is not too excessive.¹⁵⁸ In light of the transaction costs paradigm, it is to be applauded that the protection against unfair standard terms is not limited to SMEs. Although the text of the Feasibility Study referred to SME protection ('mindful of the weaker position of most SMEs'),¹⁵⁹ there is no distinction made in its rules.¹⁶⁰

5.1.3. CESL

Chapter 8 CESL contains the rules on unfair contract terms. Following the DFCR, Article 86(1) CESL provides that a contract term in a contract between traders¹⁶¹ is unfair if it forms part of not individually negotiated terms within the meaning of Article 7 and if it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing. Judicial scrutiny under the CESL is wider than under the DCFR, as the fairness test in DCFR is restricted to standard terms, whereas the test in the CESL applies to all not individually negotiated terms.¹⁶² Article 86(2) states that when assessing the unfairness of a contract term, regard is to be had to (a) the nature of what is to be provided under the contract, (b) the circumstances prevailing during the conclusion of the contract, (c) the other contract terms, and (d) the terms of any other contract on which the contract depends. Article 82 which introduces a transparency requirement is surprisingly only applicable to B2C contracts.¹⁶³

One of the important and controversial innovations by the CESL, is the introduction of a fairness control for not individually negotiated terms in a B2B contract.¹⁶⁴ However, as the CESL is only applicable to B2B contracts where at least one of the parties is an SME, Article 86(1) cannot be considered to contain a general protective rule for unfair terms in B2B contracts. It can furthermore also be invoked against an SME as supplier of these terms in contracts with other SMEs or larger traders. So it would be wrong to see it as a form of SME protection. Like the DCFR, it is unfortunate that the CESL splits up the unfairness test between B2C and B2B contracts.¹⁶⁵ In B2C contracts, a not individually negotiated term is unfair if it causes a *significant imbalance* in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing. In B2B contracts, however, a not individually negotiated term is unfair if its use *grossly deviates from good commercial practice*, contrary to good faith and fair dealing. Just like in the DCFR, the reference to good commercial practice is not an adequate criterion. First of all, it was in origin not designed for standard terms

¹⁵⁸ N. Jansen, 'Klauselkontrolle im europäischen Privatrecht', *ZEuP* 2010 (69) 91.

¹⁵⁹ Feasibility Study, 6.

¹⁶⁰ T. Pfeiffer, 'Unfaire Vertragsbestimmungen', *ERPL* 2011, (835) 843.

¹⁶¹ At least one of the traders must qualify as an SME.

¹⁶² D. Mazeaud and N. Sauphanor-Brouillaud, 'Article 86. Meaning of "unfair" in contracts between traders' in R. Schulze (ed.), *Common European Sales Law (CESL) – Commentary*, Baden-Baden, Nomos, 2012 (CESL/Mazeaud and Sauphanor-Brouillaud Art. 86), (393) 394, nr. 3.

¹⁶³ Ernst 2012 nr. 12; O. Lando, 'Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law', *ERPL* 2011, (717) 725.

¹⁶⁴ CESL/Mazeaud and Sauphanor-Brouillaud Art. 86, nr. 6.

¹⁶⁵ CESL/Mazeaud and Sauphanor-Brouillaud Art. 86, nr. 6.

control, but as judicial control on individually negotiated terms in B2B contracts. It secondly creates the impression that the use of unfair standard terms is acceptable between traders, provided that the unfairness is not excessive. This does not correspond with the transaction costs paradigm as justification for fairness control of standard terms.¹⁶⁶ As I have argued under the DCFR, contract terms used in B2B contracts should normally be subject to the same general fairness control as in B2C contracts.¹⁶⁷ The current drafting can be considered to be an indication that the courts should show more reticence than in B2C contracts to interfere with B2B contracts. It seems to be a political compromise between those members of the Expert Group who argued that unfair terms in B2B contracts should be treated in the same way as in B2C contracts and those who thought that fairness control should be limited to B2C contracts.¹⁶⁸

5.2. Germany

5.2.1. Content of the judicial control

The core of the rules on standard terms is §307 BGB which contains the *Generalklausel* for the fairness test.¹⁶⁹ Pursuant to §307(1) BGB, provisions in standard terms are ineffective if they, contrary to the requirement of good faith, unreasonably disadvantage the other party.¹⁷⁰ Such a disadvantage can exist in the fact that a provision is not clear and comprehensible (§307(1) *in fine* BGB). §307(2) BGB contains two concretisations of unfairness. In the absence of any indication to the contrary, such a disadvantage is presumed to exist if a provision is incompatible with essential principles of the statutory provision from which it deviates (§307(2)(a) BGB) or limits essential rights or obligations emanating from the nature of a contract in such a way that the attainment of the purpose of the contract is jeopardized (§307(2)(b) BGB). For B2C contracts, §307 BGB

¹⁶⁶ H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner and R. Zimmermann, 'Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht', *JZ* 2012, (269) 279–280 (translated into English as H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner and R. Zimmermann, 'The Proposal for a Regulation on a Common European Sales', *Edin.L.R.* 2012, 301–357); Schäfer and Leyens 2010, 115.

¹⁶⁷ H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner and R. Zimmermann, 'Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht', *JZ* 2012, (269) 279; Hesselink 2011, 146; D. Mazeaud, 'Unfairness and Non-negotiated Terms' in R. Schulze and J. Stuyck (eds.), *Towards a European Contract Law*, Munich, Sellier, 2011, (123) 126; CESL/Mazeaud and Sauphanor-Brouillaud Art. 86, nr. 7.

¹⁶⁸ Hesselink 2011, 147.

¹⁶⁹ H. Schmidt, '§307 Inhaltskontrolle' in H. Bamberger and H. Roth (eds.), *Kommentar zum Bürgerlichen Gesetzbuch*, Munich, Beck, 2007 (Bamberger/Roth/Schmidt §307) nr. 18; M. Coester, '§307 Inhaltskontrolle' in J. von Staudingers *Kommentar BGB* §305–310, Berlin, Sellier, 2006 (Staudinger/Coester §307) nr. 9; A. Fuchs, '§307 Inhaltskontrolle' in Ulmer, Brandner and Hensen, *AGB-Recht*, Köln, Otto Schmidt, 2011 (Fuchs in Ulmer/Brandner/Hensen §307) nr. 1; Chr. Grüneberg, '§307' in *Palandt Bürgerliches Gesetzbuch*, Munich, Beck, 2011, (Palandt/Grüneberg §307), nr. 10; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 74; W. Wurmnest, '§307 Inhaltskontrolle' in *Münchener Kommentar BGB* §§241–432 BGB, Munich, Beck, 2012 (MünchKommBGB/Wurmnest §307) nr. 21.

¹⁷⁰ §307(1) first sentence BGB: 'Bestimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen.'

is further concretised in two lists: §308 BGB contains a grey list of terms which can be unreasonable and §309 BGB contains a black list of terms which are deemed to be unreasonable.

According to §307(3) BGB, only those terms which deviate from legal provisions or supplement them are subjected to judicial control.¹⁷¹ This leads to a dual limitation of the control. Firstly, provisions which are taken from other legislative measures cannot be subjected to control. These so-called declaratory clauses (*'deklaratorische Klauseln'*), which merely copy the content of statutory provisions, are not subjected to judicial control.¹⁷² Secondly, but less obvious, contract terms which relate to the descriptions of the performance (*'Leistungsbeschreibung'*) and the determination of the price are excluded from judicial control pursuant to §307 BGB.¹⁷³ The description of the precise nature of the performance is exempt if it concerns the core of the contract, the *essentialia negotii*. This concept is interpreted narrowly. It covers only those terms which determine the nature, the quality and the size of the performance, without which the contract would not be effective because its essential content would not be determined or determinable.¹⁷⁴ Terms which limit, organise or modify the promised performance are, however, not excluded from judicial control.¹⁷⁵

To determine whether a party has been unreasonably disadvantaged in the sense of §307(1) BGB, the court has to examine the respective interests of the parties.¹⁷⁶ The unreasonable disadvantage is contrary to good faith when the user of the terms unilaterally tried to abusively push his own interests to the excessive detriment of the other party and this considerably upsets the balance of rights and obligations and the spread of risk between the parties. This is the case when the justified interests of the other party are not sufficiently taken into account or aligned, especially when the deviation from essential legal rules is not justified by specific circumstances.¹⁷⁷ The starting point of the comparison is the legal situation of the parties in the absence of the standard term.¹⁷⁸ Not just any disadvantage is sufficient: it must be clear and obvious.¹⁷⁹ This requirement can be derived from the reference to good faith and the necessity to reconcile the judicial intervention with the freedom of contract.¹⁸⁰

¹⁷¹ Bamberger/Roth/Schmidt §305 nr. 62; MünchKommBGB/Wurmnest §307 nr. 1.

¹⁷² Staudinger/Coester §307 nr. 289; Fuchs in Ulmer/Brandner/Hensen §307 nr. 6; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 331; MünchKommBGB/Wurmnest §307 nr. 6.

¹⁷³ Bamberger/Roth/Schmidt §307 nr. 68; M. Wolf, '§307 Inhaltskontrolle' in M. Wolf, W. Lindacher and T. Pfeiffer, *AGB-Recht Kommentar*, Munich, Beck, 2009 (Wolf in Wolf/Lindacher/Pfeiffer §307) nr. 288; MünchKommBGB/Wurmnest §307 nr. 12.

¹⁷⁴ Fuchs in Ulmer/Brandner/Hensen §307 nr. 40; MünchKommBGB/Wurmnest §307 nr. 12.

¹⁷⁵ BGH 12 June 2001, *BB* 2001, 1543; BGH 23 June 1993, *NJW* 1993, 2369; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 292.

¹⁷⁶ BGH 14 September 2005, *NVwZ-RR* 2006, 494; Staudinger/Coester, §307 nr. 107; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 174; MünchKommBGB/Wurmnest §307 nr. 33.

¹⁷⁷ BGH 25 April 2001, *NJW* 2001, 2331; BGH 3 November 1999, *BB* 2000, 323; Bamberger/Roth/Schmidt §305 nr. 27; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 75.

¹⁷⁸ Staudinger/Coester §307 nr. 90.

¹⁷⁹ Palandt/Grüneberg §307 nr. 12; Staudinger/Coester §307 nr. 91; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 76.

¹⁸⁰ Staudinger/Coester §307 nr. 91.

The person protected by §307 ff BGB is the counterparty of the user of the standard terms. It is not necessary that he is disadvantaged *vis-à-vis* the user, as this can take place in relation to a third party.¹⁸¹ Nor is it necessary that the disadvantage of the protected party correlates with an advantage for the user or a third party.¹⁸² The user of the standard terms cannot seek protection against the standard terms he suggested.¹⁸³ The time to determine the disadvantage is the moment that the contract is concluded.¹⁸⁴

In balancing the respective interests of the parties, it is not the concrete parties and circumstances of that single case that matters.¹⁸⁵ Rather, a more generalised and standardised approach is needed. A clause will be unfair when it does not take into account the typical interests of the affected circle of clients for that kind of transaction. It is not the concrete contract party that should be taken into account, but rather the average client in such transactions.¹⁸⁶ Not relevant moreover are the consequences of the term in the concrete contractual relationship. For the assessment pursuant to §307(1) BGB only the potential effects and consequences which are generally made possible by the clause are taken into account.¹⁸⁷ When that is the case, then it does not matter that the disadvantageous potential has not materialised or that the user did not rely on the clause.¹⁸⁸ However, the concrete contractual relationship has an impact on the fairness test, as it determines with respect to which group of persons the control is to be established.¹⁸⁹

§310(1) second sentence BGB requires the court to take into account trade usages when assessing the fairness of standard terms in a B2B context. Where such usages directly define (without the application of standard terms) the rights and duties of the parties, then §307(1) BGB cannot apply.¹⁹⁰ When it is necessary to include the clause in the contract, then the usages must be taken into account to interpret it. The reference to trade usages is important as a criterion to determine the unreasonableness of a term.¹⁹¹

An unreasonable disadvantage can, according to §307(1) *in fine* BGB also exist in the lack of transparency of a term, especially when there is a risk that it would disadvantage the other party.¹⁹² This requirement of transparency (*Transparenzgebot*) can have a great impact on B2B contracts as a decision on exclusion clauses shows.¹⁹³ The contract in question contained a clause which restricted the liability of the user of the standard

¹⁸¹ BGH 28 May 1984, NJW 1984, 2816.

¹⁸² Bamberger/Roth/Schmidt §307 nr. 23; Staudinger/Coester §307 nr. 93.

¹⁸³ BGH 4 December 1986, NJW 1987, 837.

¹⁸⁴ Bamberger/Roth/Schmidt §307 nr. 39; Staudinger/Coester §307 nr. 100; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 93.

¹⁸⁵ Bamberger/Roth/Schmidt §307 nr. 29; Staudinger/Coester §307 nr. 109; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 77.

¹⁸⁶ Staudinger/Coester §307 nr. 109; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 77.

¹⁸⁷ Staudinger/Coester §307 nr. 110; MünchKommBGB/Wurmnest §307 nr. 37.

¹⁸⁸ BGH 28 October 1981, NJW 1982, 870.

¹⁸⁹ Staudinger/Coester §307 nr. 113.

¹⁹⁰ Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 193.

¹⁹¹ Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 193.

¹⁹² BGH 12 March 1987, NJW 1987, 1931.

¹⁹³ BGH 20 July 2005, NJW-RR 2005, 1496.

terms to damages resulting from intended or grossly negligent breaches of contract, to the extent that it is not a breach of its '*Kardinalpflichten*' (essential obligations). The Bundesgerichtshof did not find this exclusion clause unreasonable as such, but held that it was not transparent as the average car dealer, being a legal layman, could not be supposed to know the case-law of the Bundesgerichtshof on '*Kardinalpflichten*.' It is clear that such a wide interpretation of the *Transparenzgebot* does not adequately address the interests of the professional parties in a B2B contract. Businesses can be considered to know what is meant by the *Kardinalpflichten* of the parties.¹⁹⁴ The Bundesgerichtshof should at least have differentiated between different businesses and limited its ruling to those businesses which need this protection, instead of generalising its ruling to all B2B contracts. It makes sense to differentiate whether the business relied on advice of its lawyers or legal department or not.¹⁹⁵

5.2.2. Differentiations

The principle of a generalised and standardised test does not exclude the possibility of making differentiations as to the group of protected persons. On the contrary, such an approach will impose itself to avoid unequal situations being treated the same.¹⁹⁶ This might be the principal function of the flexible wording of §307(1) BGB. Its openness implies that reference must be made to all relevant facts of the individual case, with the limitation that individual peculiarities of the concrete parties are left aside.¹⁹⁷ This is already shown by the BGB which provides for a uniform test as a criterion of reasonableness,¹⁹⁸ but also contains provisions which differentiate between B2B and B2C. Standard terms which are ineffective in B2C contracts can be effective in B2B contracts.¹⁹⁹

In a similar vein, it is also possible to make differentiations within B2B contracts according to the type of transaction, the industry in which the businesses operate, the size of the business or the protected persons.²⁰⁰ Small businesses or liberal professions can have a greater need for protection, as they may only have a limited knowledge or experience because of their activities.²⁰¹ Regard must also be had to the fact of whether a certain activity is part of the core business of the enterprise or only relates to an accessory

¹⁹⁴ Fuchs in Ulmer/Brandner/Hensen §307 nr. 345; R. Koch, 'Das AGB-Recht im unternehmerischen Verkehr', *BB* 2010, (1810) 1815; A. Kappus, 'BGH „succurit ignorant“ – Transparenz des „Kardinalpflichten“-Begriffs im Unternehmerverkehr', *NJW* 2006, (15) 17; F. Graf von Westphalen, 'AGB-Recht im Jahr 2005', *NJW* 2006, (2228) 2232.

¹⁹⁵ K.P. Berger and L. Kleine, 'AGB-Gestaltung und Transparenzgebot – Beispiele aus der jüngeren BGH-Rechtsprechung zum unternehmerischen Geschäftsverkehr', *NJW* 2007, (3526) 3527.

¹⁹⁶ Staudinger/Coester §307 nr. 111; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 271.

¹⁹⁷ Staudinger/Coester §307 nr. 111.

¹⁹⁸ BGH 7 July 1976, *NJW* 1976, 2345.

¹⁹⁹ BGH 3 March 1988, *NJW* 1988, 1785.

²⁰⁰ BGH 8 March 1984, *NJW* 1984, 1750; Fuchs in Ulmer/Brandner/Hensen §307 nr. 379; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 196.

²⁰¹ K.P. Berger, 'Für eine Reform des AGB-Rechts im Unternehmerverkehr', *NJW* 2010 (465) 465; Erman/Roloff BGB §307 nr. 35; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 197. e.g. BGH 8 October 2008, *NJW* 2008, 3772.

activity.²⁰² The position of an enterprise in the production chain can also be a relevant factor.²⁰³ In that sense, the German standard terms rules offer protection to SMEs. This protection is enlarged by the *Indizwirkung* of §§308 and 309 BGB.

5.2.3. *Indizwirkung*

The grey list (§308 BGB) and the black list (§309 BGB) are not applicable to B2B contracts (§310(1) BGB). This does, however, not mean that these paragraphs are without interest to B2B contracts.²⁰⁴ In a B2B context, these lists can nevertheless be an indication of an unreasonable disadvantage of a party (*Indizwirkung*). Because the requirements of §§308–309 BGB can be considered as concretisations of the *Generalklausel* in §307 BGB, they can be indirectly taken into account.²⁰⁵

The majority of German legal doctrine argues that the requirements of §308 BGB can be transposed onto B2B contracts, because business peculiarities can be taken into account during the assessment of the fairness.²⁰⁶ This is not possible for the content of §309 BGB which contains *per se* prohibitions.²⁰⁷ Case law has nevertheless ruled that the fact that a standard term in a B2B contract is in breach of 309 BGB is an indication of its unfairness. Considerable deviations from default rules will therefore only survive judicial scrutiny when they can be considered to be justified with respect to specific needs of business.²⁰⁸ This is especially the case when the requirements of §309 BGB are concretisations of §307(2) BGB.²⁰⁹ The relative ease at which prohibitions in B2C contracts are transposed to B2B contracts is not unproblematic. There is almost a presumption of unreasonableness which can only be rebutted in exceptional cases.²¹⁰ This transposition should not be done generally, but carefully with respect to a single prohibition and only after consideration of whether such a transposition is suitable. It is clear that some interests which are relevant in a B2C context are not necessarily equally important in a B2B context.²¹¹

This effect will depend on the peculiarities of the parties, the transaction and the standard terms. It will be stronger when one of the parties is economically dependent on the other. Where the situation of the business is close to that of a consumer, there can be

²⁰² BGH 28 April 1983, *NJW* 1983, 1853; Palandt/Grüneberg §307 nr. 39.

²⁰³ K.P. Berger, 'Abschied von der Privatautonomie im unternehmerischen Geschäftsverkehr?', *ZIP* 2006, (2149) 2155; Wolf in Wolf/Lindacher/Pfeiffer §307 nr. 198.

²⁰⁴ Bamberger/Roth/Schmidt §307 nr. 76; Palandt/Grüneberg §307 nr. 40; MünchKommBGB/Wurmnest §307 nr. 76.

²⁰⁵ Fuchs in Ulmer/Brandner/Hensen §307 nr. 381.

²⁰⁶ Fuchs in Ulmer/Brandner/Hensen §307 nr. 383; Palandt/Grüneberg §307 nr. 40; Ulmer/Schäfer in Ulmer/Brandner/Hensen §310, nr. 31.

²⁰⁷ Fuchs in Ulmer/Brandner/Hensen §307 nr. 381; Palandt/Grüneberg §307 nr. 40.

²⁰⁸ BGH 19 September 2007, *NJW* 2007, 3774; BGH 8 March 1984, *NJW* 1984, 1750; Ulmer/Schäfer in Ulmer/Brandner/Hensen §310, nr. 27.

²⁰⁹ Palandt/Grüneberg §307 nr. 40.

²¹⁰ Fuchs in Ulmer/Brandner/Hensen §307 nr. 382; K. Lenkaitis and S. Löwisch, 'Zur Inhaltskontrolle von AGB im unternehmerischen Geschäftsverkehr', *ZIP* 2009, (441) 442.

²¹¹ Fuchs in Ulmer/Brandner/Hensen §307 nr. 382; Wolf in Wolf/Lindacher/Pfeiffer §310, nr. 23.

a case in favour of *Indizwirkung*.²¹² In addition, when the contract in question does not belong to the core business of the party, there can be a reason for a stronger *Indizwirkung*.²¹³ The *Indizwirkung* can have the result that a certain term will be held to be unreasonable for an SME and reasonable for a larger party.²¹⁴

5.2.4. Criticism

The way in which the German courts apply §§305 ff BGB in a B2B context is disputed in German doctrine. Some fierce advocates of a reform argue that the courts interfere too much in the freedom of contract to the extent that they see a farewell of party autonomy in B2B contracts.²¹⁵ This would undermine German law as legal system in the international competition and result in parties seeking refuge in foreign (especially Swiss) law.²¹⁶ Although criticism in the past was aimed at a change in case law, it is now focused on a legal change.²¹⁷

The essence of the criticism can be boiled down to three aspects of judicial control that ought to be changed. The first issue is the delimitation between standard terms and negotiated terms. The strict interpretation of ‘negotiating in detail’ is considered to be unrealistic. The current caselaw does not accept a radiation effect (*‘Strahlungseffekt’*) of negotiated terms to other terms. Terms are only excluded from judicial control to the extent (*‘soweit’*) they have been negotiated in detail.²¹⁸ The negotiated nature of some of the terms only extends to other terms when the user can prove that they were negotiated in detail.²¹⁹ In a decision of a lower court, this strict case-law was criticised as being unrealistic. It held that terms which have not been negotiated in detail should not be considered as standard terms where parties have negotiated for more than 45 hours on

²¹² K.P. Berger, ‘Abschied von der Privatautonomie im unternehmerischen Geschäftsverkehr?’, *ZIP* 2006, (2149) 2155.

²¹³ MünchKommBGB/Basedow §310, nr. 8; Wolf in Wolf/Lindacher/Pfeiffer §310, nr. 22.

²¹⁴ Wolf in Wolf/Lindacher/Pfeiffer §310, nr. 23.

²¹⁵ K.P. Berger, ‘Abschied von der Privatautonomie im unternehmerischen Geschäftsverkehr?’, *ZIP* 2006, (2149) 2149; MünchKommBGB/Basedow §310, nr. 8.

²¹⁶ M. Habersack and J. Schürnbrand, ‘Unternehmenskauf im Wege des Auktionsverfahrens aus AGB-rechtlicher Sicht’ in *Festschrift Canaris*, I, Munich, Beck, 2007, (359) 377; Chr. Kessel and A. Stomps, ‘Haftungsklauseln im Geschäftsverkehr zwischen Unternehmern’, *BB* 2009, (2666) 2666; W. Müller, C. Griebeler and J. Pfeil, ‘Für eine maßvolle AGB-Kontrolle im unternehmerischen Geschäftsverkehr’, *BB* 2009, (2658) 2662; K. Lenkaitis and S. Löwisch, ‘Zur Inhaltskontrolle von AGB im unternehmerischen Geschäftsverkehr’, *ZIP* 2009, (441) 444 ff; Staudinger/Schlosser §305 nr. 36a. *Adde*: T. Pfeiffer, ‘Flucht ins schweizerische Recht?’ in *Festschrift Graf von Westphalen*, Cologne, Otto Schmidt, 2010, 555–567.

²¹⁷ M. Abels, ‘Bedarf einer Gesetzesänderung zur Einschränkung der Inhaltskontrolle im B2B-Bereich erneut bestätigt’ (note under BGH 17 February 2010), *BB* 2010, (918) 919; L. Leuschner, ‘AGB-Kontrolle im unternehmerischen Verkehr’, *JZ* 2010, (875) 876; K.P. Berger, ‘Für eine Reform des AGB-Rechts im Unternehmerverkehr’, *NJW* 2010, (465) 467 and 469.

²¹⁸ M. Habersack and J. Schürnbrand, ‘Unternehmenskauf im Wege des Auktionsverfahrens aus AGB-rechtlicher Sicht’ in *Festschrift Canaris*, I, Munich, Beck, 2007, (359) 374; R. Koch, ‘Das AGB-Recht im unternehmerischen Verkehr’, *BB* 2010, (1810) 1811; Ulmer/Habersack in Ulmer/Brandner/Hensen §305, nr. 55.

²¹⁹ J. Lischek and V. Mahnken, ‘Vertragsverhandlungen zwischen Unternehmen und AGB – Anmerkungen aus der Sicht der Praxis’, *ZIP* 2007, (158) 160.

the contract.²²⁰ This strict case law is particularly problematic for transactions with long and complex negotiations. In such contracts, not every clause is negotiated in detail and there are so-called '*Paketlösungen*'. That means that the suggested terms become part of negotiations but can be accepted by the other party in the end without change, because of concessions as to other parts of the contract made by the user of the terms. The current case law, however, does not deal with this reality adequately because it enables an autonomously negotiated solution to be modified by the courts in favour of the other party.²²¹ It is submitted that in the case of '*Paketlösungen*', all terms of the bargain should qualify as negotiated in detail, even if they have not been individually negotiated.²²² It can be hard to prove whether the suggested terms have been part of negotiations. The fact that some terms have been negotiated does not justify this conclusion. However, when it is clear that many terms have been negotiated in detail, the burden of proof that the other terms are standard terms should be shifted to the other party.²²³ Many commentators therefore advocate less tight requirements for negotiating in detail in B2B contracts.²²⁴ The rules on judicial control should not intervene when the result of the bargain is attributable to the free and responsible expression of the will of both parties. It might be sufficient that the user of the terms puts the terms at the disposal of the other party and that that party does not use the possibility offered to negotiate the terms.²²⁵ The decision of the Bundesgerichtshof of 17 February 2010, which was already mentioned earlier, seems to be a step in the right direction.²²⁶

A second proposition is the introduction of a financial threshold above which judicial control of standard terms should be excluded.²²⁷ Scholars have proposed values between €500,000 and €1 million. These propositions depart from the consideration that it makes

²²⁰ LG Frankfurt a.M. 20 March 2003, *NZBau* 2004, 44; M. Habersack and J. Schürnbrand, 'Unternehmenskauf im Wege des Auktionsverfahrens aus AGB-rechtlicher Sicht' in *Festschrift Canaris*, I, Munich, Beck, 2007, (359) 374.

²²¹ K.P. Berger, 'Abschied von der Privatautonomie im unternehmerischen Geschäftsverkehr?', *ZIP* 2006, (2149) 2152; MünchKommBGB/Basedow §305 nr. 41; W. Müller, C. Griebeler and J. Pfeil, 'Für eine maßvolle AGB-Kontrolle im unternehmerischen Geschäftsverkehr', *BB* 2009, (2658) 2660.

²²² R. Koch, 'Das AGB-Recht im unternehmerischen Verkehr', *BB* 2010, (1810) 1811; MünchKommBGB/Basedow §310 nr. 16.

²²³ MünchKommBGB/Basedow §310 nr. 16.

²²⁴ K.P. Berger, 'Abschied von der Privatautonomie im unternehmerischen Geschäftsverkehr?', *ZIP* 2006, (2149) 2152; K.P. Berger, 'Für eine Reform des AGB-Rechts im Unternehmensverkehr', *NJW* 2010, (465) 168; R. Koch, 'Das AGB-Recht im unternehmerischen Verkehr', *BB* 2010, (1810) 1811; A. Kollmann, 'AGB: Nicht nur theoretische Probleme (in) der Praxis', *NJOZ* 2011, (625) 629; J. Lischek and V. Mahnken, 'Vertragsverhandlungen zwischen Unternehmen und AGB – Anmerkungen aus der Sicht der Praxis', *ZIP* 2007, (158) 160; W. Müller, C. Griebeler and J. Pfeil, 'Für eine maßvolle AGB-Kontrolle im unternehmerischen Geschäftsverkehr', *BB* 2009, (2658) 2660; Palandt/Grüneberg §305 nr. 22; Staudinger/Schlosser §305 nr. 36a. For an ICC arbitral award in that sense: ICC Interim/Partial Award No. 10279, *SchiedsVZ* 2005 108, note P. Hobeck.

²²⁵ J. Lischek and V. Mahnken, 'Vertragsverhandlungen zwischen Unternehmen und AGB – Anmerkungen aus der Sicht der Praxis', *ZIP* 2007, (158) 160.

²²⁶ R. Koch, 'Das AGB-Recht im unternehmerischen Verkehr', *BB* 2010, (1810) 1815.

²²⁷ L. Leuschner, 'AGB-Kontrolle im unternehmerischen Verkehr', *JZ* 2010, (875) 884; P. Leyens and H.-B. Schäfer, 'Inhaltskontrolle allgemeiner Geschäftsbedingungen', *AcP* 2010, (771) 793; W. Müller, C. Griebeler and J. Pfeil, 'Für eine maßvolle AGB-Kontrolle im unternehmerischen Geschäftsverkehr', *BB* 2009, (2658) 2662.

sense in the case of high value contracts to invest time and money to try to understand the standard terms and/or try to negotiate unfavourable terms.²²⁸ In such cases, long and complex negotiations take place and parties rely on specialised legal advice. Parties are able to protect their own interests, so there is no need for judicial control of the content of the bargain.²²⁹ There are, however, many practical problems and issues in principle with this proposition. This threshold can be either dynamic and depend on the facts of every single case, or fixed. A fixed threshold, however, cannot adequately take into account the changes in the market and the differences between certain industries. It would also require the legislature to have knowledge which is present with the private parties involved, but to a much lesser extent with the legislature. Nevertheless, a fixed threshold still seems more appealing as it would provide more legal certainty than a dynamic threshold which is considered on a case-by-case basis.²³⁰ However, fixing an adequate threshold is a precarious task and will need much detailed information and empirical research.²³¹ Furthermore, the fixing of the threshold seems arbitrary and provides for a strict 'all-or-nothing' solution. There is also the problem that a fixed threshold would encourage strategic behaviour of parties to change the value of the contracts. Moreover, one should not focus solely on the value of the transaction, as other elements are also relevant, such as the regularity by which such transactions are entered into or whether the transaction is part of its core business.²³² In most cases, the correlation between the contract value and the information costs is nevertheless such that is reasonable to have attention for the standard terms above a certain threshold.²³³

A third proposal is to render the criterion of §307 BGB more flexible. Many commentators argue that the courts do not differentiate enough between B2C and B2B contracts and allow a reflective effect of the B2C provisions on B2B contracts too readily.²³⁴ It has already been mentioned that the term 'unreasonably' offers the possibility for the courts to make differentiations between the control in B2C and B2B contracts. To accentuate this, some authors have proposed rewriting §310 BGB to include that in applying §307 BGB, courts 'should take into account the necessities of trade.'²³⁵ It is submitted that a legislative intervention might not be necessary, but that courts should

²²⁸ MünchKommBGB/Basedow §310 nr. 15; L. Leuschner, 'AGB-Kontrolle im unternehmerischen Verkehr', *JZ* 2010, (875) 883; P. Leyens and H.-B. Schäfer, 'Inhaltskontrolle allgemeiner Geschäftsbedingungen', *AcP* 2010, (771) 794.

²²⁹ MünchKommBGB/Basedow §310 nr. 15.

²³⁰ P. Leyens and H.-B. Schäfer, 'Inhaltskontrolle allgemeiner Geschäftsbedingungen', *AcP* 2010, (771) 794–795; Schäfer and Leyens 2010, 112.

²³¹ P. Leyens and H.-B. Schäfer, 'Inhaltskontrolle allgemeiner Geschäftsbedingungen', *AcP* 2010, (771) 795; Schäfer and Leyens 2010, 112.

²³² MünchKommBGB/Basedow §310 nr. 17.

²³³ P. Leyens and H.-B. Schäfer, 'Inhaltskontrolle allgemeiner Geschäftsbedingungen', *AcP* 2010, (771) 794; Schäfer and Leyens 2010, 112.

²³⁴ Chr. Kessel and A. Stomps, 'Haftungsklauseln im Geschäftsverkehr zwischen Unternehmern', *BB* 2009, (2666) 2666–2667; K. Lenkaitis and S. Löwisch, 'Zur Inhaltskontrolle von AGB im unternehmerischen Geschäftsverkehr', *ZIP* 2009, (441) 442; R. Koch, 'Das AGB-Recht im unternehmerischen Verkehr', *BB* 2010, (1810) 1813–1814.

²³⁵ K.P. Berger, 'Für eine Reform des AGB-Rechts im Unternehmerverkehr', *NJW* 2010 (465) 469; W. Müller, C. Griebeler and J. Pfeil, 'Für eine maßvolle AGB-Kontrolle im unternehmerischen Geschäftsverkehr', *BB* 2009, (2658) 2658. *Contra*: F. Graf von Westphalen, 'Wider einen Reformbedarf

differentiate more clearly than they do now between B2C and B2B contracts. Courts should, more than they do now, reflect on the grounds for the judicial control of standard terms: compensation for the problem of transaction costs. In every case, the question should be to what extent the contractual mechanism is endangered and how urgent the need for judicial control is. In this assessment, regard must be had to the value of the transaction and/or the question whether the transaction enters into the core business of the other party or whether it is a one-off transaction.²³⁶ As a result, the *Indizwirkung* of §§308 and 309 BGB should only be upheld in those situations where a business has a similar need to be protected as a consumer. Where this is not the case, freedom of contract should give full effect to the standard terms.²³⁷

5.3. The Netherlands

According to Article 6:233 of the Dutch Burgerlijk Wetboek, a term in standard terms is voidable in two situations. First of all, it is voidable if it is unreasonably onerous to the counterparty, having regard to the nature and the further content of the contract, the manner in which these standard terms have been created, the mutually apparent interests of the parties and the other circumstances of the case (Art. 6:233(a) NBW). This implies a comparison with the situation in which the parties would find themselves if the term in question were not incorporated into the contract.²³⁸ The reference to the elements which should be taken into account does not limit the fairness test, but highlights that all circumstances of the case can be relevant. One of these important other circumstances of the case is the capacity of the parties involved.²³⁹ The open norm therefore enables differentiation between B2C and B2B, but also between different classes of businesses. Secondly, standard terms are voidable if the user has not given its counterparty a reasonable opportunity to have knowledge of the content of the standard terms (Art. 6:233(b) NBW). This provision lays down an information duty on its user regarding the content of the standard terms.²⁴⁰ The information duty is made concrete in Article 6:234 NBW. Dutch legal doctrine furthermore argues that the transparency requirement which was introduced in Articles 6:231(a) and 6:238(2) NBW exclusively for B2C contracts, can nevertheless be applied to standard terms in B2B contracts. In assessing the fairness of a standard term, the question whether a term is drafted in a plain and intelligible language is an important circumstance which should be taken into account.²⁴¹

The core elements of the contract, such as the price, quality and quantity of the goods, or other essential elements of the contract are not considered standard terms to the extent that they are in plain intelligible language. The ratio for this exception is that the

beim AGB-Recht im Unternehmensverkehr', *NJW* 2009, (2977) 2977; F. Graf von Westphalen, 'Wider die angebliche Unattraktivität des AGB-Rechts', *BB* 2010, (195) 196–197.

²³⁶ MünchKommBGB/Basedow §310 nr. 18.

²³⁷ MünchKommBGB/Basedow §310 nr. 18.

²³⁸ Hijma 2010, nr. 25.

²³⁹ Hijma 2010, nr. 26.

²⁴⁰ Hijma 2010, nr. 35.

²⁴¹ Hartkamp and Sieburgh 2010, nr. 483; Hijma 2010, nr. 33a.

opposite would amount to a partial introduction of the *iustum pretium* principle, which would endanger the principle of party autonomy.²⁴² The notion of core element must be interpreted strictly, as usually coinciding with the essential elements of the contract, without which the contract cannot be concluded as the obligations are not sufficiently determinable (see Art. 6:227 NBW).²⁴³ The question whether a term goes to the core of the contract is to be assessed by reference to objective criteria. Parties cannot exclude the fairness control by declaring certain terms essential to their contract.²⁴⁴

In principle, the open norm of Article 6:233 NBW is applicable irrespective of the capacity of the parties involved, consumers or businesses. Article 6:235 NBW provides, however, for an important exception with respect to large enterprises.²⁴⁵ According to that provision, some (large) enterprises cannot rely on the Articles 6:233 and 6:234 NBW to have unfair standard terms annulled. Two kinds of enterprises are aimed at: firstly, legal persons which at the time of concluding the contract have made their last annual account public or to whom Article 2:403 NBW has been applied (Art. 6:235(1)(a) NBW);^{246, 247} and secondly, other parties which have 50 or more employees or of which the register pursuant to the Commercial Register Act shows that it has 50 or more employees (Art. 6:235(1)(b) NBW). This exclusion has been criticised in Dutch legal doctrine as it ignores the need of (small) enterprises to be protected against unfair standard terms and introduces a criterion which is not only very hard to operate in practice, but which is also arbitrary.²⁴⁸ One commentator wrote that Article 6:235(1) NBW creates uncertainty, and is not sufficiently thought through, does not achieve its goal and was already outdated at the time it was introduced. He called it an Article to cry for.²⁴⁹ The exception should therefore be applied restrictively.²⁵⁰

The fact that large enterprises cannot rely on the protection of Articles 6:233 and 6:234 NBW does not mean that they do not have any protection against unfair standard terms. In such cases, standard terms which are used against large enterprises can be tested under the requirement of reasonableness and fairness (*redelijkheid en billijkheid*), in Articles 6:2(2) and 6:248(2) NBW.²⁵¹ In assessing the reasonableness and fairness, all circumstances of the case, such as the capacity, expertise and knowledge of the parties, must be taken into account. The courts apply these provisions with a certain reticence. This is made clear by a case about a contract for the repair and maintenance of a ship, in

²⁴² Hartkamp and Sieburgh 2010, nr. 467; Hijma 2010, nr. 14. *Contra*: Swaenepoel 2011, nr. 1101 and 1162.

²⁴³ HR 19 September 1997, NJ 1998, 6.

²⁴⁴ HR 21 February 2003, NJ 2004, 567, note JH; Hijma 2010, nr. 14.

²⁴⁵ Hartkamp and Sieburgh 2010, nr. 481.

²⁴⁶ These are enterprises which cannot suffice with a limited annual account pursuant to Art. 2:396(7) NBW or do not have to under Article 2:403 NBW: Hartkamp and Sieburgh 2010, nr. 489.

²⁴⁷ Hartkamp and Sieburgh 2010, nr. 489.

²⁴⁸ Hartkamp and Sieburgh 2010, nr. 489; Hijma 2010, nr. 49.

²⁴⁹ B. Wessels, note under Rb. Utrecht 17 July 1996, JOR 1996, 94.

²⁵⁰ R. Jongeneel, 'Grote wederpartijen' in B. Wessels, R. Jongeneel and M. Hendrikse (eds.), *Algemene voorwaarden*, Deventer, Kluwer, 2006, (173) 176. For a limitation of Article 6:233 ff NBW to B2C contracts: C. Drion, 'Een pamflet voor het fundamenteel op de schop nemen van onze regelgeving over algemene voorwaarden', *Contracteren* 2007, (2) 3.

²⁵¹ Hartkamp and Sieburgh 2010, nr. 489; Hijma 2010, nr. 49.

which the Hoge Raad had to appreciate the validity of an exclusion clause.²⁵² The Hoge Raad first considered that the clause was part of a contract between parties which belong to industries that often deal with each other and in which the use of standard terms and model contracts was very common. It then held that in such B2B contracts, it was not contrary to reasonableness and fairness that a party invokes a standard term which sought to exclude liability for gross breaches of contract committed by its employees which do not belong to the management of the company. In another case, however, the Hoge Raad accepted the view taken by a court which refused to give effect to an exclusion clause between two businesses.²⁵³ An important consideration was that the user of the standard terms had specialised knowledge and expertise which was not present with its counterparty.

The open norm is concretised for B2C contracts in the Articles 6:236 and 6:237 NBW. The first Article contains a black list; the second one a grey list. Although these lists are not directly applicable to B2B contracts, it is argued that a certain reflexive effect of those provisions can protect businesses as well.²⁵⁴ Where this effect can be realised via Article 6:233 NBW for small businesses, this necessarily has to take place via Article 6:248(2) NBW for large businesses. The latter was confirmed by the Minister during the preparation of the Civil Code.²⁵⁵ It is submitted that this reflexive effect will, however, be very limited for large businesses.²⁵⁶ To determine whether a standard term in a B2B contract is unreasonably burdensome in the sense of Article 6:233 NBW, the courts can draw inspiration from the provisions of the Articles 6:236 and 6:237 NBW. A judgment of the civil court of Arnhem accepted this in a case where a school, as a non-profit organisation, entered into contract which did not enter its area of expertise.²⁵⁷ The same conclusion was reached by the civil court of Dordrecht where a real estate business had concluded a contract with an electricity supplier.²⁵⁸ The cantonal court Harderwijk, however, ruled in a case of damage related to a power cut that the small size of the business was not a valid argument to put it on equal footing with consumers.²⁵⁹

It is difficult to derive any clear rules from the diverse case law on the reflexive effect. It is suggested that the following aspects can be relevant: the capacity of the counterparty and the nature of the contract. Firstly, the capacity of the parties refers to the objective fact whether the counterparty is, e.g. a small business, a liberal professional, or a multinational. The more the counterparties resemble consumers, the stronger the reflexive effect can be. For large businesses, the reflexive effect will be the exception. For small businesses, some even argue that the reflexive effect should be the rule, unless

²⁵² HR 31 December 1993, *NJ* 1995, 389, note C. Brunner.

²⁵³ HR 8 March 1991, *NJ* 1991, 396.

²⁵⁴ Hartkamp and Sieburgh 2010, nr. 502; Hijma 2010, nr. 31; R. Jongeneel and B. Wessels, 'Ondernemingen en algemene voorwaarden', *VA* 2010, (15) 21.

²⁵⁵ W. Reehuis and E. Slob, *Boek 6. Algemeen gedeelte van het verbintenissenrecht in Invoering Boeken 3, 5 en 6*, Deventer, Kluwer, 1990, 1644–1646.

²⁵⁶ R. Jongeneel and B. Wessels, 'Ondernemingen en algemene voorwaarden', *VA* 2010, (15) 28–29.

²⁵⁷ Rb. Arnhem 13 January 1994, *TvC* 1994, 360.

²⁵⁸ Rb. Dordrecht 12 June 1996, *A&V* 1996, 87.

²⁵⁹ Ktg. Harderwijk 11 March 1998, *NJ kort* 1998, 54.

that business is in an equal position relative to the user of the standard terms.²⁶⁰ Secondly, the nature of the contract is relevant. The reflexive effect depends on whether the contract in question belongs to the usual activities of that business. In that case, it can be expected that the businesses will be more experienced. The reflexive effect will then be weaker and further depend on the other circumstances of the case.²⁶¹ When the contract does not belong to its core business, however, a reflexive effect is considered adequate. This is especially the case where small non-profit associations are contracting.²⁶²

5.4. France

5.4.1. Consumer law and B2B contracts

The French legislature introduced rules on unfair terms in 1978 with the Act concerning the protection and the information of consumers of goods and services.²⁶³ As is clear from its title, its goal was to protect consumers and it was therefore not applicable to B2B contracts. This principle was underlined by the Cour de cassation in a decision of 1986.²⁶⁴ However, in a decision of 1987, the Cour de cassation ruled that the Act could apply to businesses where the contract in question was not the kind of transaction which belonged to their business or specialisation. The Cour de cassation accepted the approach taken by a Court of Appeal which held that when it comes to the installation of an alarm installation, a real estate business is in the same state of ignorance as every other consumer.²⁶⁵ This approach was criticised in French legal doctrine.²⁶⁶ Since a decision of 1995, the Cour de cassation has applied another terminology.²⁶⁷ In that decision, it held that the provisions on unfair terms are not applicable to a contract between an electricity supplier and a printing business, because that contract had a direct connection (*'un rapport direct'*) with the professional activity of the business. *A contrario*, this means that these rules do apply where there is only an indirect connection with the professional activity. In most of the cases, the connection is still direct. This change in case law thus meant a stricter approach to the notion of 'consumer'.²⁶⁸ It is submitted that the definition of consumer should be restricted to those persons who are acting for purposes which are outside their trade, business or profession.²⁶⁹

²⁶⁰ R. Jongeneel and B. Wessels, 'Ondernemingen en algemene voorwaarden', VA 2010, (15) 28.

²⁶¹ Hijma 2010, nr. 32; R. Jongeneel and B. Wessels, 'Ondernemingen en algemene voorwaarden', VA 2010, (25) 28.

²⁶² Hijma 2010, nr. 32.

²⁶³ Loi n° 78-23 du 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services, JO 11 January 1978, 299.

²⁶⁴ Cass. civ. 15 April 1986, *Bull. civ.* 1986, I, nr. 90, 91, D 1986, 787, note J.-L. Aubert.

²⁶⁵ Cass. civ. 28 April 1987, *Bull. civ.* 1987, I, nr. 134, 103.

²⁶⁶ J. Calais-Auloy and H. Temple, *Droit de la consommation*, Paris, Dalloz, 2010, 225, nr. 185.

²⁶⁷ Cass. civ. 24 January 1995, D 1995, 327, note G. Paisant.

²⁶⁸ J. Calais-Auloy and H. Temple, *Droit de la consommation*, Paris, Dalloz, 2010, 12, nr. 13.

²⁶⁹ J. Calais-Auloy and H. Temple, *Droit de la consommation*, Paris, Dalloz, 2010, 14, nr. 13; G. Paisant, 'À la recherche du consommateur. Pour en finir avec l'actuelle confusion née de l'application du critère direct', JCP 2003, I, 121.

Article 35 of the 1978 Act prohibited in contracts between professionals and non-professionals or consumers, those clauses which are imposed on that party by an abuse of economic power of the other party and create for the latter an excessive advantage. This provision was considered to determine the conditions under which the government was mandated to prohibit certain clauses by Decree. Although the Act did not expressly exclude this possibility, it was not the intention of the legislature to give the courts the authority to declare unfair contract terms null and void directly pursuant to Article 35.²⁷⁰ The courts only had to apply the Decrees issued pursuant to the Act. Faced with inactive administrative authorities, the Cour de cassation intervened. In 1989, it cautiously admitted that a court could declare unfair contract terms null and void.²⁷¹ It was only after a milestone decision two years later that the Cour de cassation clearly affirmed the courts can nullify clauses which meet the conditions of Article 35.²⁷²

During the implementation of the Unfair Contract Terms Directive, the French legislature transposed the 1978 Act into the Code de la consommation. Its Article L132-1 provides for the general prohibition of unfair contract terms in B2C contracts. According to this provision, a term in contracts between professionals and non-professionals or consumers, is unfair when it causes or has the effect of causing a significant imbalance in the rights and the obligations of the parties to the contract, to the detriment of the consumer or the non-professional.²⁷³ This prohibition is elaborated in a grey list (Art. R132-2 Code de consommation) and a black list (Art. R132-1 Code de consommation) of unfair terms. The personal scope of Article L132-1 Code de consommation is somewhat wider than the Directive as it is applicable to 'non-professionals or consumers', which covers natural as well as legal persons which act for non-professional purposes.²⁷⁴ In a decision of 2005, the Cour de cassation held that a consumer is necessarily a natural person, but that the notion of '*non-professional*' could cover legal persons.²⁷⁵ However, in 2008, the Cour de cassation departed from that case law in deciding that the rules on unfair contract terms do not apply to contracts between commercial companies.²⁷⁶ As a result, a business which is not a legal person could still qualify as a '*consumer*' if there is no direct connection with its professional activity.

The rules on unfair terms are in principle not applicable to unfair standard terms in B2B contracts.²⁷⁷ They are, however, not entirely left without protection. Courts apply

²⁷⁰ Ph. Malinvaud and D. Fenouillet, *Droit des obligations*, Paris, LexisNexis, 2012, 257, nr. 339.

²⁷¹ Cass. civ. 6 December 1989, *D* 1993, 568, note G. Paisant.

²⁷² Cass. civ. 14 May 1991, *D* 1991, 449, note J. Ghestin, *JCP* 1991, II, 21763, note G. Paisant.

²⁷³ Article L132-1 Code de commerce: '*Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat.*'

²⁷⁴ Cass. civ. 5 March 2002, *RTD Civ* 2002, 291, note J. Mestre and B. Fages; Ph. Malinvaud and D. Fenouillet, *Droit des obligations*, Paris, LexisNexis, 2012, 252, nr. 331.

²⁷⁵ Cass. civ. 15 March 2005, *JCP E* 2005, II, 10114, note G. Paisant.

²⁷⁶ Cass. civ. 11 December 2008, *JCP G* 2009, 1278, note G. Raymond.

²⁷⁷ Cass. com. 23 November 1999, *Bull. civ.* 1999, I, nr. 120; Ph. Malinvaud and D. Fenouillet, *Droit des obligations*, Paris, LexisNexis, 2012, 252, nr. 331.

general principles and rules of contract law to protect businesses against unfair terms.²⁷⁸ For example, the courts have used the concept of *cause* to annul contract terms which were contrary to the economy of the contract. The *Chronopost* cases form illustrative examples where the concept of *cause* has been stretched at best, or denaturalised at worse. In the first *Chronopost* case,²⁷⁹ the Cour de cassation held that a contract term which limited damages in case of delay to a reimbursement of the shipping costs was ineffective, as it was considered an essential obligation of the contract to deliver the goods in time.²⁸⁰ Because of the suppression of the essential obligation of the contract, it did not have a *cause* and was null and void.²⁸¹

5.4.2. Modern developments and perspectives

The recent French projects to modernise the Civil Code might change this situation and extend the protection against unfair contract terms to businesses. According to the Article 1122–2 of the Catala project, a clause which causes in a contract a significant imbalance to the detriment of one of the parties may be revised or annulled. This is possible in two situations: where the law protects that party with a specific disposition, in particular in its capacity of consumer, or when the clause was not negotiated.²⁸² Moreover, the Terré project, in its Article 67, provides that a non-negotiated term which causes in a contract a significant imbalance to the detriment of one of the parties may be revised or annulled.²⁸³ The reform project of the Ministry of Justice of July 2008 did not contain a similar provision,²⁸⁴ although it codified the *Chronopost* case law in its Article 87, providing that a clause which empties the contract of its interest is reputed to be non-written. According to Article 87*bis* of its reform project of February 2009, however, a non-negotiated term which causes a significant imbalance in the rights and obligations of the parties to the contract, may be revised or annulled.²⁸⁵

Recently, however, these projects have to a certain extent inspired the legislature to enact Article L442–6, I, 2° Code de commerce, which was introduced by the Act

²⁷⁸ A. Bénabent, *Droit des obligations*, Paris, Montchrestien, 2012, 21, nr. 26; Ph. Malinvaud and D. Fenouillet, *Droit des obligations*, Paris, LexisNexis, 2012, 263, nr. 345; D. Mazeaud, 'La protection par le droit commun' in Chr. Jamin and D. Mazeaud (eds.), *Les clauses abusives entre professionnels*, Paris, Economica, 1998, (33) 35, nr. 4 ff.

²⁷⁹ Cass. com. 22 October 1996, *D* 1997, 121, note A. Sériaux. This case-law was nuanced in subsequent cases: Cass. mixte 22 April 2005 (2 cases), *JCP* 2005, II, 10066, note G. Loiseau, *RDC* 2005, 681, note D. Mazeaud, and 753, note P. Delebecque; Cass. com. 21 February 2006, *RTD Civ* 2006, 322, note P. Jourdain, *RTD Com* 2006, 909, note B. Bouloc.

²⁸⁰ A. Bénabent, *Droit des obligations*, Paris, Montchrestien, 2012, 311, nr. 423; F. Terré, Ph. Simler and Y. Lequette, *Droit civil. Les obligations*, Paris, Dalloz, 2009, 631, nr. 619.

²⁸¹ Ph. Malinvaud and D. Fenouillet, *Droit des obligations*, Paris, LexisNexis, 2012, 585, nr. 764.

²⁸² Ph. Malinvaud and D. Fenouillet, *Droit des obligations*, Paris, LexisNexis, 2012, 265, nr. 347.

²⁸³ J. Flour, E. Savaux, J.-L. Aubert, *Les obligations. 1. L'acte juridique*, Paris, Dalloz, 2012, 173, nr. 189; D. Houtcieff, 'Le contenu du contrat' in F. Terré (ed.), *Pour une réforme du droit des contrats*, Paris, Dalloz, 2009, (183) 217.

²⁸⁴ D. Fenouillet, 'Regards sur un projet en quête de nouveaux équilibres', *RDC* 2009, (279) nr. 49.

²⁸⁵ M. Chagny, 'L'article L. 442-6, I, 2°, du code de commerce entre droit du marché et droit commun des obligations', *D* 2011, (392) II B; Ph. Malinvaud and D. Fenouillet, *Droit des obligations*, Paris, LexisNexis, 2012, 265, nr. 347.

concerning the Modernisation of the Economy.²⁸⁶ According to this provision, a producer, a trader, an industrial or a craftsman engages its liability and is obliged to repair the damages caused when he imposes or tries to impose on a commercial party obligations which create a significant imbalance in the rights and duties of the parties.²⁸⁷ It must be noted, however, that liberal professions and farmers are not included.²⁸⁸ Contrary to Article L132-1 Code de consommation, the *ratio* of this provision is not the protection of the individual interests of one of the parties, but rather the preservation of the economic order with free competition.²⁸⁹ It is therefore not surprising that infringements of this Article are sanctioned by a civil fine and that unfair contract terms are not expressly declared null.²⁹⁰ Most procedures are launched by the Minister of Economy, as most victims of such provisions want to preserve their commercial relationships.²⁹¹ By infringing the rule of Article L442-6, I, 2° Code de commerce a party can nevertheless engage its extra-contractual liability.²⁹² It has furthermore been argued that the nullity of such a clause can be invoked on the basis of general contract law.²⁹³ For example, the Court of Appeal of Nîmes has ruled that when a clause which provides for an obligation prohibited by this Article, this obligation reposes on an illegal cause and can therefore be annulled.²⁹⁴ This absolute nullity can be invoked, not only by the disadvantaged party which is the direct victim of these practices, but also by every interested person.²⁹⁵ In another case and without any further motivation, the court of appeal of Paris recently applied Article L442-6 I 2° Code de commerce to strike out a provision (*'réputée non écrite'*).²⁹⁶

The notion of 'significant imbalance' has been criticized for not being precise enough. The Conseil constitutionnel, however, ruled that this notion meets the requirements of clarity and precision.²⁹⁷ The Conseil constitutionnel expressly refers to Article L132-1 Code de consommation where it is also applied. Such an abstract open norm is considered to be justified by the necessities of business and the difficulty to address all unconscionable

²⁸⁶ Loi n° 2008-776 du 4 août 2008 de modernisation de l'économie, JO 5 August 2008.

²⁸⁷ Article L 442-6, I, 2° Code de commerce: 'Engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé le fait, par tout producteur, commerçant, industriel ou personne immatriculée au répertoire des métiers de soumettre ou de tenter de soumettre un partenaire commercial à des obligations créant un déséquilibre significatif dans les droits et obligations des parties.'

²⁸⁸ D. Mainguy, 'Défense, critique et illustration de certains points du projet de réforme du droit des contrats', D 2009, (308) 313, nr. 9.

²⁸⁹ J. Flour, E. Savaux, J.-L. Aubert, *Les obligations. I. L'acte juridique*, Paris, Dalloz, 2012, 167, nr. 186-1.

²⁹⁰ D. Houtcieff, *Droit commercial*, Paris, Dalloz, 2011, 483, nr. 1135; Ph. Malinvaud and D. Fenouillet, *Droit des obligations*, Paris, LexisNexis, 2012, 263, nr. 345; F. Terré, Ph. Simler and Y. Lequette, *Droit civil. Les obligations*, Paris, Dalloz, 2009, 351, nr. 330.

²⁹¹ D. Ferrier, 'Panorama Concurrence-Distribution', D 2013, (732) 735.

²⁹² M. Chagny, 'L'article L. 442-6, I, 2°, du code de commerce entre droit du marché et droit commun des obligations', D 2011, (392) I B.

²⁹³ M. Chagny, 'L'article L. 442-6, I, 2°, du code de commerce entre droit du marché et droit commun des obligations', D 2011, (392) I B.

²⁹⁴ CA Nîmes 25 February 2010, *JurisData* 2010-003528.

²⁹⁵ M. Chagny, 'L'article L. 442-6, I, 2°, du code de commerce entre droit du marché et droit commun des obligations', D 2011, (392) I B.

²⁹⁶ CA Paris 7 June 2013, No. 11/08674.

²⁹⁷ Conseil constitutionnel 13 January 2011, D 2011, 415, note Y. Picod.

conduct.²⁹⁸ The judicial control is not limited to standard terms. However, the fact of whether parties have negotiated a term will have an impact on the assessment whether a term was imposed on a party.²⁹⁹ The limitations of the judicial control are not entirely clear, because Article L442–6, I, 2° Code de commerce is not followed by a provision similar to Article L132–1(7) Code de consommation which excludes the core elements of the contract from the fairness control. This could lead to the conclusion that also the economic balance can be taken into account.³⁰⁰ The Court of Appeal of Paris has ruled that courts can examine whether the prices on which the parties have agreed, create a significant imbalance. This was *in casu* not the fact.³⁰¹ Some have however argued that the courts should not include the price in the fairness test.³⁰² It is furthermore contended that the assessment of fairness should be applied more cautiously than in B2C contracts, but that the courts might nevertheless draw some inspiration from consumer law.³⁰³ For example, an imbalance can exist when one of the parties provides a right or an advantage for its own, while there is no counterpart or reciprocity in favour of the other party.³⁰⁴

In conclusion, to a certain extent there is now an express provision in French law to prohibit unfair contract terms between businesses which can offer a certain protection to SMEs. It is unfortunate that the legislature did not execute the modernisation projects and did not incorporate a prohibition on unfair standard terms into the Code civil.³⁰⁵ Furthermore, SMEs can in very limited circumstances qualify as ‘consumers’ and rely on the rules provided for by the Code de consommation. In other cases, they will have to seek protection under general rules of contract law.

²⁹⁸ Y. Picod, ‘Le déséquilibre significatif et le Conseil constitutionnel’ (note under Conseil constitutionnel 13 January 2011), *D* 2011, (415) nr. 13.

²⁹⁹ Commercial court Lille 6 January 2010, *D* 2010, 1000, note J. Sénéal; D. Ferrier, ‘Panorama Concurrence-Distribution’, *D* 2011, (540) 546.

³⁰⁰ M. Béhar-Touchais, ‘Que penser de l’introduction d’une protection contre les clauses abusives dans le Code de commerce?’, *RDC* 2009, (1258) nr. 2; J. Flour, E. Savaux, J.-L. Aubert, *Les obligations. I. L’acte juridique*, Paris, Dalloz, 2012, 168, nr. 186-1; C. Lucas de Leyssac and M. Chagny, ‘Le droit des contrats, instrument d’une forme nouvelle de régulation économique?’, *RDC* 2009, (1268) I B; M. Malaurie-Vignal, *Droit de la distribution*, Paris, Dalloz, 2012, 112, nr. 401; Y. Utzschneider and A. Lamothe, ‘Que penser d’une règle de protection contre les clauses abusives dans le Code de commerce?’, *RDC* 2009, (1261) II A.

³⁰¹ CA Paris 23 May 2013, No. 12/01166.

³⁰² M. Cousin, ‘La négociabilité des tarifs et des conditions de vente après la LME: quels garde-fous?’, *JCP E* 2008, (2288) nr. 51.

³⁰³ Y. Utzschneider and A. Lamothe, ‘Que penser d’une règle de protection contre les clauses abusives dans le Code de commerce?’, *RDC* 2009, (1261) II B.

³⁰⁴ e.g. Commercial court Lille 7 September 2011, *JCP E* 2011, 1701, note G. Chantepie; D. Ferrier, ‘Panorama Concurrence-Distribution’, *D* 2013, (732) 735.

³⁰⁵ Cf. M. Chagny, ‘L’article L. 442-6, I, 2°, du code de commerce entre droit du marché et droit commun des obligations’, *D* 2011, (392) II B.

5.5. Belgium

5.5.1. B2C contracts

The ALP and the AMP both contain a general provision and a black list. For contracts between liberal professionals and consumers, Article 7 §2 ALP considers unfair every term which has *not been individually negotiated* and which causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.³⁰⁶ The annex to this act contains a black list of terms which are always unfair, even if they have been individually negotiated (Art. 7 §4 ALP).³⁰⁷

In contracts between enterprises and consumers, Article 2, 28° AMP qualifies as unfair every term which, on its own or in relation to other terms, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.³⁰⁸ It must be noted that the AMP does not impose the requirement that a term must not be individually negotiated. As in France, the Belgian legislature thus went further than the Directive requires and as a result, the scope of the judicial control is much broader. Article 73 *in fine* AMP contains an important restriction which was also present in the Directive. The assessment of the unfair nature of the terms is not applicable to the definition of the main subject matter of the contract, nor to the adequacy of the price and remuneration as against the goods or the services in exchange, to the extent that these terms are in plain intelligible language. The catch-all provision is concretised in Article 74 AMP which contains a black list of provisions which are always considered unfair in B2C contracts.

5.5.2. B2B contracts

The provisions of the AMP and the ALP are not applicable in a B2B context. Therefore, businesses have to rely on general rules and concepts of contract law, such as *cause*, good faith, public policy, abuse of rights, etc., to seek protection against unfair standard terms.³⁰⁹ The implementation of the Late Payment Directive provides for an important

³⁰⁶ Article 7(2) ALP: '*Een onrechtmatig beding is elk beding of elke voorwaarde waarover niet afzonderlijk is onderhandeld en dat het evenwicht tussen de uit de overeenkomst voortvloeiende rechten en verplichtingen ten nadele van de cliënt aanzienlijk verstoort.*'

³⁰⁷ Swaenepoel 2011, nr. 812.

³⁰⁸ Article 2, 28° AMP: '*onrechtmatig beding: elk beding of elke voorwaarde in een overeenkomst tussen een onderneming en een consument die, alleen of in samenhang met een of meer andere bedingen of voorwaarden, een kennelijk onevenwicht schept tussen de rechten en plichten van de partijen ten nadele van de consument.*'

³⁰⁹ e.g. Article 1231 of the Belgian Civil Code restricts the use of penalty clauses, whether they are standard terms or not. According to that Article, courts can reduce the agreed sum when it grossly exceeds the foreseeable damage in case of non-performance. The Article sets a lower limit: the actual damage. Courts can, however, reduce even further (and even prohibit a creditor from relying on a penalty clause altogether) when it constitutes an abuse of rights. See: Cass. 8 February 2001, *Pas.* 2001, RW 2001–2002, 778, note A. Van Oevelen; S. Stijns, *Verbintenissenrecht*, I, Bruges, die Keure, 2005, 181–187, nrs. 253–262; P. Wéry, *Droit des obligations*, I, Brussels, Larcier, 2011, 701–712, nrs. 710–724. Case-law considers exclusion clauses which seek to exclude liability for personal fraud or suppress an essential obligation

exception. Article 7 of the Act on Late Payment in Commercial Transactions provides that a contractual term which deviates from certain provisions of that Act can be reviewed by a judge if it is grossly unfair to the creditor (e.g. by stipulating too a low default interest rate). A judge has to consider all circumstances of the case, including good commercial practice and the nature of the product. This judicial intervention cannot be excluded by contract. The use of the term ‘grossly’ makes clear that the courts have only a marginal margin of appreciation.³¹⁰ It is not necessary that the clause has not been individually negotiated, although this will in practice mostly be the case.

This situation might, however, change in the future. In 2007, the Belgian government brought together a round table of experts to evaluate the current economic legislation and make propositions for a modernisation of Belgian economic law. The final report of this research has led to a Draft Code of Economic Law.³¹¹ The purpose is not only to coordinate the existing legislation, but to create a general, clear and durable legislative framework. Book V of the Draft was the most revolutionary part. It governs ‘economic contracts’, which are contracts concluded by businesses with respect to the supply of goods or services. Book V had a wide scope and contains many general rules of contract law which were to supplement the rules of the Civil Code or took priority if they deviated from the provisions of the Civil Code (Art. V.2 §1 Draft).

The fundamental problem with Book V of the Draft was that it created a whole body of private law alongside the Civil Code, as the Draft also contained many provisions on general contract law. Such contract law provisions belong in a modernised Civil Code or a new Code of Private Law.³¹² Given the wide scope of Book V, the Civil Code would risk becoming the same desolate museum as the Belgian Commercial Code is now. The only contracts which would be solely governed by the Civil Code were contracts between consumers or with government agencies. The Civil Code would serve as a mere back-up for those issues which are not covered by the Code of Economic Law. This would lead to an extreme form of ‘verkokering’ or fragmentation of Belgian private law.³¹³

The first parts of the Code have already been adopted by the Belgian Parliament in the spring of 2013.³¹⁴ The provisions on economic contracts are incorporated in Book X of the Code of Economic Law.³¹⁵ The content and the scope of the intended Book X are

of the contract to be contrary to public policy. See: S. Stijns, *Verbintenissenrecht*, I, Bruges, die Keure, 2005, 163–167, nrs. 233–235.

³¹⁰ T. Dang Vu, ‘De nieuwe richtlijn betalingsachterstand handelstransacties en haar omzetting in het Belgische recht: een mogelijkheid tot vooruitgang inzake (betalings)achterstand?’, *RW* 2012–13, 732, nr. 87.

³¹¹ The Draft and (many) critical observations are available at: http://economie.fgov.be/nl/fod/codificatie_economische_wetgeving/2008/.

³¹² E. Terryn, ‘Codificatie in het economisch recht’ in B. Tilleman and E. Terryn (eds.), *Liber Amicorum Gabriël Luc Ballon*, Antwerp, Kluwer, 2011, (27) 61, nr. 49; P. Van Ommeslaghe, ‘Observations schématiques sur le livre V: Contrats économiques’ in *Codificatie van de economische wetgeving*, 2008, (135) 141.

³¹³ Cf. W. Van Gerven, ‘Verkokering van het privaatrecht’, *TPR* 1992, (1021) 1022.

³¹⁴ See: Act of 28 February 2013 on the Introduction of the Code of Economic Law, *OJ* 29 March 2013; D. Bruloot, ‘Wetboek van economisch recht krijgt stilaan vorm’, *Juristenkrant* 2013, 9 October, (4) 4–5.

³¹⁵ Bill on the introduction of the Code on Economic Law, *Parl.St.* Chamber, 2543/001, 15.

however significantly altered in comparison with Book V of the Draft. The relevant provisions of consumer protection are no longer part of it and are incorporated in Book VI on Market Practices and Consumer Protection. Book VI essentially updates the AMP in accordance with Directive 2011/83/EU on Consumer Rights.³¹⁶ Book X on economic contracts is currently negotiated and drafted, so it is uncertain what its content will be. However, its scope will probably be reduced to rules on commercial intermediaries and collaborative contracts.³¹⁷ In what follows, I will discuss the provisions on unfair terms as they appeared in Book V of the Draft.

Article V.13 of the Draft contains a definition of unfair contract terms in B2C and B2B contracts. It reiterates the concept as it is now defined in consumer law. Unfair is every term which, on its own or in relation to other terms, causes a significant imbalance in the parties' rights and obligations. The round table justifies the extension of the protection against unfair contract terms to B2B contracts by highlighting the need to create a general legal framework to stimulate economic activity and the consideration that SMEs are important in the Belgian economic landscape. These SMEs should, to some extent, be able to rely on the same protection as consumers against some practices of large enterprises.³¹⁸ Fortunately, the protection against unfair contract terms is not restricted to SMEs. The application of the same fairness test for B2C and B2B contracts is also to be applauded. It is, however, problematic that the judicial control is applicable to all contract terms, whether they have been individually negotiated or not.³¹⁹ Considering the transaction costs paradigm, this goes too far and infringes the freedom of contract too strongly. Courts would be able to review contract terms which have been negotiated in detail between businesses, although the preparatory documents of the Draft seem to indicate that the rules on unfair contract terms in B2B contracts are only applicable to terms which have not been individually negotiated.³²⁰ According to Article V.13 §2, it is possible to deviate from the rule contained in Article V.13 §1. This is confirmed by Article V.16 which states that only a consumer cannot give up the rights which are conferred unto him by the relevant chapter of Book V. One can question why it should be possible to exclude the fairness test by contract. The goal of SME protection will not be achieved if the supposedly stronger counterparty is able to exclude that

³¹⁶ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. See: Bill on the introduction of Book VI on Market Practices and Consumer Protection in the Code of Economic Law and on the introduction of definitions for Book VI and the enforcement provisions for Book VI, in Books I and XV of the Code of Economic Law, *Parl.St.* Chamber, 3018/001, 5 ff.

³¹⁷ D. Bruloot, 'Wetboek van economisch recht krijgt stilaan vorm', *Juristenkrant* 2013, 9 October, (4) 5.

³¹⁸ *Explanatory Memorandum*, 2008, 48. Available at: http://economie.fgov.be/nl/fod/codificatie_economische_wetgeving/#.UdLWgZzvfgQ.

³¹⁹ The assessment of the unfair nature of terms does not apply to the definition of the main subject matter of the economic contract, nor the adequacy of the price and remuneration, on the one hand, as against the goods or the services in exchange, on the other, to the extent that these terms are in plain intelligible language. See: Article V.14 *in fine* Draft Code Economic Law.

³²⁰ *Explanatory Memorandum*, 48.

protection.³²¹ Such a possibility has been suggested in legal doctrine, but only where this deviation is founded on an express and individually negotiated agreement.³²² It should not be possible to exclude this control in standard terms.

5.6. *United Kingdom*

In the discussion about the United Kingdom, I will focus on the UCTA which is applicable to B2B contracts and leave the UTCCR aside, because they are only applicable to B2C contracts. The key provision of the UCTA to assess the validity of exclusion clauses is the reasonableness test in section 11.

Section 2 UCTA does not distinguish between exclusion clauses which are part of standard terms or which are individually negotiated. Section 2(2) UCTA prevents a person from excluding or restricting his liability for negligence for any loss or damage other than death or personal injury, except in so far as the term or notice satisfies the requirement of reasonableness (s 2(2) UCTA).

Section 3 UCTA, as we have seen, applies *inter alia* to standard terms. Section 3(2)(a) UCTA applies where the user of the standard terms, himself in breach of contract, tries to exclude or restrict any liability of his own in respect of the breach by reference to these terms. Such clause will only be valid in relation to that breach if the contract term satisfies the requirement of reasonableness. Furthermore, a party cannot rely on his standard terms in order to (i) render a contractual performance substantially different from that which was reasonably expected of him, or (ii) to render no performance at all in respect of the whole or any part of his contractual obligation (section 3(2)(b) UCTA), except in so far as the contract term satisfies the requirement of reasonableness. It has been argued that too little use has been made of section 3(2)(i)(b) UCTA.³²³ The rationale for this provision is to protect a party from clauses which deprive or may deprive the person against whom they are invoked of rights which it reasonably believed were conferred on him by the other party. The major difficulty in its application has been the contention that a party 'cannot reasonably expect that which the contract does not purport to offer.'³²⁴ This has found some acceptance, but it is argued that the very existence of the subsection assumes that there can be reasonable expectation of performance which do not simply reflect the legal rights conferred by the contract.³²⁵ In some cases, the contractual performance reasonably expected of a party may be determined by the content of representation made by that party in pre-contractual negotiations.³²⁶

³²¹ In a similar vein: P. Naeyaert, *Distributeurs en handelstussenpersonen - met focus op beëindiging*, Brugge, die Keure, 2012, 810, nr. 961.

³²² N. Jansen, 'Klauselkontrolle im europäischen Privatrecht', *ZEuP* 2010, (69) 92–93.

³²³ E. Macdonald, 'Unfair Contract Terms Act – Thirty Years On' in A. Burrows and E. Peel (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, (153) 158.

³²⁴ *Timeload Ltd. v British Telecom* [1995] EMLR 459. *Adde*: R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, London, Sweet & Maxwell, 2005, 149, nr. 8.13.

³²⁵ E. Macdonald, 'Unfair Contract Terms Act – Thirty Years On' in A. Burrows and E. Peel (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, (153) 160.

³²⁶ *SAM Business Systems Ltd v Hedley and Company* [2002] EWHC 2733 (TCC). *Adde*: Guest 2008, nr. 14–073.

5.6.1. Reasonableness test

With respect to the reasonableness test, section 11 UCTA provides that a contract term 'shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.' This section makes clear that the time at which the reasonableness test is to be applied is the time the contract was entered into and not the moment at which there was a breach of contract. The aim of this test is to assess the reasonableness or the fairness of the allocation of the rights and responsibilities between the parties at the moment they entered into the contract.³²⁷ The burden of proof in relation to the reasonableness rests upon the party who asserts that the term is reasonable (section 11(5) UCTA).³²⁸

The courts have regard to a wide range of factors in deciding whether a term satisfies the reasonableness test. There is an important degree of discretion in the application of the test to the facts of a concrete case. Lord Bridge said that 'the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down.'³²⁹ Factors which have been taken into account in applying the reasonableness test are *inter alia*:³³⁰ the meaning of the clause,³³¹ equality of bargaining power,³³² the clause as a whole, the importance of insurance,³³³ the dangers of relaxation of the clause in practice,³³⁴ two different losses within the same clause³³⁵ and the advantage of limitation clauses. When the contract is one for sale or supply of goods, the requirement of reasonableness is determined with regard of the guidelines of Schedule 2 of the Act (section 11(2) UCTA).³³⁶ These guidelines are by no means exhaustive: it is 'impossible to draw up an exhaustive list of factors to be taken into account when a judge is faced with this very

³²⁷ E. McKendrick, *Contract Law: Text, Cases, and Materials*, Oxford, Oxford University Press, 2012 (McKendrick 2012), 433.

³²⁸ *Sheffield v Pickfords Ltd & Anor* [1997] EWCA Civ 984.

³²⁹ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803.

³³⁰ McKendrick 2012, 433–438.

³³¹ e.g. *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] All E.R. (Comm) 696 at [35].

³³² e.g. *Ibid*, at [55].

³³³ e.g. *The Flamar Pride* [1990] 1 Lloyd's Rep 434.

³³⁴ e.g. *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498 at 508.

³³⁵ *E.g. Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep 273.

³³⁶ The following matters should be considered: (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met; (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term; (c) whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); (d) where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; (e) whether the goods were manufactured, processed or adapted to the special order of the customer.

difficult question.³³⁷ Although a court is not required to take Schedule 2 matters into account in dealing with reasonableness for the purpose of section 3 UCTA, it seems reasonable to do so.³³⁸

Case law demonstrates that appellate courts are not likely to interfere with the findings of the lower courts as to reasonableness.³³⁹ The basic approach was explained in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* Lord Bridge found that: “There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong.”³⁴⁰ This shows that trial judges have a considerable discretion on the application of the reasonableness test *in concreto* and to balance the various factors of the case.³⁴¹ Appellate courts will only interfere where the judge has adopted an incorrect interpretation of the exclusion clause or has taken into account irrelevant factors.³⁴²

English courts show a great degree of reticence to interfere in B2B contracts where experienced businessmen are involved and the parties are of equal bargaining power in terms of size and resources.³⁴³ Lord Diplock famously described the approach in *Photo Production Ltd v Securicor Transport Ltd*:³⁴⁴ ‘In commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations.’

In the same case, Lord Wilberforce considered that: ‘after [the UCTA], in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament’s intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.’³⁴⁵

³³⁷ *Smith v Eric S Bush* [1990] 1 AC 831 at 858. *Adde*: Peel 2007, 7-079.

³³⁸ *The Flamar Pride* [1990] 1 Lloyd’s Rep 434; *SAM Business Systems Ltd v Hedley and Company* [2002] EWHC 2733 (TCC). *Adde*: Guest 2008, nr. 14-085; McKendrick 2012, 433.

³³⁹ Guest 2008, nr. 14-103; R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, London, Sweet & Maxwell, 2005, 207, nr. 9.26; Peel 2007, 7-080.

³⁴⁰ [1983] 2 AC 803. Quoted with approval by Thorpe L.J. in *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd’s Rep 498.

³⁴¹ McKendrick 2012, 433; Peel 2007, 7-080.

³⁴² e.g. *Watford Electronics Ltd v Sanderson CFL Ltd* [2000] 2 All ER (Comm) 984.

³⁴³ Guest 2008, nr. 14-098; R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, London, Sweet & Maxwell, 2005, 177, nr. 9.11 ff.

³⁴⁴ [1980] UKHL 2, at 9–10.

³⁴⁵ *Ibid*, at 3–4 (applied in *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm) and *JP Morgan Chase Bank and others v Springwell Navigation Corporation* [2008] EWHC 1793 (Comm)).

In *Granville Oil & Chemicals Ltd v Davis Turner & Co. Ltd*,³⁴⁶ this approach was adopted by Tuckey LJ who took the view that: ‘The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms.’

While these cases may be considered as taking a non-interventionists approach, other cases could rather be seen as advocating a freedom-of-contract approach. Judge Thyne Forbes QC said in *Salvage Association v CAP Financial Services Ltd*³⁴⁷ that: ‘Generally speaking, where a party well able to look after itself enters into a commercial contract and, with full knowledge of all relevant circumstances, willingly accepts the terms of the contract which provide for apportionment of the financial risks of the transaction, I think that it is very likely that those terms will be held to be fair and reasonable.’

This latter approach rather looks at the circumstances of the making of the contract, rather than its substance. The relevant question is whether freedom of contract was sufficiently operational for the contract to be one in which the agreement arrived at should be respected.³⁴⁸ These considerations, however, only raise a presumption of reasonableness. The courts are still to determine each case on its own special facts.³⁴⁹ So even in a B2B context, this attitude will not prevent courts from considering a term unreasonable.

5.6.2. Dealing as consumer

It is possible for a business to be considered as dealing as a consumer when entering into a contract.³⁵⁰ According to section 12(1) UCTA, a party to a contract deals as consumer in relation to the other party if (a) he neither makes the contract in the course of a business nor holds himself out as doing so, and (b) the other party does make the contract in the course of a business. In *R & B Customs Brokers Company Ltd v United Dominions Trust Ltd*,³⁵¹ the Court of Appeal adopted a narrow construction of the concept of ‘in the course of a business’. A transaction will be in the course of a business if it is integral to the business, or, if it is entered into as part of the regular course of dealing of the business. In this case, the purchase of a car was not integral to the business of freight forwarding agents and it was not regularly occurring. The result of this line of reasoning was very generous to the small business as its effect was to deprive the defendants of any opportunity to prove that the exclusion clause was reasonable.³⁵² Yet it has been followed by the Court of Appeal in a

³⁴⁶ [2003] EWCA Civ 570.

³⁴⁷ 1995 FSR 654 at 676.

³⁴⁸ E. Macdonald, ‘Unfair Contract Terms Act – Thirty Years On’ in A. Burrows and E. Peel (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, (153) 167.

³⁴⁹ R. Lawson, *Exclusion Clauses and Unfair Contract Terms*, London, Sweet & Maxwell, 2005, 186, nr. 9.12. e.g. *Salvage Association v CAP Financial Services Ltd* (1995) FSR 654; *Edmund Murray Ltd v BSP International Foundation Ltd* (1993) 33 Con LR 1; *Motours Ltd v Euroball (West Kent) Ltd* [2003] EWHC 614.

³⁵⁰ Guest 2008, nr. 14-066; McKendrick 2012, 438 ff; Peel 2007, 7-051.

³⁵¹ [1987] EWCA Civ 3.

³⁵² McKendrick 2012, 439.

subsequent case.³⁵³ It has been argued that this narrow approach of ‘in the course of a business’ is inappropriate. While enlarging the scope of protection in one direction, it narrows it down in another. For section 12 UCTA to apply, a party must not be contracting in the course of a business, whereas the user should be. So when a narrow meaning of ‘in the course of a business’ is adopted, it risks excluding many parties not dealing without connection to their business. More fundamentally, the scope of the extension of the protection is not delimited by a criterion which is likely to identify those businesses which need such a protection the most.³⁵⁴ With respect of the meaning of ‘consumer’ under the Regulations, comment was made about the ‘absurdity of a major trader claiming the protection afforded to a consumer whenever he stepped out of his habitual line of business.’³⁵⁵

5.6.3. Recommendations of the Law Commissions

The UTCCR are only applicable to B2C contracts. The sharp division between B2C and B2B has been criticised as lacking in nuance. It is argued that there is no clear cut-off point between consumers and businesses with respect to the need for protection against unfair terms. There are spectra of the need for protection which need to be considered.³⁵⁶

In their 2002 Joint Consultation Paper on unfair contract terms, the Law Commission and the Scottish Law Commission argued that ‘many of the terms to which UTCCR apply and UCTA does not, may be unfair not only in a consumer contract but also in a business-to-business contract, especially where the business against whose interests is small.’³⁵⁷ In their Joint Report after the consultation, the Law Commission and the Scottish Law Commission came back to this proposal and took the view that protection against unfair contract terms should only be extended to small businesses, defined as having less than ten employees.³⁵⁸ The Law Commissions moreover wanted to take into account whether the small business is sufficiently sophisticated or sufficiently likely to take legal advice so that the protection is not necessary or where the contract falls into a category or field which is already sufficiently regulated. Their recommendation therefore included a ‘transaction value limit’ according to which contracts with a value greater than £500,000 would be excluded (and would not count as small business contracts no matter what the size of the businesses involved), an exemption for businesses under the control of a larger business, and an exemption for financial services contracts.³⁵⁹

³⁵³ *Feldaroll Foundry Plc v Hermes Leasing (London) Ltd* [2004] EWCA Civ 747.

³⁵⁴ E. Macdonald, ‘Unfair Contract Terms Act – Thirty Years On’ in A. Burrows and E. Peel (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, (153) 155.

³⁵⁵ *Prostar Management Ltd v Twaddle* (2003) SLT (Sh Ct) 11 at [12].

³⁵⁶ E. Macdonald, ‘Unfair Contract Terms Act – Thirty Years On’ in A. Burrows and E. Peel (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, (153) 157.

³⁵⁷ Law Commission and Scottish Law Commission, *Unfair terms in contracts. Consultation Paper*, 2002, para 2.30.

³⁵⁸ Law Commission and Scottish Law Commission, *Unfair terms in contracts. Report*, 2005, 78, para 5.2. See previously: Law Commission and Scottish Law Commission, *Unfair terms in contracts. Consultation Paper*, 2002, paras 5.25 and 5.40.

³⁵⁹ Law Commission and Scottish Law Commission, *Unfair terms in contracts. Report*, 2005, 78, para 5.24 ff.

5.7. Conclusion

There are two main potential justifications for judicial control of standard terms. The classic justification refers to the abuse of bargaining power, which has been followed (to some extent) in the Unfair Contract Terms Directive and in French and Belgian consumer law. According to this theory, the judicial intervention should compensate for the unequal bargaining position of the weaker party. This theory is not convincing for a number of reasons. It was therefore necessary to look for another possible justification. A second justification is derived from law and economics research and is based on information asymmetries and the related transaction costs. The reason why a party accepts standard terms without reading or discussing, is not necessarily his weak or inferior position, but essentially a logical and rational decision. The transaction costs for that party to discuss or to try to change the standard terms are simply too high. This paradigm has been followed in Germany and the Netherlands, but can also be seen in the Unfair Contract Terms Directive.

The Unfair Contract Terms Directive only provides for judicial control on not individually negotiated terms in B2C contracts. Following the DCFR, the CESL introduces a judicial control on unfair terms in B2B contracts in European law. Whereas the DCFR applies the fairness test to terms which form part of *standard terms*, the CESL refers to *not individually negotiated terms*, which is a broader concept. It suffices that the other party was not able to influence the content of it and it is not required that the terms have drafted in advance for several transactions involving different parties.

The Unfair Contract Terms Directive and the B2C provisions in the DCFR and the CESL all require a *significant imbalance* in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The criterion to establish the fairness of a term in B2B contracts under the DCFR and the CESL is different and requires a *gross deviation from good commercial practice*. This difference has been criticised, because the underlying rationale is in both cases the same: the avoidance of the market failure related to transactions costs. A *significant imbalance* should be sufficient. It seems to indicate that courts should show more reticence in intervening in B2B contracts than in B2C contracts and appears to be political compromise between advocates of a standard term control in B2B contracts and those who oppose the introduction of such rules.

Contrary to the DCFR and the CESL, the fairness test for B2C or B2B contracts in Germany and the Netherlands is in principle the same, which is in accordance with the market failure paradigm. §307(1) BGB applies when a term, contrary to the requirement of good faith, *unreasonably disadvantages* the other party. Similarly, Article 6:233 NBW is aimed at standard terms which are *unreasonably onerous* to the counterparty. In the United Kingdom, section 3 UCTA refers to the reasonableness test provided for in section 11 UCTA. Both in the Netherlands and in the United Kingdom, the circumstances of the individual case are very relevant in the assessment of the reasonableness of a term. In Germany, however, a more abstract approach is taken. The relevant test is generalised and standardised. Although the general fairness test in B2C and B2B is essentially the same in Germany and in the Netherlands, there are still important differences between both situations, especially after the implementation of the Unfair Contract Terms

Directive. In both countries, there is a black list and a grey list for B2C contracts. Dutch law makes a further distinction between small and large enterprises. Only the former can invoke the protection offered by Article 6:233 NBW, the latter could only rely on the general requirement of reasonableness and fairness. The strict delimitations between B2C and B2B contracts are to some extent nuanced and blurred by the *Indizwirkung* or the reflexive effect of both lists. Especially in Germany, this *Indizwirkung* can be strong, or indeed – according to many practitioners and academics – too strong. It has been argued that a transposition of rules which are applicable to B2C contracts should not be done generally and only after careful consideration. In the Netherlands, the reflexive effect seems to play a more moderate role. For larger enterprises this will necessarily have to take place through the general requirement of reasonableness and fairness, which will not be accepted easily. For small enterprises, this can take place through Article 6:233 NBW. Moreover, these open norms in German and Dutch law, combined with the influence of the B2C lists, allow courts to take into account the position of SMEs. They allow differentiation according to *inter alia* the size of the enterprise, the nature of the transaction or party which seeks protection. This will be especially beneficial for those SMEs which find themselves in a situation close to that of a consumer.

The civil codes of France and Belgium do not contain special rules on the fairness of contract terms in B2B transactions. In both countries, standard terms are treated as individually negotiated terms. Protection against unfair terms must thus be operated through general rules of contract law. The fairness of contract terms in B2C contracts can be scrutinised. Such control against unfair terms takes place in France and Belgium in light of the abuse of bargaining power paradigm. This should explain why the control on unfair contract terms is limited to B2C contracts in the Code de consommation and the AMP respectively and the control is also extended to individually negotiated contract terms. Following the Unfair Contract Terms Directive, the comprehensive judicial control on standard terms is in the United Kingdom also limited to B2C contracts. Exclusion clauses in B2B contracts, even when they are individually negotiated, and some aspects of standard terms can be examined under the reasonableness test. English courts are however generally reticent to interfere in B2B contracts where experienced businesses are of equal bargaining power. In limited cases, English and French case law accepts that businesses can invoke the provisions on standard terms in B2C contracts against another business. In both cases, this case law has not been considered to be really satisfactory. In these three jurisdictions, there are interesting reform projects.

In France, the projects for a reform of the Code civil contain judicial control on not individually negotiated clauses. It remains to be seen whether and when these projects will result in hard law. Indirectly, a fairness control has already been introduced in the Code de commerce in 2009. According to its Article L442–6, I, 2°, a producer, a trader, an industrial or a craftsman can be held liable for imposing or trying to impose on a commercial party obligations which create a significant imbalance in the rights and duties of the parties. This rule is different from other rules on fairness as it is included in the rules on competition law and therefore aims at protecting free competition, rather than the individual interests of the party. Infringements are therefore sanctioned by a civil fine and not expressly declared null. Some courts have, however, already held that the nullity of such a clause can be invoked on the basis of general contract law. In

Belgium, a draft Code of Economic Law has been established. It has been submitted that this project could lead to a further fragmentation of private law as it contains many provisions on contract law which belong in the Burgerlijk Wetboek. Article V.13 of the draft contains a unitary definition of unfair contract terms in B2C and B2B contracts. Just as in Germany and in the Netherlands, the general fairness test is thus the same for B2B as for B2C contracts. The criterion is, as under the Unfair Contract Terms Directive, the creation of a *significant imbalance*. Although the preparatory documents refer to the protection of SMEs as a justification for this introduction, the fairness test has a general application to all B2B contracts. This judicial control seems to go very far as all contract terms are subjected to this fairness test: also terms which have been individually negotiated. It is advisable that this would be changed in accordance with the statements made in the preparatory documents which restrict the fairness control to not individually negotiated terms. This would be fortunate in light of the market failure paradigm. The fact that the parties would be able to deviate from the fairness test in B2B transactions should be carefully considered. Such an exclusion should only be admitted when it originates of an express and individually negotiated agreement of the parties. In the United Kingdom, the Law Commission and the Scottish Law Commission have proposed a reform to nuance the strict division between B2C and B2B contracts. After consultation, they altered their initial proposal to extend the consumer protection rules to all businesses and took the view that protection against unfair contract terms should only be extended to small businesses with fewer than ten employees. They furthermore proposed a number of transactions to be excluded from this control.

6. Conclusion

In its proposal for a Common European Sales Law, the Commission introduces judicial control on unfair terms in B2B contracts. This contribution sought to examine the diverse landscape in several Member State jurisdictions in relation to the judicial treatment of unfair terms which appear in B2B contracts. Although there are considerable differences between the jurisdictions which provide for rules on unfair terms in B2B transactions and those that do not, there are some common trends. In those countries where there is no judicial control for standard terms in B2B transactions, steps are being taken to introduce such rules. There is furthermore a trend to blur or nuance the division between B2B and B2C contracts, especially to the benefit of SMEs.

HARMONISATION OF RULES ON BUSINESS-TO-BUSINESS MARKETING PRACTICES: A CRITICAL ANALYSIS OF THE MCAD REPORT

B. Keirsbilck*

1. The purpose of this chapter is to assess possible options for the further harmonisation of rules on business-to-business practices. Whereas Directive 2005/29 ('UCPD')¹ protects consumers against unfair, misleading and aggressive B2C practices, Directive 2006/114/EC ('MCAD')² protects businesses against misleading B2B advertising. In the first section of this chapter, a critical analysis of this 'dualistic' approach underlying the current European law of unfair commercial practices will be presented. In the second section, the Commission's plan to maintain the dualistic approach through a minor revision of the MCAD will be critically assessed. It will be argued that the best way forward would be to amend the scope of the UCPD so as to cover B2C/B2B practices directly connected with the promotion of products. In the third section, the broader issue of the need and desirability of harmonisation of rules concerning unfair business-to-business trading practices will be dealt with.

1. The current European law on unfair commercial practices

1.1. UCPD

2. The UCPD is a maximum harmonisation directive covering, pursuant to Article 3(1), all 'business-to-consumer commercial practices (...) before, during and after a

* Assistant Professor at the KU Leuven – HUBrussel, Economic Law Department – Consumer, Competition and Market. This chapter is an amended, extended and updated version of an analysis first undertaken in a book on the future of the UCPD. See B. Keirsbilck, 'Vers un règlement européen unique relative aux pratiques commerciales déloyales "B2C" et "B2B" in E. Terryn and D. Voinot, *Droit européen de pratiques commerciales déloyales – Evolutions et perspectives*, Brussel, Larcier, 2012, 156–175. This chapter focuses on both the UCPD and the MCAD and critically assesses the Commission's plan announced in the MCAD report published on 27 November 2012.

¹ Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149/22, 11.06.2005.

² Directive 2006/114/EC of the European Parliament and the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376/21, 27.12.2006.

commercial transaction in relation to a product.' The UCPD contains a particularly wide definition of 'business-to-consumer commercial practices (hereinafter also referred to as commercial practices)': 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers'.³ The concept encompasses pre-existing EU concepts such as 'advertising' and 'commercial communication' and in essence covers all 'commercial acts which clearly form part of an operator's commercial strategy and relate directly to the promotion thereof and its sales development'.⁴ While the MCAD's definition of 'advertising' requires the making of a representation 'in order to promote the supply of goods or services', the UCPD does not require that a commercial practice aims at promoting the sale of goods or services. There must be a 'direct connection with the promotion, sale or supply of a product' meaning that there must be a direct link between the practice and the main economic modalities determining consumers' transactional decisions (quality, price, after sale service, and so forth). The concepts of 'promotion', 'sale' and 'supply' simply denote the pre-contractual, contractual and post-contractual stage.⁵ The UCPD establishes what might be called a 'cradle-to-grave regime', covering commercial practices at the time of promotion, negotiation, conclusion, performance and enforcement of the contract.⁶

The UCPD prohibits unfair commercial practices and has a three-layer structure. The unfairness of any B2C commercial practice is tested against: (i) an exhaustive blacklist of 31 *per se* misleading or aggressive practices;⁷ (ii) general prohibitions of misleading or aggressive practices;⁸ and (iii) a catch-all prohibition of unfair practices defined as practices contrary to the requirements of professional diligence and likely to materially distort the economic behaviour of the average consumer.⁹

As mentioned, the UCPD is a maximum harmonisation Directive. In *VTB-VAB* and subsequent case law, the ECJ confirmed the Directive's maximum harmonisation character, *inter alia* on the basis of Article 4 pursuant to which 'Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive'.¹⁰ Maximum harmonisation means that the Member States have to adopt provisions replicating

³ Article 2(d) UCPD.

⁴ ECJ Joined Cases C-261/07 and C-299/07 of 23 April 2009, *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV*, [2009] ECR I-02949, paras 49–50; ECJ Case C-304/08 of 14 January 2010, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH*, [2010] ECR I-00217, paras 36–37; ECJ Case C-540/08 of 9 November 2010, *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v 'Österreich'-Zeitungsv Verlag GmbH*, paras 17–18.

⁵ 'Commercial transaction' is clearly a functional equivalent of the concept of 'contract', which probably has been avoided to support the claim expressed in Article 3(2) that the Directive is without prejudice to contract law.

⁶ See C. Willet, 'Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive', *J.Cons.P.* 2010, 247–273.

⁷ Article 5(5) *juncto* Annex I UCPD.

⁸ Article 5(4) *juncto* Articles 6–7 and 8–9 UCPD.

⁹ Article 5(2) UCPD.

¹⁰ ECJ Joined Cases C-261/07 and C-299/07 of 23 April 2009, *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV*, [2009] ECR I-02949, paras. 51–52.

exactly the standard set by the Directive (regulation) and to amend or repeal national provisions that go further than the Directive (deregulation). Member States can no longer, in B2C relations, prohibit *per se* or regulate *in abstracto* the use or commercial communication of certain commercial practices (including sales promotions) that are not blacklisted by the UCPD, without giving a competent national court or administrative authority the power to appraise *in concreto* whether they are unfair towards consumers. Practices that are not blacklisted by the UCPD can be prohibited in B2C relations only if a case-by-case assessment shows that they are misleading, aggressive or unfair within the meaning of the Directive's general prohibitions. Hence, the Directive has a huge deregulatory effect upon national unfair trade laws.

3. During the political negotiations, a number of Member States argued that the concept of 'commercial practice' is a comprehensive one and that the UCPD should also cover B2B practices.¹¹ Despite these efforts to extend the scope of the UCP Proposal, the UCPD as finally adopted only covers B2C commercial practices. According to Recital 6 UCPD, 'it neither covers nor affects the national laws on unfair commercial practices (...) which relate to a transaction between traders (...)',¹² 'such as boycotts and refusal to supply.'¹³ Article 3(1) UCPD clearly confirms this by stating that 'this Directive shall apply to unfair business-to-consumer commercial practices (...)'

4. There is, however, another important limitation to the scope of the UCPD. The Directive provides, in Recitals 6 and 8 of the preamble, that it 'neither covers nor affects

¹¹ See Follow-up of the Green Paper on EU Consumer Protection, 11 June 2002, COM(2002) 0289 final, 4–5 and 9: 'Two Member States [Germany and Austria] argued that the objective of the framework directive should be to protect consumers, competitors and the general public by means of a ban on unfair trading practices. They maintain that the framework directive should be drafted in such a way that includes business-to-business trading relations as under their system of unfair competition, which includes trading practices such as protection of trade secrets or slavish imitation. They argued that this extension of the scope of the directive is justified by the fact that not only consumers, but also competitors, and particularly SMEs, need protection against unfair commercial practices. According to two Member States, a framework directive should also cover fairness in business-to-business commercial relations. ... Given that no other Member State advocated the extension of a framework directive to all business to business relationships, the Commission sees no reason to change its initial orientation of covering solely business-to-consumer transactions.'

¹² See Commission Staff Working Paper, Extended Impact Assessment on the Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), 18 June 2003, SEC(2003) 724, sub 7.2, explaining why including business (in particular SMEs), in its role of purchaser, within the scope of the UCP Proposal, had been rejected, even though, in particular situations, business operators may be struck by specific disadvantages just as consumers: 'First, because the Treaty makes special provision of consumer protection, not business protection. Second, commercial relations between businesses are inherently more equal than those between businesses and consumers. Therefore, in general, businesses are less in need of protection. Third, it is not yet possible to define satisfactorily and include the more deserving cases of very small companies.'

¹³ Explanatory Memorandum to the Commission Proposal for a Directive of the European Parliament and of the Council concerning unfair 'business-to-consumer' commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) ('UCP Proposal'), 18 June 2003, COM(2003) 356 final, para. 41.

the national laws on unfair commercial practices which exclusively harm the economic interests of competitors',¹⁴ 'such as slavish imitation (i.e. copying independently of any likelihood of consumer confusion) and denigration of a competitor'.¹⁵ Article 3(1) does not confirm this, but Article 1 explains that the purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests (see also Recitals 4 and 12). Furthermore, Recital 6 provides that 'this Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors.' According to Recital 8, 'this Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it.' The UCPD is applicable to all business-to-consumer commercial practices which harm the economic interests of consumers, irrespective of whether it affects the economic interests of competitors.¹⁶

5. With regard to enforcement, the requirements introduced by the UCPD are rather limited. Pursuant to Article 11, Member States must 'ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.' Such means must include legal provisions under which persons or organisations with a legitimate interest (including 'competitors')¹⁷ may take legal action in court or bring the case before an administrative authority, so as to lead, if necessary taking into account 'all the interests

¹⁴ See Commission Staff Working Paper on the UCP Proposal, sub 7.2, explaining why the more ambitious option of regulating 'all unfair competition', following the model in some Member States, has been rejected: 'this would have meant covering commercial practices that do not give rise to consumer detriment, such as slavish imitation, denigration and the breach of other laws. Having examined these provisions in detail, it appears that they do not cause important internal market barriers that need to be harmonised and are statistically insignificant. Further, their inclusion would dilute and obscure the very clear consumer protection focus of the proposal.' During the political negotiations, the Commission argued that 'it would not be feasible to extend the protection of a full harmonisation directive to unfair competition practices which do not harm consumers (e.g. disclosure of business secrets, denigration), given the different legal traditions of Member States in this field and the vast area of commercial activity that would have to be included.'

¹⁵ Explanatory Memorandum to the UCP Proposal, para. 40.

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Protecting businesses against misleading marketing practices and ensuring effective enforcement – Review of Directive 2006/114/EC concerning misleading and comparative advertising, 27 November 2012, COM(2012) 702 final, at 3.

¹⁷ See already Resolution of the European Parliament of 13 March 2003 on the Commission communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on 'Consumer Policy Strategy 2002–2006', P5_TA(2003)0100, where the EP found it 'necessary for consumer protection legislation to confer on competitors a status which is recognised in the legal order' and considered that 'in legal proceedings concerning improper sales methods, competitors must be assured a right to speak and access to effective legal remedies.'

involved and in particular the public interest', to an order for the cessation (or the prohibition of the publication) of unfair commercial practices.

Pursuant to Article 13 UCPD, Member States must also lay down effective, proportionate and dissuasive penalties for infringements of national UCP provisions and must take all necessary measures to ensure that these provisions are enforced.

The UCPD is included in the Annex of Directive 2009/22/EC on injunctions for the protection of consumers' interests ('Injunctions Directive')¹⁸ and in the Annex of Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ('CPC Regulation').¹⁹

1.2. MCAD

6. As mentioned, the MCAD covers, first of all, business-to-business advertising. 'Advertising' means 'the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.'²⁰ Thus, 'advertising' requires some kind of intention ('in order to promote') and typically occurs at the pre-contractual stage ('the supply of goods or services').

The Directive contains a general prohibition of misleading business-to-business advertising.²¹ In this respect, Article 8(1), first limb, MCAD contains a minimum harmonisation clause. Member States remain free to retain or adopt more stringent measures than those provided for by the MCAD (within the boundaries set by EU law), setting a higher level of business/competitor protection. Hence, national rules concerning misleading business-to-business advertising continue to diverge widely.

Since 2005, EU unfair trade law takes a dualistic approach: the UCPD covers B2C practices and the MCAD covers B2B advertising only (see Article 14 UCPD limiting the scope of the MCAD). According to Recital 6 UCPD, 'nor does this Directive cover or affect the provisions of Directive 84/450/EEC on advertising which misleads business but which is not misleading for consumers and on comparative advertising.' Up until 2005, the MCAD applied to any advertising, whether addressed to consumers or businesses (integrated approach).

The scope of the MCAD is further limited to misleading advertising which harm traders' economic interests. Article 1 MCAD provides that 'the purpose of this Directive is to protect traders against misleading advertising and the unfair consequences thereof' Up until 2005, Article 1 MCAD provided that 'the purpose of this Directive is to protect consumers, [businesses/competitors] and the interests of the public in general against

¹⁸ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110/30, 01.05.2009, replacing Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumer's interests, OJ L 166, 16.06.1998, pp. 51–55, as amended.

¹⁹ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 364/1, 09.12.2004.

²⁰ Article 2(a) MCAD.

²¹ Article 2(b) *juncto* 3 MCAD.

misleading advertising and the unfair consequences thereof' Traditionally, this protective triad (*Schutzzwecktrias*) was one of the essential features of EU unfair trade law. Under the dualistic approach adopted in 2005, the UCPD one-dimensionally focuses on consumer protection and the MCAD one-dimensionally focuses on business/competitor protection. 7. As mentioned, the MCAD still covers B2C/B2B comparative advertising. 'Comparative advertising' means any 'advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor'.²² Comparative advertising is designed to highlight the advantages of the goods or services offered by the advertiser in comparison with those of a competitor and, to that end, necessarily underlines the differences between the goods or services compared by describing their main characteristics.

The Directive permits comparative advertising only if it meets eight conditions.²³ According to Article 8(1), second limb, MCAD, the prohibition of unlawful comparative advertising is based on maximum harmonisation.²⁴

8. With regard to enforcement, the requirements introduced by the MCAD are rather limited. Pursuant to Article 5, Member States must 'ensure that adequate and effective means exist to combat misleading advertising and enforce compliance with the provisions on comparative advertising in the interests of traders and competitors.' Such means must include legal provisions under which persons or organisations having a legitimate interest may take legal action in court or bring the case before an administrative authority, so as to lead, if necessary taking into account all the interests involved and in particular the public interest, to an order for the cessation (or the prohibition of the publication) of misleading advertising or unlawful comparative advertising. It is worth recalling that, up until 2005, Article 4 MCAD stated that Member States must ensure that such enforcements means exist 'in the interests of consumers as well as competitors and the general public.'

The MCAD is no longer included in the Annex of the Injunctions Directive and that only its provisions on comparative advertising are referred to in the Annex of the CPC Regulation. Member States currently enforce the MCAD on the basis of different national systems. The crucial difference concerns the possibility of public enforcement. In some Member States, authorities can take action against rogue traders, while in other Member States only victims can seek redress.

1.3. Critical analysis of the dualistic approach

9. On closer inspection, the distinction between B2C/B2B practices seems to be rather artificial and difficult to apply in practice. The MCAD defines misleading B2B advertising as 'any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches' The UCPD defines

²² Article 2(c) MCAD.

²³ Article 4 MCAD.

²⁴ ECJ Case C-44/01 of 8 April 2003, *Pippig Augenoptik GmbH & Co. KG v Hartlauer Handelsgesellschaft mbh and Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer*, [2003] ECR I-03095, para. 44; ECJ Case C-159/09 of 18 November 2010, *Lidl SNC v Vierzon Distribution SA*, nyr, para. 22.

unfair, misleading and aggressive B2C commercial practices as practices which (are likely to) materially distort the economic behaviour of ‘the average consumer whom it reaches or to whom it is addressed’.²⁵ Both the MCAD and the UCPD focus on the issue of whether traders/consumers in reality can be assumed to be reached by the practice, rather than on which groups the trader targets through the practice. On many occasions, B2C practices (addressing or reaching consumers) simultaneously qualify as B2B practices (reaching or addressing businesses), and *vice versa*. The vast majority of practices/ads are not exclusively either B2C or B2B. The European Parliament suggested that ‘the distinction between B2C and B2B cannot be taken for granted’²⁶ and argued that ‘it is particularly important to establish a uniform legal concept covering the whole spectrum of economic transactions within the internal market.’²⁷

10. Likewise, the distinction between commercial practices which (directly) harm consumers’ economic interests on the one hand and commercial practices which (exclusively) harm competitors’ economic interests on the other hand seems to be rather theoretical and difficult to apply in practice. In contrast to the suggestion made in Recitals 6 and 8 UCPD, even denigration of a competitor, qualified by the Commission as a practice exclusively harming the economic interests of the competitor, not only harms competitors’ economic interests, but thereby also harms consumers’ economic interests, and the general interest in undistorted competition. The economic interests of consumers, competitors, other market participants and, eventually, the general interest in undistorted competition are closely intertwined and most often coincide (*Interessenparallelität*). In the words of the European Parliament, ‘fair business practices help to protect not only consumers but also competitors, in the interests, in particular, of small and medium-sized undertakings’;²⁸ ‘consumer protection and the promotion of fair trading practices between competitors can often be two sides of the same judicial coin.’²⁹

1.4. Consultation on the MCAD

11. On 21 October 2011, the Commission launched the *MCAD public consultation*, requesting detailed information on the overall effectiveness and existing problems in the application of the MCAD, but also collecting information on wider issues concerning the

²⁵ See also Explanatory Memorandum to the UCP Proposal, para. 30, where the Commission notes that the UCPD incorporates ‘the misleading advertising Directive’s B2C provisions (i.e. provisions dealing with advertising reaching or directed at consumers)’.

²⁶ Resolution of the European Parliament of 13 March 2003 on prospects for legal protection of the consumer in the light of the Commission Green Paper on European Union Consumer Protection, P5_TA(2003)0102, consideration L.

²⁷ *Idem*, no. 3.

²⁸ Resolution of the European Parliament of 13 March 2003 on the implications of the Commission Green Paper on European Union Consumer Protection for the future of EU consumer policy, P5_TA(2003)0101, consideration B.

²⁹ Resolution of the European Parliament of 13 March 2003 on prospects for legal protection of the consumer in the light of the Commission Green Paper on European Union Consumer Protection, P5_TA(2003)0102, consideration L.

nature and scale of ‘unfair business-to-business commercial practices’. The consultation document focused on ‘unfair commercial practices affecting businesses’ (B), ‘the practices of misleading directory companies’ (C) and ‘the effectiveness of the current legislation and options for improvement’ (D). According to the press release, unfair business-to-business practices especially harm 23 million small and medium-sized enterprises (SMEs) in the EU, representing 99% of EU businesses. According to Vice-President Reding, the EU’s Justice Commissioner, ‘we need solid and effective Europe-wide rules to crack down on unfair practices and to make sure the culprits cannot hide behind national borders.’³⁰ The MCAD consultation was concluded on 16 December 2011 and attracted a total of 280 responses. It took one year before the results of the consultation were published.³¹

The MCAD Report was eventually published on 27 November 2012. It gives an overview of how the MCAD is currently implemented in the Member States, identifies problems in how it is applied and outlines plans to revise it in the future.³² It assesses how best to stop rogue traders exploiting loopholes in the rules of the MCAD (focusing on the problem of *misleading* marketing practices) and discusses how to make sure that legitimate traders are effectively protected. Once again Miss Reding said that ‘only solid Europe-wide rules will enable us to crack down on scams targeting businesses and make sure the culprits cannot hide behind national borders. This is why we are presenting this comprehensive plan today.’³³ To upgrade the current rules, the Commission plans to present a proposal in the course of 2013.³⁴

2. Possible options for the further harmonisation of rules on business-to-business practices

12. According to the press release launching the MCAD public consultation, unfair business-to-business practices range from ‘providing false or deceiving information about the offer, in particular in the form of misleading advertising’ and ‘omitting important information’ to ‘using harassment, coercion or undue influence’.³⁵ In the

³⁰ Commission Press Release of 21 October 2011, Commission seeks to protect EU businesses against scams and unfair practices, IP/11/1224, available at http://europa.eu/rapid/press-release_IP-11-1224_en.htm.

³¹ Result of the MCAD consultation, 15 November 2012, available at <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=DisplayPublishedResults&form=MisleadingAd>.

³² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Protecting businesses against misleading marketing practices and ensuring effective enforcement – Review of Directive 2006/114/EC concerning misleading and comparative advertising, 27 November 2012, COM(2012) 702 final.

³³ Commission Press Release of 27 November 2012, European Commission takes action to protect businesses against marketing scams, IP/12/1264, available at http://europa.eu/rapid/press-release_IP-12-1264_en.htm.

³⁴ Roadmap – Possible revision of Directive 2006/114/EC concerning misleading and comparative advertising subject to the outcome of the consultation, available at http://ec.europa.eu/governance/impact/planned_ia/docs/2012_just_023_misleading_comparative_advertising_directive_en.pdf.

³⁵ Commission Press Release of 21 October 2011, Commission seeks to protect EU businesses against scams and unfair practices, IP/11/1224, available at http://europa.eu/rapid/press-release_IP-11-1224_en.htm.

consultation document, the Commission essentially presented three possible ways forward for the further harmonisation of rules on business-to-business practices. Under the first two options, the MCAD's general prohibition of misleading B2B advertising would be complemented, either by a blacklist alone or by a blacklist and some general prohibitions of unfair and aggressive practices. Under these options, the dualistic approach would be maintained. Under the third option, the MCAD would be completely integrated into the UCPD. The fourth option would be to do nothing at all.

In the MCAD Report, the Commission clearly chose the first option and stated that the revision of the MCAD will target specific areas of concern (essentially, the problem of *misleading* practices, not the more general problem of *unfair* practices) and will clarify the interplay of the MCAD with the UCPD. The dualistic approach, with the UCPD covering B2C practices and one-dimensionally focusing on consumer protection, and the MCAD covering B2B advertising and one-dimensionally focusing on business/competitor protection, will be maintained.

2.1. *Minor revision of the MCAD*

13. Under the first option, the MCAD would be amended so as to insert a blacklist of the most frequent misleading B2B practices: 'Problems should be addressed through changes in EU legislation, as its current provisions are inadequate, in particular: – specific provisions/bans should be added to the [MCAD] to further strengthen the substantive rules.'³⁶

In the MCAD consultation document, the Commission asked to indicate the most frequent and harmful unfair business-to-business practices and any new unfair business-to-business practice, particularly in an online context.³⁷ Yet the results for these more general questions were not published.

The MCAD consultation document also described a number of *unfair* business-to-business practices and asked whether they could be regarded as a significant problem in Europe. In reality, most of these 'unfair' practices can be qualified more specifically as *misleading* practices.³⁸ In the MCAD Report, the Commission concluded that the vast majority of stakeholders focused their concerns on a number of *misleading* practices which are very often operated cross-border (misleading offers to extend protection for trademarks³⁹ or internet domain names,⁴⁰ misleading payment forms,⁴¹ or unfair commercial practices affecting businesses in the online context).⁴² Strangely enough, the Commission also claimed that only a limited number of respondents complained about

³⁶ MCAD consultation document, question D.11.7 (= option 1).

³⁷ Idem, question B.1 and B.2.

³⁸ Idem, question B.3.1. misleading environmental claims; B.3.2. misleading offers to extend protection for trademarks; B.3.3. misleading offers to extend internet domain names; B.3.4. misleading payment forms; B.3.5. unlawful comparative advertising; B.3.6. unfair business-to-business practices in an online context.

³⁹ Results of the MCAD consultation, question B.3.2 (61.4%).

⁴⁰ Idem, question B.3.3 (66.5%).

⁴¹ Idem, question B.3.4 (74.4%).

⁴² Idem, question B.3.6 (65.8%).

misleading environmental claims⁴³ and unfair comparative advertising practices.^{44, 45} The consultation document asked whether there is an increase of cross-border *unfair* business-to-business practices, and a majority of respondents thought so,⁴⁶ but the MCAD Report concluded from these data that there is an increase in *misleading* cross-border advertising affecting businesses.⁴⁷

The MCAD consultation documents contained a lot of questions in relation to the problem of practices of so-called 'misleading directory companies'.⁴⁸ The Commission stated in the MCAD Report that various Member States (Austria, Belgium, Czech Republic, Germany, France, Luxembourg, Poland, Portugal, Sweden, Slovakia and the United Kingdom) consider this problem as a serious one.⁴⁹ An overwhelming majority of the respondents to the MCAD public consultation assessed the problem of misleading directory companies as being moderately significant, significant or very significant.⁵⁰ Almost half of the replies to the public consultation came from companies directly affected by misleading directory schemes.⁵¹ The Commission concluded that there was a very strong call for increased protection of small companies and independent professionals against misleading marketing practices.⁵²

A majority of the respondents to the MCAD public consultation agreed that the current EU and national legislative framework does not allow to sufficiently well tackle misleading advertising practices.⁵³ A majority of respondents to the MCAD public consultation agreed that in general the protection of businesses against any *unfair* commercial practices (especially micro-businesses and independent professionals) in Europe is not sufficient, especially in cross-border transactions, and should be strengthened.⁵⁴ Accordingly, respondents agreed that there should be a European

⁴³ Compare, however, idem, question B.3.1 (65.8%).

⁴⁴ Compare, however, idem, question B.3.5 (62.1%).

⁴⁵ MCAD Report, 5–6.

⁴⁶ Results of the MCAD consultation, question B.4 (69.1%).

⁴⁷ MCAD Report, 6.

⁴⁸ MCAD consultation, questions C.1–C.8.

Such schemes can take various forms. Most frequently, misleading directory companies send out forms asking businesses to update details in their directories, seemingly for free. If the targeted traders sign the form, they are then told that they have signed a contract and will be charged a yearly sum of €1,000 to 5,000. Attempts to withdraw from the contract are usually refused and the companies are often pursued for the amount purportedly owed through debt collection agencies. Many small businesses underline having suffered constant psychological harassment. For several years, they face a struggle under threat of legal action in a foreign jurisdiction, with rising 'administrative costs' and constant phone calls from debt collectors, described by the victims as close to threats.

⁴⁹ MCAD Report, 8.

⁵⁰ Results of the MCAD public consultation, question C.1 (94.4%).

⁵¹ Idem, question A.10 (47.4%).

⁵² MCAD Report, 8. Reference was made to two important resolutions of the European Parliament. See Resolution of the European Parliament of 16 December 2008 on misleading directory companies, A6–0446/2008; Resolution of the European Parliament of 9 June 2011 on misleading directory companies, B7–0342/2011. Reference was also made to relevant legislative and enforcement actions at the national level.

⁵³ Results of the MCAD consultation, question D.1 (52.2%).

⁵⁴ Idem, question D.6 (79%).

legislation protecting businesses against the most harmful *unfair* commercial practices.⁵⁵ Yet the Commission concluded in the MCAD Report that there was a very strong call for increased protection of small companies and independent professionals against *misleading* marketing practices.⁵⁶

The MCAD Report concluded that there is strong support for an EU-wide instrument to protect businesses against the most harmful misleading marketing practices. Therefore, the Commission proposed to amend the MCAD, in particular to extend its scope so as to cover all business-to-business marketing practices and to insert a blacklist of certain *per se* misleading marketing practices.

According to the Commission, the definition of ‘advertising’ in the MCAD is not clear enough. The Commission argues that many of the most common and harmful B2B practices might not qualify as ‘advertising’ within the meaning of the current MCAD. The Commission proposed in the MCAD Report to replace the concept of ‘advertising’ with the concept of ‘marketing practice’, defined as any representation or communication made by a trader in order to promote goods and services and including not only advertising but also other marketing techniques, such as situations where a commercial intent or identity of a trader is hidden and the communication pretends to be a simple update of information or a communication from the authorities. The Commission explained that the new concept would better serve the purpose of business protection, eliminate confusion and establish legal certainty.⁵⁷

It is important to note that the new concept, like the previous one, only pertains to practices at the precontractual stage.⁵⁸ The Commission added, however, that the proposal to amend the MCAD will be complemented by a forthcoming initiative addressing unfair trading practices between businesses in the retail chain (see, critically, epilogue of this chapter).

The Commission concluded in the MCAD Report that the best way forward is to insert a blacklist of the most common and harmful misleading B2B marketing practices in the MCAD.⁵⁹ The Commission argued that this additional layer would strengthen the protection granted by the general prohibition and would also facilitate clearer enforcement.

⁵⁵ Idem, question D.7 (84.2%).

⁵⁶ MCAD Report, 8.

⁵⁷ Idem, 9–10.

⁵⁸ It is added in footnote 21 that ‘the Communication does not address certain contractual practices between companies mostly in the retail sector which can possibly be considered unfair due to an unbalanced relation resulting from a considerable bargaining-power of some market players. These issues will be addressed in the forthcoming initiative on unfair trading practices between businesses in the retail chain.’

⁵⁹ See also Resolution of the European Parliament of 13 January 2009 on the transposition, implementation and application of Directives 2005/29/EC and 2006/114/EC, *O.J. C 46 E/26*, 24.02.2010, no. 7, suggesting to amend the MCAD so as to include a blacklist of practices that are under all circumstances to be considered misleading. See also the Commission response in the Follow-up to the European Parliament Resolution on the transposition, implementation and application of Directives 2005/29/EC and 2006/114/EC, 10 March 2009: ‘Misleading business-to-business practices are already covered by the MCA Directive. Such practices should continue to be regulated solely by this Directive. There is currently no evidence that this Directive is not functioning properly in relation to business-to-business practices. ... Following the European Parliament’s request, the Commission will study the possibility of improving the protection afforded to SMEs against certain misleading practices.’

According to the Commission, the general prohibition alone does not give sufficient legal certainty for the purpose of tackling certain clearly misleading practices as it is broad, general and open to different interpretations and case-by-case assessments.⁶⁰ Consequently, the amended MCAD would be based on a two-tier system with a general prohibition of misleading business-to-business marketing practices and a specific blacklist of the most common and harmful business-to-business marketing practices (including misleading directory companies schemes, misleading payment forms, misleading offers to extend internet domain names or protection for trademarks, and a number of other marketing practices⁶¹). Importantly, the Commission stated that inspiration must be drawn from relevant national *per se* prohibitions, such as the Austrian⁶² and Belgian⁶³ prohibitions of misleading directory companies. Certainly, there are good reasons for adopting an EU-wide blacklist of the most frequent and harmful B2B practices. In my view, however, the Commission should draw inspiration not only from solutions at the national level (including *per se* prohibitions of certain aggressive B2B practices), but also from the existing B2C blacklist annexed to the UCPD.⁶⁴

Moreover, unfair B2B practices should not be addressed exclusively through a new blacklist of misleading B2B practices ('specific bans'), complementing the existing general prohibition of misleading B2B practices, but also through other new prohibitions covering aggressive and unfair B2B practices (compare options 2 and 3 explained below). It is worth noting that the idea of addressing unfair B2B practices exclusively through the adoption of a blacklist of misleading B2B practices was not the option supported by most respondents in the MCAD consultation.⁶⁵ Surprisingly, except for cynical minds, this is one of the few results of the consultation not cited by the Commission in the MCAD Report. Moreover, it should be noted that the Commission did not touch upon the crucial issue whether the MCAD should continue to be based on minimum harmonisation. The MCAD Report stated that some Member States decided to go beyond the minimum legal standard enshrined in the MCAD and to extend the level of protection granted by the

⁶⁰ MCAD Report, 10.

⁶¹ Such as concealing the commercial intent of a communication, the identity of a trader or material information on the consequences of the reply to a communication; disguising a commercial communication as an invoice or obligatory payment; etc.

⁶² §28a Austrian UWG.

⁶³ Article 97/1 WMPC.

⁶⁴ For example, the European Parliament wondered whether misleading directory companies could be combated by extending the scope of the UCPD to cover B2B relationships as regards point 21 of the blacklist: 'Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.' See Resolution of the European Parliament of 16 December 2008 concerning misleading directory companies, A6-0446/2008, no. 12–13, suggesting to the Commission 'to extend the scope of the UCPD to cover business-to-business contracts with specific regard to point 21 of Annex thereto' and calling on the Commission 'to propose legislation to extend the scope of the UCPD, based on the Austrian model, in a way that specifically prohibits advertising in business directories unless prospective clients are unequivocally and by clear and graphic means informed that such advertisement is solely an offer for a contract against payment.'

⁶⁵ Results of the MCAD consultation, question D.11.7 (48.2%). Compare option 2 and 3: idem, D.11.8 (59.2%) and idem, D.11.9 (59.6%).

UCPD to business-to-business relations, either partly or in its entirety,⁶⁶ whereas other Member States emphasise the higher degree of diligence expected in transactions between businesses instead, and do not consider it appropriate that businesses and consumers should be equally protected. The MCAD Report concluded that the level of protection for European businesses remains varied, leaving businesses uncertain about their rights and obligations in cross-border situations, and that the differences between consumer and business protection further blur the picture. The Commission proposed to insert a blacklist of the most frequent and harmful B2B practices, without addressing the crucial issue of whether the minimum harmonisation approach should be maintained. Minimum harmonisation means that Member States are free to maintain or adopt more stringent measures than those provided for by the MCAD, setting a higher level of business/competitor protection (e.g. through blacklisting additional B2B practices).

In general, the respondents to the MCAD public consultation did not know whether the transposition of the MCAD has created legal gaps/loopholes in Member States that are exploited by companies engaging in misleading business-to-business advertising.⁶⁷

Finally, the Commission stated in the MCAD Report that further legislative clarification of the fully harmonised rules on comparative advertising is needed, based on the ECJ case law. The MCAD consultation showed that a majority of respondents perceived a need to revise the rules regarding the conditions for comparative advertising to be lawful.⁶⁸ The Commission announced that it would look into the scope of the definition of comparative advertising, its relation with certain intellectual property rights of competitors, the use of a competitor's trademark in comparative advertising, the comparison of products with designation of origin with those without such designation, and the conditions under which a trader's advertising can lawfully be based on a price comparison solely concerning certain product groups.⁶⁹

14. A majority of respondents to the MCAD public consultation thought that sanctions provided for by national law should be strengthened.⁷⁰ The Commission suggested in the MCAD Report to require Member States to ensure that penalties for misleading marketing practices in business-to-business relations are effective, proportionate and dissuasive (similar to Article 13 UCPD).⁷¹

15. The current MCAD does not provide for a cross-border cooperation procedure and national authorities have no formal basis to request an enforcement action from their counterparts in other Member States. Moreover, there are no established tools to share

⁶⁶ See Resolution of the European Parliament of 16 December 2008 concerning misleading directory companies, A6-0446/2008, no. 12, regretting 'that Directive 2005/29/EC does not cover business-to-business transactions and that Member States appear reluctant to extend its scope'; noting, however, 'that Member States may unilaterally extend the scope of their national consumer protection legislation to cover business-to-business transactions and actively encourages them to do so.'

⁶⁷ Results of the MCAD consultation, question D.4 (56.6%).

⁶⁸ Idem, question D.5 (55.9%).

⁶⁹ MCAD Report, 10 and 12.

⁷⁰ Results of the MCAD consultation, question D.11.1 (64.7%).

⁷¹ MCAD Report, 13.

information about marketing practices affecting businesses in Europe. Furthermore, in many Member States national authorities lack enforcement powers to stop such practices in business-to-business relations, whereas authorities in some Member States (e.g. Belgium, Bulgaria, France, Italy, the United Kingdom) already have competences to enforce marketing legislation against traders in B2B cases, either through courts or administrative procedures.⁷²

A majority of the respondents to the MCAD public consultation was of the opinion that existing mechanisms in Member States against misleading business-to-business advertising are not effective⁷³ and an overwhelming majority thought that there is a need to develop a cooperation mechanism among Member States authorities in cross-border cases of misleading advertising.⁷⁴ In the MCAD Report, the Commission observed that this was a recurring message, raised equally by small businesses, chambers of commerce and public authorities.⁷⁵ The respondents to the MCAD public consultation were of the opinion that national authorities should be granted more powers and resources,⁷⁶ that cooperation mechanisms between national authorities should be created to ensure a more efficient and expedite treatment of cross-border cases⁷⁷ and that new enforcement tools should be created allowing qualified entities of one EU Member State to seek action before the competent authority and/or court of another Member State.⁷⁸

The Commission announced to propose a legislative instrument creating an enforcement cooperation procedure that, whilst creating minimal additional costs, allows enforcers to efficiently react whenever cross-border problems become systemic, affect the collective interest of businesses in Europe and evidently breach the rules of fair trading and good commercial practices. In order to establish a clear basis for cross-border enforcement action, an explicit mutual assistance obligation would be introduced in the legislative proposal, requiring Member States to take an enforcement action at the request of another Member State. Exchange of requests and information would be coordinated by the Commission through an online platform.⁷⁹ Moreover, specific provisions would require Member States to designate authorities with *ex officio* enforcement powers for the correct and effective implementation of the MCAD. The Commission stressed that the purpose of this new system of public enforcement would not be to engage in commercial disputes and enforce the rights of individual companies but to intervene in cases of serious market failure, when widespread practices cause harm to European businesses.⁸⁰ Surprisingly, however, the Commission did not state that inspiration for something like a 'Business Protection Cooperation Network' could be drawn from the existing CPC Regulation.

⁷² MCAD Report, 10.

⁷³ Results of the MCAD consultation, questions D.2 (64.7%).

⁷⁴ Idem, question D.3 (85,3%).

⁷⁵ MCAD Report, 8.

⁷⁶ Results of the MCAD consultation, question D.11.2 (64.7%).

⁷⁷ Idem, question D.11.3 (76.1%).

⁷⁸ Idem, question D.11.4 (62.9%).

⁷⁹ An online application for exchange of requests would ensure swift, secure and cost-effective cooperation without much additional burden and costs for the Member States. The existing Internal Market Information System (IMI) could be used for this purpose.

⁸⁰ MCAD Report, 13.

2.2. Substantial revision of the MCAD so as to mirror the UCPD

16. The second option would be to turn the existing MCAD into a genuine framework directive concerning *unfair* business-to-business practices: 'Problems should be addressed through changes in EU legislation, as its current provisions are inadequate, in particular: – the [MCAD] should be extended and developed into a broader legislation protecting businesses against common types of most harmful unfair practices.'⁸¹ Like the first option, this second option would maintain the current dualistic approach.

The existing UCPD concerning unfair B2C practices would of course be an important, if not the major, source of inspiration for the drafters of such broader B2B legislation. In particular, the new B2B Directive could include a blacklist with specific prohibitions as well as general prohibitions covering not only misleading but also unfair and aggressive practices. As mentioned above, when launching the MCAD consultation and stressing that the EU needs harmonised rules in the field of *unfair* business-to-business practices,⁸² the Commission referred to some open-textured UCPD concepts such as misleading actions and omissions, harassment, coercion and undue influence.⁸³

Following the MCAD public consultation, there was a strong call for granting businesses a similar level of EU wide protection against unfair commercial practices as the one granted to consumers by the UCPD,⁸⁴ for example by turning the MCAD into broader B2B legislation.⁸⁵ This was not mentioned by the Commission in the MCAD Report. The Commission did not assess the issue whether the MCAD should be turned into broader B2B legislation, let alone whether such broader B2B legislation should be based on minimum or maximum harmonisation.

17. As regards procedure, reference can be made to what has been explained in the final paragraph of the previous subsection. The option of a substantial revision of the MCAD so as to mirror the UCPD would have to be combined with the creation of a Business Protection Cooperation Network, drawing inspiration from the CPC Network.

2.3. Substantial revision of the UCPD so as to integrate the MCAD

18. The third option would be to turn the UCPD into a single regulatory framework concerning B2C/B2B practices: 'Problems should be addressed through changes in EU legislation, as its current provisions are inadequate, in particular: – [the UCPD], currently protecting only consumers, should be extended to also cover certain business-to-business relations (e.g. misleading practices affecting independent professionals and/or SME).'

⁸⁶

⁸¹ MCA questionnaire, question D.11.8 (= option 2).

⁸² Commission Press Release of 21 October 2011, Commission seeks to protect EU businesses against scams and unfair practices, IP/11/1224, available at http://europa.eu/rapid/press-release_IP-11-1224_en.htm.

⁸³ See Article 6 on misleading actions, Article 7 on misleading omissions and Article 8 on aggressive practices.

⁸⁴ Results of the MCAD public consultation, question D.8 (73.5%).

⁸⁵ Idem, question D.11.8 (= option 2) (59.2%).

⁸⁶ MCAD consultation document, question D.11.9 (= option 3).

Under this option, the protection of businesses and consumers would be streamlined under a single legislative instrument covering both B2C and B2B practices, whether targeted at consumers or businesses, and the MCAD would be abolished.⁸⁷ As a direct result, the European law of unfair commercial practices would be entirely based on maximum harmonisation.⁸⁸

Following the MCAD public consultation, there was a strong call for granting businesses a similar level of EU wide protection against unfair commercial practices as the one granted to consumers by the UCPD,⁸⁹ for example by turning the MCAD into broader B2B legislation.⁹⁰ This was not mentioned by the Commission in the MCAD Report, which did not at all discuss this option.

19. Notwithstanding the fact that the Commission apparently intends to maintain the dualistic approach, the integration of the MCAD into the UCPD seems to be the better approach.⁹¹ Simplification and coherence of the legal toolbox should be high on the Commission's agenda. Drafting a single regulatory framework covering B2C/B2B practices would of course require much more research and reflection. What might it look like? What follows is a first sketch for such a single European law of unfair commercial practices.

⁸⁷ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 179, 283. See also Resolution of the European Parliament of 13 January 2009 on the transposition, implementation and application of Directives 2005/29/EC and 2006/114/EC, *OJ C* 46 E/26, 24.02.2010, no. 7, suggesting to the Commission to extend the scope of the UCPD to cover business-to-business relationships. See also the Commission response in the Follow-up to the European Parliament Resolution on the transposition, implementation and application of Directives 2005/29/EC and 2006/114/EC, 10 March 2009: 'The Commission reminds the European Parliament that a full harmonisation directive on unfair business-to-consumer practices was already been a rather ambitious project, which might never have been adopted if its scope had been extended to business-to-business unfair competition practices. From the consultation leading to the proposal and the works in Council it was clear that there was little support for extending the scope of the directive to cover business-to-business unfair commercial practices. The Commission has not received any signal of new support for such an extension, except from SME associations. The Commission also reminds the European Parliament that Member States are free to apply UCP provisions to business-to-business transactions; this is the case, for example, in Germany, Austria and France for certain provisions.' See also European Parliament IMCO Report of 21 October 2011 on the new strategy for consumer policy, A7-0369/2011, no. 43, calling on the Commission 'to continue its work on the review of [UCP and MCADs ...] and the broader issue of whether the rules on UCP need to apply to business-to-business relations.'

⁸⁸ See in this respect B. Keirsbilck, 'Vers un règlement européen unique relative aux pratiques commerciales déloyales "B2C" et "B2B"?' in E. Terryn and D. Voinot, *Droit européen des pratiques commerciales déloyales – Evolutions et perspectives* in: *Code économique européen*, Brussel, Larcier, 2012, 173–175.

⁸⁹ Results of the MCAD public consultation, question D.8 (73.5%).

⁹⁰ Idem, question D.11.9 (= option 3) (59.6%).

⁹¹ See B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 256–257. In my view, the European legislator should also consider the integration of the Price Indication Directive; in the UCP Questionnaire for the Member States, the Commission asked (question 7 g): 'Is there a need to modernise the current provisions of Directive 98/6/EC on price indication and include them in the UCPD? In this case the Directive 98/6/EC would cease to exist and merged with the UCPD.'

First of all, the scope of the UCPD should be amended to cover B2C/B2B commercial practices at the pre-contractual stage only (before the conclusion of the contract).⁹² In my view, unfair practices following the conclusion of a contract and during its execution should be dealt with under national law. In this respect, one could consider replacing the concept of 'commercial practice' with the concept of 'marketing practice', defined as any practice employed by a trader at the precontractual stage and directly connected with the promotion of a product.

The new single regulatory framework should explicitly seek to protect the collective economic interests of consumers, competitors and other market participants as well as the general economic interest in undistorted competition.⁹³ All national provisions falling within the scope of the new single framework would be swept away, irrespective of whether these provisions pursue objectives relating to consumer or business/competitor protection.

20. Implementing the integrated approach, the scope of the UCPD prohibition of misleading B2C practices⁹⁴ should be extended so as to cover also misleading practices between businesses.⁹⁵ The existing and slightly different general prohibition of misleading B2B advertising should thus be merged into the existing general prohibition of misleading B2C practices. Certainly in this respect, the current dualistic approach is inconsistent with the objectives of harmonisation, simplification and legal certainty. The European Parliament considered that 'the distinction between B-to-C and B-to-B (...) might well not be compatible with the objectives of simple and consistent legislation and legal certainty'.⁹⁶ As there are almost no practices which are exclusively either B2C or B2B only, it is better to have a single instrument applicable to B2C/B2B practices.⁹⁷ Even for practices that are exclusively B2B only (exclusively targeting businesses and not reaching consumers at all), it is difficult to see why the definition of misleading advertising should be slightly different for B2B situations as compared to B2C situations. As a matter of principle, the criteria for determining the unfairness of practices/advertising should be uniform, irrespective of whom is targeted, addressed or reached by it. The catalogue of

⁹² In this respect, it should be noted that the fact that the UCPD covers also commercial practices during or after a commercial transaction is the strange result of a trade-off made by the Commission. The Commission's original idea was to substantiate the general prohibition of unfair practices by a number of specific unfairness categories concerning different stages of the business-to-consumer relationship. Eventually, the Commission abandoned the idea of introducing specific unfairness categories for the after-sales period (because a study found that the costs to businesses were out of proportion to the consumer benefits) and instead decided to apply the same principles to all stages of the trader/consumer relationship (both before and after sale). See Explanatory Memorandum to the UCP Proposal, para. 59.

⁹³ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 256–257.

⁹⁴ Article 6 UCPD.

⁹⁵ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 331–332.

⁹⁶ Resolution of the European Parliament of 13 March 2003 on the Commission communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on 'Consumer Policy Strategy 2002–2006', P5_TA(2003)0100, consideration L.

⁹⁷ Only as regards comparative advertising, the harmonized rules (continue) to apply both to B2C and B2B situations.

elements in relation to which information may be misleading should be made non-exhaustive. From a law and economics perspective, it is better to leave the list open for the purposes of flexibility; the idea of having a sole set of dimensions that is uniformly relevant for the finding of a misleading action is unnecessarily rigid. The list should reflect the major types of pre-contractual information required by the consumer *acquis*.

In my view, however, the scope of the UCPD's general prohibition of misleading B2C omissions (in essence, general B2C information requirements)⁹⁸ should not be extended to B2B relations; as a matter of fact, it would be better to abolish this prohibition altogether, for the following reasons.⁹⁹ From a law and economics perspective, the attempt to ensure complete consumer information may place an excessive burden on business and lead to information overload and consumer confusion, by making consumers disregard or downplay the overall benefits from it, especially when provision of that information is required at a time when the consumer does not (yet) need that information. Furthermore, the UCPD's general B2C information requirements go further than most, if not all, national contract laws in setting a high requirement of disclosure¹⁰⁰ and, because of the Directive's maximum harmonisation character, have a deep and inconsiderate impact on those national laws. Assuming that a harmonised general information requirement is needed and desirable, it should be based on minimum harmonisation and part of a well-considered EU contract law instrument.¹⁰¹

Likewise, the UCPD's specific information requirement applicable in case of so-called invitations to purchase (except if already apparent from the context)¹⁰² should not be extended to B2B relations but rather deleted.¹⁰³ In this respect too, the maximum harmonisation UCPD has a deep and inconsiderate impact on national contract laws.¹⁰⁴ Assuming that a harmonised specific information requirement in the context of marketing or invitations to purchase is needed and desirable, it should be

⁹⁸ Article 7(1) and (2) UCPD.

⁹⁹ See also B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 346–348.

¹⁰⁰ National contract laws have developed pre-contractual duties to inform (*essentialia negotii*) as well as principles of pre-contractual liability (for instance, *culpa in contrahendo*).

¹⁰¹ It should be noted that the consumer *acquis* does not refer to any overarching principle which requires that full disclosure is made of all the material information that the average consumer needs in order to take a transactional decision. Neither does the new Consumer Rights Directive adopt such a general duty.

¹⁰² Article 7(4) UCPD.

¹⁰³ See also B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 359–361.

¹⁰⁴ While Article 3(2) underlines that the UCPD is without prejudice to contract law and does not define an upper limit or 'ceiling' for information duties under contract law (to the extent that they are not qualified as 'misleading omissions' – Recital 15), Article 7(4) may *de facto* fix a lower limit or 'floor' for national pre-contractual information duties. Information provision which is required by Article 7(4) in case of an 'invitation to purchase' may, also from a contract law point of view, be required before the conclusion of a contract. As a consequence, Article 7(4) may have a sort of 'benchmarking effect' in that it may lead to an indirect minimum harmonisation of national contract law in the field of pre-contractual information duties.

based on minimum harmonisation and part of a well-considered EU contract law instrument.¹⁰⁵

Likewise, the (amended) prohibition of unlawful comparative practices should be deleted and this *per se* B2C/B2B prohibition should be integrated in the UCPD's blacklist.¹⁰⁶ Only two permissibility conditions should be retained: comparative commercial practices should 'be not misleading within the meaning of this Directive' and 'objectively compare the price and/or one or more of the main characteristics of those goods or services'.

In addition, the scope of the general prohibition of aggressive B2C practices should be extended so as to cover also aggressive practices between businesses.¹⁰⁷

But what about the law of unfair competition? According to Recital 8, 'there are other commercial practices which, although not harming consumers, may hurt competitors and business customers' and 'the Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.'¹⁰⁸ Would it be possible and desirable to extend the personal scope of Article 5(2) UCPD so as to cover not only any unfair practice vis-à-vis consumers but also any unfair practice between businesses? As a matter of principle, my answer is in the affirmative,¹⁰⁹ although of course much more research would be required to draft (an) adequate general prohibition(s) of unfair B2C and B2B practices. According to some authors, there is no strong case for harmonisation of rules on unfair business-to-business practices. There is said to be no convincing evidence that disparities between the laws of the Member States in this field create (important) obstacles for the internal market.¹¹⁰ This is certainly a strong argument. As a matter of fact, one can doubt whether the

¹⁰⁵ Article 5 CRD resembles Article 7(4) UCPD but is based on minimum harmonization. Articles 20–22 and 23 of the CESL Proposal contain precontractual information requirements for B2C resp. B2B contracts.

¹⁰⁶ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 336–338.

¹⁰⁷ *Idem*, 382. See also Resolution of the European Parliament of 13 January 2009 on the transposition, implementation and application of Directives 2005/29/EC and 2006/114/EC, *OJ C* 46 E/26, 24.02.2010, no. 4, calling on the Commission 'with reference to Recital 8 to the UCPD, to investigate the need to protect small and medium-sized undertakings against aggressive business practices and, if appropriate, to initiate the requisite follow-up measures.' See also the Commission response in the Follow-up to the European Parliament Resolution on the transposition, implementation and application of Directives 2005/29/EC and 2006/114/EC, 10 March 2009: 'as regards aggressive practices, which were regulated for the first time at EU level through the UCP Directive, it was considered that such practices occur almost exclusively in business-to-consumer relations.'

¹⁰⁸ See also Revised Addendum to 'I/A' Item Note, Statements to be entered in the minutes, Interinstitutional File 2003/0134 (COD), 14166/04, 12 November 2004, 3 p.: 'Germany and Austria regret that at present no majority is in favour of this position. Nevertheless, the current proposal for a directive is a step in the right direction. Any reservations will be deferred without the overall goal of creating a common legal framework having to be relinquished. Germany and Austria ask that the Commission pave the way for businesses to be included in the European law on fair trading practices in such a way that they can also be party to the rules on fairness it sets out.'

¹⁰⁹ B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 297–300.

¹¹⁰ See IMCO Briefing Paper on Addressing unfair commercial practices in business-to-business relations in the internal market, IP/A/IMCO/NT/2010–18, May 2011, available at www.europarl.europa.eu/

European Union has competence to adopt uniform rules concerning industrial espionage or third complicity with breach of contract. Admittedly, one should first demonstrate that the existing national provisions in these fields impose important obstacles to the internal market.¹¹¹ This could, however, be done fairly easily as regards national prohibitions of denigration a competitor¹¹² or slavish imitation (misappropriation, copying independently of any likelihood of consumer confusion).¹¹³

And what about the blacklist? In my view, the blacklist should not seek to distinguish between misleading and aggressive practices. It should contain only those relatively few, most common and harmful practices which should be considered unfair in all circumstances. Some of these practices could be blacklisted only in B2C or only in B2B relationships. Since it must be possible to apply the blacklist in an all-or-nothing and uniform fashion throughout Europe, its wording should be crystal-clear specifications of its general prohibitions. Finally, the Commission should be competent under the comitology procedure to adapt the blacklist easily in view of new economic or technological developments, following consultation of the national enforcement authorities and business and consumer organisations.

21. The integrated approach is of course not only a matter of substance but also a matter of procedure. Arguably, the scope of the CPC Regulation and of the Injunctions Directive would have to be extended to B2B relationships as well. The lists of legislation of the CPC Regulation and of the Injunctions Directive should be aligned.¹¹⁴

document/activities/cont/201108/20110825ATT25282/20110825ATT25282EN.pdf. See also J. Stuyck, 'Pratiques du commerce et concurrence: vers un nouvel équilibre?', *DCCR* 2011, 22.

¹¹¹ ECJ Judgment of 5 October 2000, Case C-376/98, *Germany v. European Parliament and Council of the European Union*, (2000) ECR, I-8419, point 17.

¹¹² B. Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 307–309. See also Article 4, sub d of the MCAD.

¹¹³ *Idem*, 303–307. See also Article 6(2), sub a, of the UCPD.

¹¹⁴ See Report from the Commission to the European Parliament and the Council on the application of the CPC Regulation, 12 March 2012, COM(2012) 100 final. The findings of this report have been the basis for preparing the terms of reference of an external evaluation launched by the Commission later in 2012. The external evaluation study is under way. See already Inception report submitted by the Consumer Policy Evaluation Consortium (CPEC), 8 February 2012, 33–34 and 39: 'Should the scope of the regulation be revised, if so, why and how? ... Can the legislation be regarded as protecting economic collective interests of consumers? On which grounds? Equally, could the CPC Regulation be extended to cover certain types of business-to-business infringements and if so on which grounds? ... Could the regulation be applicable to business-to-business trade, what difficulties might this create?' See Resolution of the European Parliament of 16 December 2008 concerning misleading directory companies, A6-0446/2008, no.15, calling on the Commission to propose legislation to extend the scope of the CPC Regulation to cover business-to-business transactions. See Report from the Commission to the European Parliament and the Council concerning the application of the Injunctions Directive 2009/22/EC, 6 November 2012, COM(2012) 635 final. See also Report from the Commission to the European Parliament and the Council concerning the application of the Injunctions Directive 98/27/EC, 18 November 2008, COM(2008) 756 final, 5: 'Some Member States, notably Germany, Slovenia and Sweden, have extended the scope of injunctions, at national level, to include commercial practices (such as misleading advertising) detrimental to the collective interests of companies. However, the majority of Member States consulted are not in favour of extending the scope of the Directive to include the collective interests of companies, arguing that the Community legislation listed in the Annex is primarily there to

2.4. *Maintaining the status quo*

22. The fourth option would be *dolce far niente*: ‘No further EU legislative action is needed in the context of misleading business-to-business practices.’¹¹⁵ In this baseline scenario, the European legislator would take no further action in the field of unfair (misleading) advertising, marketing or commercial practices and would keep the *status quo*. B2B advertising would continue to be regulated by the MCAD. In my view, this option is neither feasible nor desirable, in light of the problem of unfair B2B practices and the obstacles to the smooth functioning of the internal market resulting from the regulatory diversity in this field.

3. Conclusion and epilogue on the need and desirability of harmonisation of rules concerning unfair business-to-business trading practices

23. In my view, the MCAD Report does not strike the right note. Rather than just inserting a blacklist of the most frequent and harmful business-to-business marketing practices, the Commission should consider to extend the scope of the UCPD to cover also B2B practices at the pre-contractual stage. Admittedly, much more research would be required to draft adequate prohibitions of unfair, misleading and aggressive B2C/B2B practices.

24. As neither Directive 93/13/EEC of 5 April 1993 concerning (not individually negotiated) terms in consumer contracts (‘UCTD’)¹¹⁶ nor the UCPD apply to business-to-business relationships, a number of recent announcements and policy initiatives in relation to the B2B sector deal with what the Commission designates as ‘unfair trading practices’ in business-to-business relationships.¹¹⁷ This extremely broad concept seems to encompass all kind of unfair B2B practices, all along the distribution chain, at any stage of the commercial relationship, whether non-contractual or contractual (including

protect consumers and that it would not be desirable to mix up the interests of consumers with those of small and medium-sized companies, even though the latter may also need protection. In view of the above, the Commission does not consider that it would be justified to amend the scope of the Directive, as allowed under Article 6(2). In particular, it does not consider that it would be appropriate to extend the scope to cover the collective interests of companies. However, whenever justified, it will continue to propose the addition of new Community consumer protection legislation to the Annex.’

¹¹⁵ MCAD consultation document, question D.11.10 (= option 4).

¹¹⁶ Directive 93/13/EEC of 5 April 1993 concerning terms in consumer contracts, *OJ* 1993, L 95/34. See Nebbia, *Unfair Contract Terms in European Law – A Study in Comparative and EC Law*, Hart Publishing, 2007.

¹¹⁷ Initiatives:

- from the perspective of ‘food industry policy’ (mainly DG Enterprise and Services):
 - Commission Communication of 28 October 2009, A better functioning food supply chain in Europe, COM(2009) 591 final, 7, considering that ‘action is needed to eliminate unfair contractual practices between business actors all along the food supply chain’ and stating that ‘the Commission will work with Member States to put contractual relations on a more secure footing so that contracting parties will be able to reap the full benefits from the single market while retaining their freedom to contract’ and that ‘the Commission will work together with the food supply chain stakeholders to prepare sets of standard contracts, whose use would be voluntary, taking into account the diversity of the food supply chain, and to assess unfair

contractual practices in the Internal Market and propose any necessary Community measures to address such practices’;

- As a follow-up of this Communication, the work of the Experts Platform on Business-to-Business Contractual Practices set up in 2010 within the High Level Forum for a Better Functioning Food Supply Chain, listing and defining practices which can be deemed unfair, identifying relevant best practices in commercial relations, and proposing actions through regulatory or non-regulatory instruments when necessary (see ‘Vertical relationships in the Food Supply Chain: Principles of Good Practice’);
- Commission Press Release of 5 December 2012, Improving the functioning of the food supply chain, IP/12/1314, available at http://europa.eu/rapid/press-release_IP-12-1314_en.htm. See also Commission Memo of 5 December 2012, Better functioning of the food supply chain, MEMO/12/914, available at http://europa.eu/rapid/press-release_MEMO-12-941_en.htm.
- from the perspective of ‘SME policy’ (mainly DG Enterprise and Services):
 - Communication of the Commission of 23 February 2011, ‘Review of the Small Business Act’, COM(2011) 78 final, 13, announcing that ‘the Commission will carry out an in depth analysis of the unfair commercial practices and contractual clauses in the business to business environment in the Single Market and table a legislative proposal if needed in order to protect businesses against unfair contractual terms’, ‘will issue a Communication on the Directive on Misleading and Comparative Advertising to look into problems SMEs often face such as directory scams’, and ‘will also work towards ensuring that SMEs in economically dependent situations will be protected against unfair commercial practices and have the possibility of seeking effective redress against such practices, wherever they are applied within supply chains.’
- from the perspective of ‘retail market policy’ (mainly DG Internal market and services):
 - Commission Report of 5 July 2010, Retail Market Monitoring Report – Towards more efficient and fairer retail services in the internal market for 2020, COM(2010) 355 final, 7, identifying unfair trading practices in business-to-business relations along the retail supply chain as one of the ‘problems impeding the retail sector from exploiting its potential in the EU’ and explaining that ‘although certain national laws on unfair contractual terms between enterprises exist, they vary widely between Member States, which can lead to barriers fragmenting the internal market, distorting competition or increasing the risk of circumvention’;
 - Commission Communication of 27 October 2010, Towards a Single Market Act – For a highly competitive social market economy – 50 proposals for improving our work, business and exchanges with one another, COM(2010) 608 final, explaining that ‘the coexistence of an array of divergent rules laid down at national level with a view to regulating this sector, in particular with regard to unfair practices, can create serious obstacles to the smooth operation of the retail market’ and that ‘an initiative geared towards business-to-business relations would make it possible to protect the different operators in the supply chain while enabling the gradual emergence of a more efficient and fairer single wholesale and retail market while meeting consumers’ and manufacturers’ expectations regarding competitive prices’;
 - Commission Communication of 13 April 2011, Single Market Act – Twelve levers to boost growth and strengthen confidence ‘Working together to create new growth’, COM(2011) 206 final, 11, stating that ‘an initiative will be launched to combat unfair business-to-business commercial practices [in the retail and wholesale sectors], in order to identify the nature and scale of the problems associated with unfair commercial practices between professional operators throughout the supply chain, list current regulations within the Member States, to assess their implementation and, finally, identify the various possible options’;
 - European Parliament Resolution of 6 April 2011, A Single Market for Europeans, P7_TA(2011)0145, no. 38, calling on the Commission ‘to put forward practical proposals to extend consumer protection against unfair commercial practices to small businesses’;
 - European Parliament of 6 April 2011, A Single Market for Enterprises and Growth, P7_TA(2011)0146, no. 51, calling on the Commission ‘to encourage the development of the business services sector and to take the necessary regulatory measures in order to protect businesses, especially SMEs, from unfair commercial practices by larger enterprises in the supply chain’, inviting the Commission ‘to define ‘manifestly unfair commercial practices’ in the supply chain,

unfair B2B marketing and commercial practices, unfair B2B contract terms, etc.). These practices traditionally pertain to the commercial, tort, contract or competition laws of the Member States. They are now *inter alia* considered to be one of the problems impeding the retail sector from exploiting its potential in the EU. The Commission announced that an initiative will be launched to combat those practices.¹¹⁸ In my view, a horizontal harmonisation instrument covering all kind of unfair B2B trading practices risks resulting in a complete legal mess at the national level, upsetting traditional national doctrines of (the relationship between) commercial, tort, contract and/or competition law.

The better thing to do, if anything, would be to extend the scope of the UCTD to cover unfair terms in business-to-business contracts¹¹⁹ and – as argued above – to amend the scope of the UCPD so as cover both B2C and B2B (marketing) practices at the pre-contractual stage.

in consultation with the stakeholders, and to propose further action to prevent unfair commercial practices in respect of competition and freedom of contract’ and urging the Commission again ‘to come up with a proposal to prevent the fraudulent practices of misleading business directories’;

- European Parliament Resolution of 5 July 2011, A More Efficient and Fairer Retail Market, T7–0307/2011, asking the Commission to publish ‘a communication mapping national laws and tools in place to deal with commercial practices and contractual relations, and to assess thoroughly if these rules are being properly enforced and if further action is needed’;
- Opinion of the European Economic and Social Committee of 12 July 2011, Key Actions towards a Single Market Act II, 2012/C 299/30, 3.8.1., stressing that ‘not only consumers see their rights violated by providers of goods and services, by unfair contract terms and unfair commercial practices’ and that ‘SMEs may need similar protection against unfair commercial practices’;
- Commission Communication of 3 October 2012, Single Market Act II Together for new growth, COM(2012) 573 final, 13, stating that ‘In the context of its forthcoming European Retail Action Plan, the Commission will step up its work to identify and combat unfair trading practices, in line with its commitment in the Single Market Act in April 2011. Such practices are particularly detrimental to SMEs. In the absence of satisfactory progress to eliminate unfair trading practices, including in the context of the High Level Forum for a Better Functioning Food Supply Chain, the Commission will consider appropriate next steps in 2013’;
- Commission Green Paper of 31 January 2013, on unfair trading practices in the business-to-business food and non-food supply chain in Europe, COM(2013) 37 final, which takes into account the responses of interested stakeholders to the online consultation (via the European Business Test Panel) launched by the Commission ‘to identify the nature and scale of unfair commercial practices by obtaining first-hand accounts of the frequency of such practices, as well as the existence of rules and adequate redress mechanisms aimed at protecting the weaker party in business-to-business relationships’ (Commission, Summary Report: EBTP Consultation on Unfair Practices, February 2012).

¹¹⁸ B-Brussels: Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, 2013/S 002–001079, Contract award notice, available at <http://ted.europa.eu/udl?uri=TED:NOTICE:1079–2013:TEXT:EN:HTML>.

¹¹⁹ Cf. Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 11 October 2011, COM(2011) 653 final, 11, containing in Art. 86 a specific prohibition of unfair terms in business-to-business contracts, defined as terms that ‘grossly deviate from good commercial practice, contrary to good faith and fair dealing’ (cf. Art. II. – 9:405 DCFR), and stating that ‘the Commission will continue to examine broader aspects of consumer law, such as whether to update or extend consumer-related rules, for instance when revising the Unfair Commercial Practices Directive and the Misleading Advertising Directive [...] and will continue to reflect] on B2B commercial practices, including in their contractual dimension.’

IUS COMMUNE EUROPAEUM

A peer-reviewed book series in which the common foundations of the legal systems of the Member States of the European Union are the central focus.

The *Ius Commune Europaeum* series includes horizontal comparative legal studies as well as studies on the effect of treaties within the national legal systems. All the classic fields of law are covered. The books are published in various European languages under the auspices of METRO, the Institute for Transnational Legal Research at Maastricht University.

Editorial Board: Prof. Dr. J. SMITS (chair), Prof.Dr. M. FAURE, Prof. Dr. Chr. JOERGES, Prof. Dr. J. DU PLESSIS and Prof.Dr. E. Vos.

Recently published:

Volume 111: *Truth and Efficiency in Civil Litigation. Fundamental Aspects of Fact-finding and Evidence-taking in a Comparative Context*, C.H. VAN RHEE and A. UZELAC (eds.)

Volume 112: *Law and Security in Europe: Reconsidering the Security Constitution*, M. FICHERA and J. KREMER (eds.)

Volume 113: *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions*, J. BLACKSTOCK, E. LLOYD-CAPE, J. HODGSON, A. OGORODOVA and T. SPRONKEN

Volume 114: *Motive Matters! An Exploration of the Notion 'Deliberate Breach of Contract' and its Consequences for the Application of Remedies*, M. VAN KOGELENBERG

Volume 115: *Legal Education*, A.W. HERINGA

Volume 116: *Standing up for your Rights in Europe. A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States' Courts*, M. ELIANTONIO, CH. BACKES, C.H. VAN RHEE, T. SPRONKEN and A. BERLEE

Volume 117: *European Union Property Law. From Fragments to a System*, E. RAMAEKERS

Volume 118: *Comparing Ecological Damage. Comparative and Economic Observations*, J. LIU

Volume 119: *Parliamentary Immunity. A Comprehensive Study of the Systems of Parliamentary Immunity of the United Kingdom, France, and the Netherlands in a European Context*, S. HARDT

Volume 120: *The Effects of Judicial Decisions in Time*, P. POPELIER, S. VERSTRAELEN, D. VANHEULE and B. VANLERBERGHE (eds.)