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Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law

MARCO B.M. LOOS*

Abstract: This paper discusses whether and to what extent the transparency principle is applicable to standard contract terms legislation under European Union law and what the consequences are when the principle, in so far as it is recognized, is breached. To that extent, it focuses first on the Unfair Contract Terms Directive and second on the proposal for a Common European Sales Law.

Résumé: Cet article traite si et dans quelle mesure le principe de transparence s'applique à la législation européenne de conditions générales et quelles sont les conséquences lorsque le principe, dans la mesure où il est reconnu, a été violé. Dans cette mesure, il se concentre d'abord sur la Directive concernant les clauses abusives dans les contrats conclus avec les consommateurs et d'autre part sur la proposition d'un Droit Commun Européen de la Vente.

Zusammenfassung: Dieser Aufsatz beschreibt, ob und inwieweit der Grundsatz des Transparenzgebots gilt nach das europäischen AGB-Recht und was die Konsequenzen sind, wenn das Gebot verletzt wird. Der Aufsatz konzentriert sich zunächst auf die Klauselrichtlinie und zweitens über den Vorschlag für einen Gemeinsamen Europäischen Kaufrechts.

1. Introduction

In this paper, I will look into a matter that so far has been discussed less extensively in literature but has lately been the subject of three cases decided by the Court of Justice: the transparency principle regulated in Article 5 of the Unfair Contract Terms Directive.¹

The function of the transparency principle is to enable the counterparty of the trader that introduces standard contract terms into the contract to determine

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

its legal position when that party wants to read the standard contract terms. This implies, on the one hand, that the contract terms are made available to the other party before the contract is concluded and, on the other hand, that the terms are drafted in such a way that, when reading the terms, the ‘average other party’ is able to understand them without legal advice.²

In other words, in order to meet the principle of transparency,

- (1) the trader must ensure that the other party has an opportunity to become acquainted with the terms before the contract is concluded;
- (2) the terms must be ‘understandable’ to the (average) other party if he decides to make use of the opportunity to become acquainted with these terms.

Very different rules may apply to determine whether or not these requirements have been met. For instance, does the requirement that the other party must have an opportunity to become acquainted with the terms require the trader to send the standard terms to the other party or hand them over before the contract is concluded, or does it suffice that the trader informs the other party where he (the other party) can obtain a copy of the standard terms – basically requiring the other party to take action? And with regard to the second requirement: what is the yardstick against which the term is evaluated for ‘understandability’? And who is the ‘average other party’ – the benchmark – for whom the term must be understandable?

Similarly, sanctions for breach of the transparency principle may differ. Typically, with regard to the first requirement, the sanction is that the terms have not been validly incorporated into the contract.³ The sanction for breaching the second requirement is much less uniformly determined. On the one hand, the same sanction may apply as to the first requirement: the terms may simply not have been incorporated into the contract. The second option is that the terms are incorporated but are deemed to be unfair and, for that reason, remain without

2 A. FUCHS, in G. Christensen, A. Fuchs, M. Habersack, C. Schäfer, H. Schmidt & A. Witt, *Ulmer/Brandner/Hensen, AGB-Recht, Kommentar zu den §§ 305–310 BGB und zum UKlaG*, (11th ed. Köln: Verlag Dr. Otto Schmidt, 2011), no. 11 to §307 BGB; E. GOTTSCHALK, ‘Das Transparenzgebot und allgemeine Geschäftsbedingungen’, 206. *Archiv für die civilistische Praxis* (2006), pp 559, 581; OFFICE OF FAIR TRADING, *Unfair Contract Terms, Bulletin No. 3*, 1997, p 19, available at <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/> (last visited on 11 Jul. 2014).

3 A variation to this would be that the terms are incorporated, but the incorporation may be annulled with retroactive effect if the terms have not been provided – what effectively amounts to the same result. This variation is the rule in The Netherlands, see Arts 6:232, 233, introduction and under (b), and 234 Dutch Civil Code.

effect. A third option would be that the breach of the transparency principle is merely one of many factors that must be taken into account when determining whether or not a specific term is unfair. Fourth, the breach of the transparency principle may simply trigger the application of the *contra proferentem* rule, implying that the term will be interpreted against the trader. And finally, the breach of the transparency principle does not have any effect on the validity of the term but may lead to another remedy, for instance, avoidance of the contract on the basis of mistake or misrepresentation⁴ or damages.⁵

In this paper, I will look into the question whether and to what extent the transparency principle is applicable to standard contract terms legislation under European Union law. To that extent, I will focus first on the *acquis communautaire*, in particular on the Unfair Contract Terms Directive, and second on the proposal for a Common European Sales Law.⁶ I will conclude by summarizing the main findings of the paper.

2. The Transparency Principle under the *Acquis Communautaire*

2.1. *Trader's Obligations to Provide the Other Party with the Standard Contract Terms*

The Unfair Contract Terms Directive does not impose a direct obligation on the trader to provide his standard contract terms to the consumer. However, recital (20) in the preamble to the Directive suggests that such an obligation nevertheless exists:

Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail.

The trader's obligation to provide the standard terms to the contract is therefore worded as an element of the transparency principle regulated in Article 5 of the Directive.

In some areas, European law provides for a more direct obligation to make the terms of the contract, including the standard contract terms, available to the

4 In case the other party convincingly argues that had he been aware of the true meaning of the term he would not have concluded the contract or only on different terms.

5 If as a result of the lack of clarity or comprehensibility of the term the other party sustains a loss he would not have sustained or is deprived of a profit he would have gained had the term been clear. The chances that the other party can prove such loss or profit do not seem particularly high, so the remedy would not seem to be very effective.

6 Proposal for a Regulation on a Common European Sales Law (COM (2011) 635 final, available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF> (last visited on 11 Jul. 2014).

other party.⁷ Apart from these specific provisions, EU law only imposes information obligations on the trader. Some of this information will typically be regulated in the trader's standard contract terms, such as the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or to perform the services.⁸

2.2. *Transparency of Terms*

The second requirement focuses on the possibility for the other party to understand the contract terms. This requirement is included in EU legislation. The most prominent example is offered by the Unfair Contract Terms Directive.⁹ In particular, Article 5, first sentence, of the Unfair Contract Terms Directive provides that:

where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.

The provision is explained in recital (20) of the preamble to the Directive quoted above. The breach of the transparency principle, however, is not regulated

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- 7 The Commercial Agency Directive (Directive 86/653/EEC, *OJ* 1986, L 382/17) offers the clearest example. Art. 13, para. 1, of this Directive provides that both parties may request 'a signed written document setting out the terms of the agency contract including any terms subsequently agreed'. Similarly, Arts 3 and 5 of the Distance Marketing of Financial Services Directive (Directive 2002/65/EC, *OJ* 2002, L 271/16, *OJ* 2002, L 271/16) require the provider of the financial service to provide the consumer with the contract terms before the conclusion of the contract or, if the means of distance communication does not allow the provider of the financial service to provide the terms earlier, immediately after the conclusion of the contract. In other legislation, the trader is merely required to make the standard contract terms available to the other party, but it is basically left up to the trader whether he provides the terms to the other party or informs the other party where the latter may obtain a copy thereof. See, for instance, Art. 22, para. 1, under (f), of the Services Directive (Directive 2006/123/EC, *OJ* 2006, L 376/36). See also Art. 10, para. 3, of the E-commerce Directive (Directive 2000/31/EC, *OJ* 2000, L 178/1), which indicates that where a contract is concluded electronically and contract terms and general conditions are provided to the other party, these terms and conditions must be 'made available' in a way that allows the other party to store and reproduce them.
- 8 See Art. 5, para. 1, under (d), and Art. 6, para. 1, under (f), Consumer Rights Directive (Directive 2011/83/EU, *OJ* 2011, L 304/64). See also the information to be provided in accordance with Art. 5, para. 1, under (e) and (f), and Art. 6, para. 1, under (m), (o), (p), and (t), Consumer Rights Directive.
- 9 The Unfair Contract Terms Directive may be the most prominent example of the application of the transparency principle with regard to standard contract terms, but it is not the only one. Similar provisions are included in the annexes to the Third Energy Directives (Directives 2009/72/EC, *OJ* 2009, L 211/55, and 2009/73/EC, *OJ* 2007, L 211/94) and were already provided for in the annexes to the Second Energy Directives (Directives 2003/54/EC, *OJ* 2003, L 176/37 and 2003/55/EC, *OJ* 2003, L 176/57).

separately. Instead, Article 6, paragraph 1, of the Directive merely provides that Member States must ensure that *unfair* terms are not binding on the consumer. Transparency – including the question of whether the consumer has had a chance to read the terms before the contract is concluded – is therefore seen as an element in the assessment whether or not a term is unfair within the meaning of Article 3, paragraph 1, of the Directive.

In addition to the general unfairness test, the annex to the Directive contains ‘an indicative and non-exhaustive list of the terms which may be regarded as unfair’, Article 3, paragraph 3, indicates. Point 1 under (j) of the Annex indicates that terms enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract may be unfair. Point 2 under (b) clarifies that the former provision does not stand in the way of terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract. Moreover, whereas point 1 under (l) of the Annex indicates that terms allowing a seller of goods or supplier of services to increase their price without giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded may be unfair, point 2 under (d) clarifies that this provision does not stand in the way of price indexation clauses, provided that the method by which prices vary is explicitly described.

2.3. *Surprising Terms*

Surprising terms are terms that are so uncommon to be found in a particular set of standard contract terms that the mere fact that the other party has accepted the incorporation of the trader’s standard contract terms into the contract as a whole can’t be interpreted as an acceptance also of this uncommon and therefore surprising term. A good example is a term in a contract for the lease of a boiler for a central heating system with a duration of twelve years, which required the lessee who prematurely terminated the contract to purchase the boiler against its remaining value.¹⁰ It seems rather obvious that a consumer who *hires* a boiler does not expect to have concluded a *sales* contract if he decides to terminate the lease. By not disclosing that the standard contract terms contain such clause, it could be argued that the consumer has not been provided with a real opportunity to ascertain his rights and obligations under the contract. In that sense, the surprising nature of the term causes a breach of the transparency principle.

¹⁰ See Art. 7, para. 1, of the Algemene voorwaarden voor de huur en verhuur van cv-toestellen en cv-combotoestellen of Feenstra Verwarming B.V., an installation company, see www.feenstra.com/voorwaarden (last visited on 11 Jul. 2014).

In some legal systems, such terms for that reason are simply not incorporated into the contract. A good example is §305c, paragraph 1, of the German BGB.¹¹ This provision reads as follows:

Bestimmungen in Allgemeinen Geschäftsbedingungen, die nach den Umständen, insbesondere nach dem äußeren Erscheinungsbild des Vertrags, so ungewöhnlich sind, dass der Vertragspartner des Verwenders mit ihnen nicht zu rechnen braucht, werden nicht Vertragsbestandteil.

Provisions in standard contract terms that, in the circumstances of the case, in particular the external appearance of the contract, are so unusual that the other party need not have reckoned with them, do not form part of the contract (my translation, MBML).

Such a rule does not exist at the European level. The reason for the absence of such a rule is that it does not fit with the information doctrine that is accepted in European legislation. EU law starts from the assumption that contracting parties that are properly informed are able to freely decide whether or not a contract offered to them meets their needs. When the trader's standard contract terms have been provided to the other party before the conclusion of the contract and the terms themselves have been written in plain and intelligible language, the other party has had a fair chance to become acquainted with all the terms offered by the trader. If he then concludes the contract, he is expected to indeed have read the terms. If during his reading of the terms he has come across a provision that is unacceptable to him, he would be expected to raise this matter before the conclusion of the contract. In this sense, terms in a set of standard contract terms can't be 'surprising'. In so far as the terms could be surprising as they are unjustly detrimental to the other party, this would be an argument why the term could be unfair within the meaning of Article 3, paragraph 1, of the Unfair Contract Terms Directive.

2.4. Sanction for Breach of the Transparency Principle

EU law does not provide for a clear sanction for the breach of the transparency principle. In so far as one may infer from recital (20) in the preamble to the Unfair Contract Terms Directive that the trader is in fact required to provide the standard contract terms to a consumer, it is clear that this 'indirect obligation' can only be sanctioned in the same manner as the breach of the transparency principle under Article 5 of that Directive. However, although this provision does require the trader to draft the standard contract terms in plain and intelligible language, it does not indicate the consequences of a breach thereof. Instead, the

11 Bürgerliches Gesetzbuch, i.e., the German Civil Code.

breach of the transparency principle will have to be taken into account when assessing the unfairness of the term under Article 3, paragraph 1, of the Directive, one may deduce from the case law of the Court of Justice.

In *Invitel*,¹² the first case decided by the Court of Justice in which transparency played an important role, the Court was to explain whether terms allowing the trader to amend the total price of the contract could be considered to be unfair under Article 3, paragraph 1, of the Directive. In its answer, the Court pointed at the annex to the Directive, which contains four relevant provisions relating to such terms.¹³ These provisions indicate, according to the European Court of Justice (ECJ), that the contract must mention the reason for and the method of the variation of the total price and the consumer must have the right to terminate the contract if he does not want to accept the changed terms.¹⁴ The Court then related this to the requirement in recital (20) of the preamble to the Directive, which provides that the consumer should actually be given an opportunity to examine all the terms appearing in the standard contract terms, and to the obligation to draft terms in clear, intelligible language laid down in Article 5 of the Directive. From this, the Court then concluded that ‘in the assessment of the “unfair” nature of a term, within the meaning of Article 3 of the Directive, the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the GBC [the relevant standard contract terms, MBML] with regard to the fees connected to the service to be provided is of fundamental importance’. In so far as the method for calculating the adjustment is specified by mandatory statutory or regulatory provisions or when such provisions entitle the consumer to terminate the contract, the seller or supplier must also inform the consumer thereof.¹⁵

In the *Invitel* case, the Court of Justice therefore directly related the breach of the transparency principle to the possible unfair nature of the unclear term. In the second case, *RWE*,¹⁶ the Court followed the same reasoning. Again the Court had to decide on the possible unfairness of terms allowing the trader to unilaterally change the price. In its answer, the Court first recalled that the system of protection established by the Directive is based on the idea that the

12 ECJ 26 Apr. 2012, C-472/10 *NFH/Invitel*, ECLI:EU:C:2012:242.

13 Points 1(j) and (l) and 2(b) and (d) of the annex to the Directive, as mentioned above.

14 ECJ 26 Apr. 2012, C-472/10 *NFH/Invitel*, ECLI:EU:C:2012:242, point 24. In points 25 and 26, the Court indicated that although the annex itself only contains an indicative and non-exhaustive list of terms, which may be regarded as unfair, ‘it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term’ and that with regard to terms allowing for changes in the total price the provisions in the annex are ‘particularly relevant’.

15 ECJ 26 Apr. 2012, C-472/10 *NFH/Invitel*, ECLI:EU:C:2012:242, points 27-29.

16 ECJ 21 Mar. 2013, C-92/11 *RWE Vertrieb AG/Verbraucherzentrale Nordrhein-Westfalen eV*, ECLI:C:EU:2013:180.

consumer is in a weak position vis-à-vis the seller or supplier. In view of this, unfair terms imposed on the consumer by the trader are prohibited. Secondly, Article 5 of the Directive imposes an obligation on the seller or supplier to draft terms in plain, intelligible language. The Court then added that recital (20) in the preamble to the Directive ‘specifies’ that the consumer must actually be given an opportunity to examine all the terms of the contract. This obligation is deemed to be of fundamental importance for a consumer, as on the basis of that information the consumer decides whether or not to accept the terms.¹⁷ The Court of Justice then pointed to Article 3, paragraph 3, of the Second Gas Directive,¹⁸ applicable at the time when the price increases were notified to the consumers,¹⁹ which required the Member States to ensure a high level of consumer protection with respect to transparency regarding contractual terms and conditions. These terms should not only be fair and transparent but must also be stated ‘in clear and comprehensible language and [be, MBML] notified to consumers before the contract is concluded’, the annex to the Second Gas Directive indicated. Moreover, the annex specified that these measures apply without prejudice to Directive 93/13. In both the Unfair Contract Terms Directive and the Second Gas Directive, the European legislator has recognized that in the case of a contract that is concluded for an indeterminate period of time, such as contracts for the supply of energy, the supplier of the goods and services has a legitimate interest in being able to amend the price for the supply thereof. However, a standard term that allows for such a unilateral adjustment must meet the requirements of good faith, balance and transparency laid down by those directives. It is ultimately up to the national court to determine whether these requirements have been met.²⁰ However, the Court of Justice does not leave much discretion to the national court. In practice, the national court can only consider that the contract term meets the requirements if two conditions have been met simultaneously:

- (1) the contract itself sets out under which conditions the price may be changed and according to which criteria the change is to be calculated;
- (2) consumers must have the right to terminate the contract after having been informed that the seller or supplier indeed wishes to change the price.

17 ECJ 21 Mar. 2013, C-92/11 *RWE Vertrieb AG/Verbraucherzentrale Nordrhein-Westfalen eV*, ECLI:C:EU:2013:180, points 40–44.

18 Directive 2003/55/EC, *OJ* 2003, L 176/57.

19 The directive has now been replaced by the Third Gas Directive mentioned earlier, but the substantive rules of Art. 3, para. 3 of this directive and Annex I to it are the same on this point.

20 ECJ 21 Mar. 2013, C-92/11 *RWE Vertrieb AG/Verbraucherzentrale Nordrhein-Westfalen eV*, ECLI:C:EU:2013:180, points 45–49.

The first criterion cannot be met by a mere reference to the applicable legislation or compensated by informing the consumer at a later moment during the performance of the contract that the price will be changed, even if this information is provided in good time before the variation of the price takes effect and if the consumer is informed of his right to terminate the contract if he does not wish to accept the variation. Moreover, the right to terminate (the second criterion) is to be met *in addition* to the first criterion. Only by informing the consumer before the conclusion of the contract of the reason for changes to the price and the method for the calculation thereof *and* when the seller or supplier makes use of the right to unilaterally amend the contract price can the legitimate interest of the seller or supplier in being able to respond to a change of circumstances be balanced against the consumer's equally legitimate interest, first, in knowing and thus being able to foresee the consequences that such a change might in the future have for him and, second, in having the data available in such a case to allow him to react most appropriately to his new situation, the ECJ reasoned.²¹

In the - upon completion of this paper - most recent case on this matter, the *Kásler* case,²² the same pattern is followed. This case revolves around a loan agreement, secured by a mortgage, denominated in Swiss francs, whereas the loan advance and all payments were made in Hungarian forints, and the amount of the conversion rate was to be established by the bank unilaterally a few days before a payment would become due. Such a term could possibly constitute a core term. Under Article 4, paragraph 1, of the Unfair Contract Terms Directive, core terms are excluded from the unfairness test, provided that they are worded in clear and intelligible language. The Court of Justice first indicated that the requirement of plain and intelligible language in Article 4, paragraph 2, of the Directive has the same scope as that referred to in Article 5 of the Directive.²³ In the *RWE* case, the Court had already decided that it is of fundamental importance that the consumer has a reasonable opportunity to become acquainted with the terms of the contract and the consequences of the conclusion of the contract. For that reason, the Court reasoned in *Kásler*, the requirement of transparency of contractual terms 'cannot therefore be reduced merely to their being formally and grammatically intelligible', but rather must be understood in a broad sense.²⁴ In line with its decision in *RWE*, the Court then indicated that the term can only be

21 ECJ 21 Mar. 2013, C-92/11 *RWE Vertrieb AG/Verbraucherzentrale Nordrhein-Westfalen eV*, ECLI:C:EU:2013:180, points 50-53.

22 ECJ 30 Apr. 2014, C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282.

23 ECJ 30 Apr. 2014, C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, point 69.

24 ECJ 30 Apr. 2014, C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, points 67-72.

considered transparent if it enabled the consumer to foresee, on the basis of clear, intelligible criteria, which economic consequences derive for him from the term.²⁵ The national court must therefore determine whether ‘the average consumer’, on the basis of all relevant information, including the promotional material and information provided by the trader in the course of concluding the contract, would not only be aware of the existence of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed.²⁶ If the national court would find that the term is not transparent, the term is not excluded from the unfairness test and would most likely be considered to be unfair exactly because the consumer could not oversee its potentially significant economic consequences.

Again, the transparency principle is expressed as an instrument that requires the trader to enable the consumer to make a transactional decision. Where the term is insignificantly clear, it is likely to be unfair. The yardstick *whether* the term is drafted ‘in clear intelligible language’ is whether ‘an average consumer’ would understand the consequences of the term. This indicates that it is not so much the individual consumer, but rather the ‘typical’ consumer, who should be able to understand the meaning of the term. This is logical in the sense that standard contract terms are normally drafted for a multitude of contracts, and it is both uneconomic and practically impossible to take into account the differences between individual consumers. However, the level is set at a rather high level: the European notion of an ‘average consumer’, as developed in the *Gut Springenheide* case²⁷ and codified in the Unfair Commercial Practices Directive,²⁸ is a rather savvy, knowledgeable consumer,²⁹ whereas unfair terms legislation is rather based on the idea that the consumer is in a position of

25 ECJ 30 Apr. 2014, C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, point 73.

26 ECJ 30 Apr. 2014, C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, point 74.

27 ECJ 16 Jul. 1998, C-210/96 *Gut Springenheide GmbH/Oberkreisdirektor des Kreises Steinfurt*, ECLI:EU:C:1998:369, [ECR] 1998, p I-4657.

28 Directive 2005/29/EC, *OJ* 2005, L 149/22.

29 See on the notion of the average consumer critically the dissertation of B.B. DUIVENVOORDE, *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, available online at <http://dare.uva.nl>, search for ‘Duivenvoorde’ (last visited on 11 Jul. 2014). In this dissertation, Duivenvoorde challenges the benchmark, arguing that it prevents the goals of the Unfair Commercial Practices Directive from being reached. A commercial edition of this dissertation will be published by Springer.

weakness vis-à-vis the trader, as regards both his bargaining power *and* his level of knowledge, as the Court expressed even in the *Kásler* case.³⁰ This would seem to suggest that the notion of the ‘average consumer’ should rather *not* be set at the level of a person ‘who is reasonably well informed and reasonably observant and circumspect’.

From the cases discussed, it does follow that under the Unfair Contract Terms Directive the breach of the transparency principle is an element that must be taken into account when determining whether a term is fair or unfair. However, both the *Invitel* case and the *RWE* case seem to suggest that if a national court would find a term not to be transparent, then it is rather likely that the court should also find the term to be unfair as a result. In other words: the lack of transparency of a term is a strong indication that the term itself is unfair.

3. The Transparency Principle under CESL

3.1. *Trader’s Obligations to Provide the Other Party with the Standard Contract Terms*

From the interplay between Articles 30, 34, 38 and 39 CESL, one may deduce that standard terms must be agreed upon, but also that a mere reference to them in the offer suffices to incorporate them into the contract.³¹ However, Article 70 CESL provides that the trader may invoke the standard terms against the other party only if the other party was either aware of them or if the party supplying them took reasonable steps to draw the other party’s attention to them, before or when the contract was concluded. This provision applies both to commercial and consumer contracts and is mandatory in so far as the parties have opted for the application of CESL, paragraph 3 provides. According to paragraph 2 of the same Article, in a consumer contract a mere reference to the standard contract terms in the written contract is not sufficient in order for the business supplying the terms to be able to rely on them, not even if the consumer signs the contract document. However, there is not a clear-cut obligation for the trader to provide the standard contract terms to the consumer.

Since Article 70, paragraph 2, CESL is expressly restricted to B2C contracts, *a contrario* one may infer from this that in a *commercial* contract the mere reference to standard contract terms in the contract document would be sufficient for the supplier of the terms to be able to rely on them.³² This would

30 ECJ 30 Apr. 2014, C-26/13 *Kásler and Káslerné Rábai/OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, point 39.

31 Otherwise, the text of Art. 39, para. 1, CESL, which speaks of the situation where offer and acceptance ‘refer to conflicting standard terms’ (emphasis added, MBML) would not make any sense.

32 Cf. extensively M.B.M. Loos, ‘Standard Terms Regulation in the Proposal for a Common European Sales Law. Comment to Nils Jansen’, *Zeitschrift für Europäisches Privatrecht* 2012/4,

mean that for a commercial contract it would suffice that the other party expresses its consent to the use of standard contract terms in one way or the other for them to be binding on the other party, save the possibility to invoke the unfairness of the terms. This would be true even if the other party did not have an opportunity to become acquainted with the terms before the contract was concluded.

Even though there is no obligation under CESL to provide the standard contract terms as such, in particular in B2C contracts precontractual information obligations may require the trader to provide at least some of the terms before the contract is concluded.³³ In addition, implementing Article 10, paragraph 3, of the E-commerce Directive, Article 24, paragraphs 3 and 4, CESL requires the trader, where a distance contract is concluded by electronic means, to make the contract terms available on a durable medium by means of any support that permits reading, recording of the information contained in the text and its reproduction in tangible form. It adds to the provision of the Directive by requiring that the terms must be made available ‘in alphabetical or other intelligible characters’. This suggests that the standard contract terms must not only be provided but also be legible. In line with the scope of the E-commerce Directive, this provision applies also in case of a B2B contract.

3.2. *Transparency of Terms*

A more direct expression of the transparency principle may be found in Chapter 8 CESL on unfair contract terms. Article 82 paragraph (1) CESL provides that terms in a consumer contract must be drafted and communicated in plain and intelligible language. This provision is directly taken over from Article 5, first sentence, of the Unfair Contract Terms Directive, and different from its

p 780. Different apparently F. MÖSLEIN, ‘Kontrolle vorformulierter Vertragsklauseln’, in *Ein einheitliches Kaufrecht? Eine Analyse des Vorschlags der Kommission*, ed. M. Schmidt-Kessel (Munich: Sellier, 2012), p 274, who does not distinguish between B2B and B2C contracts, even though the scope of Art. 70, para. 2, CESL is expressly limited to B2C contracts.

33 The relevant provisions in CESL basically copy Arts 5 and 6 of the Consumer Rights Directive. For instance, in Art. 13, para. 1, introduction and under (d), CESL requires a trader concluding a distance contract or off-premises contract to provide a consumer with certain contract terms ‘in a clear and comprehensible manner’ before the contract is concluded. These terms then form ‘an integral part of the contract and shall not be altered unless the parties expressly agree otherwise’, para. 2 adds. Moreover, paras 3 and 4 add that if the contract is a distance contract, then the terms must be given or made available to the consumer in a way that is appropriate to the means of distance communication used, and if the contract is an off-premises contract, then the information must be given on paper or, if the consumer agrees, on another durable medium. Where the contract is concluded on business premises, only some contract terms need to be provided and only in so far as the conditions are not already apparent from the context. These terms, again, must be provided in a clear and comprehensible manner before the contract is concluded, Art. 20 CESL sets out.

counterpart in Article II.-9:402 of the Draft Common Frame of Reference (DCFR) but in accordance with Article 80 of the Feasibility Study prepared by the Expert Group,³⁴ its application is restricted to consumer contracts. In the DCFR, the duty of transparency is justified as a means to enable the party not supplying the term to assess what obligations and rights arise from the contract without having the need to invoke (legal) assistance.³⁵ It is hard to understand why that same argument would not apply also to commercial contracts.³⁶ Obviously, the question *whether* a term is drafted in plain and intelligible language may be answered differently in a commercial contract than in a consumer contract.³⁷ For instance, where two businesses operate in the same sector of business, they will normally not have any problem to understand jargon that is commonly used in that sector, whereas businesses that are active in different industries - a manufacturer of washing machines buys a new computer - may not always understand the jargon used by the other party, and a consumer will most of the time not be able to understand that jargon.

3.3. *Surprising Terms*

Under the information doctrine accepted in EU legislation, there does not seem to be much room for a rule on surprising terms. In order to rely on the standard contract terms, the trader must have taken reasonable steps to draw the other party's attention to the standard terms (Article 70 CESL), but this requirement does not imply that the trader must draw the other party's attention to specific terms included in his standard contract terms. Moreover, whereas the Expert Group instigated by the European Commission to prepare a preliminary draft of, what is now, CESL expressly suggested to include a provision on surprising terms - indicating that such a term is unfair unless expressly agreed by the other party³⁸ - a provision to this extent was not taken over by the European Commission. This suggests that the introduction of such a rule deliberately has been left out of CESL. Yet, for B2C contracts, the European Parliament has adopted an

34 The feasibility study was prepared by an Expert Group instigated by the European Commission to prepare a preliminary draft of, what is now, CESL. It is published by the European Commission as an annex to a report by the Commission and available online at http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf (last visited on 11 Jul. 2014).

35 Cf. C. VON BAR & E. CLIVE (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Full edition, (Munich: Sellier, 2009), Comment A to Article II.-9:402 DCFR, p 629.

36 In this sense also TH. PFEIFFER, 'Unfaire Vertragsbestimmungen', *European Review of Private Law* 2011, p (835) 848; MÖSLEIN 2012, pp 276-277.

37 VON BAR & CLIVE 2009, Comment B to Art. II.-9:402 DCFR, p 630; see also MÖSLEIN 2012, p 277.

38 See Art. 87 of the Feasibility Study.

amendment to the unfairness test of Article 83.³⁹ If this amendment is ultimately included in the final text of CESL (if it comes to that), the fact that a term is of such a surprising nature that the consumer could not have expected the proposed term to be taken into account expressly when assessing the unfairness of a term in a B2C contract. For B2B contracts, no explicit rule is included in the amendments of the European Parliament.

3.4. Sanction for Breach of the Transparency Principle

Under CESL, there is no direct obligation for the trader to provide the other party with his standard terms. However, one could argue that where CESL does burden the trader with the obligation to provide the other party with (some of) the standard contract terms and that obligation is breached, the trader has not taken reasonable steps to draw the other party's attention to these terms. That would then imply that under Article 70, paragraph 1, CESL he may not invoke such terms against the other party.

Moreover, CESL does not provide for an express sanction to a breach of the transparency principle either. Noteworthy is also that Article 83 paragraph (1) CESL merely provides that when assessing the unfairness of a term 'regard is to be had' to whether the trader has complied with the duty of transparency set out in Article 82 CESL. This does not cast much light on the exact effect of the violation of the principle of transparency: is this an important factor, implying that an unclear or incomprehensible term would usually be considered unfair, or is this just one of many circumstances that are to be taken into account, or does the violation of the transparency duty tip the balance when it is unclear whether or not a term is unfair? It seems likely that in this respect CESL merely reflects the existing *acquis communautaire*. Developments therefore should rather be expected from the case law of the Court of Justice than from the implementation of CESL.

4. Concluding Remarks

From the above, it will be clear that, although the principle of transparency of standard contract terms is recognized in European legislation, the extent thereof is somewhat limited. Since CESL merely reflects the existing *acquis* - even refusing to extend the scope of the requirement to draft the terms in plain and intelligible language to B2B contracts - it seems that nothing new is to be expected from CESL with regard to the transparency principle.

39 See amendment 156, introducing a new point ca to Art. 83, para. 2, CESL. The amended text is produced in: European Parliament, Texts adopted Part III at the sitting of Wednesday 26 Feb. 2014, P7_TA (2014)0159, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0159+0+DOC+XML+V0//EN&language=EN> (last visited on 11 Jul. 2014).

Under the *acquis*, an obligation to provide the other party with the standard contract terms may only be inferred from a (non-binding) recital in the preamble to the Unfair Contract Terms Directive and some specific provisions, but the case law of the Court of Justice seems to suggest that where the trader does not provide the terms to a consumer this implies that the terms do not meet the requirements of the transparency principle. A breach of that principle is to be sanctioned in the light of the unfairness test, but the recent case law of the Court of Justice points in the direction that the lack of transparency of a term is in fact a strong indication of the unfairness of the term, but all circumstances of the case need to be taken into account when applying the unfairness test. The surprising nature of a term may, under the same conditions, lead to the invalidity of the term.