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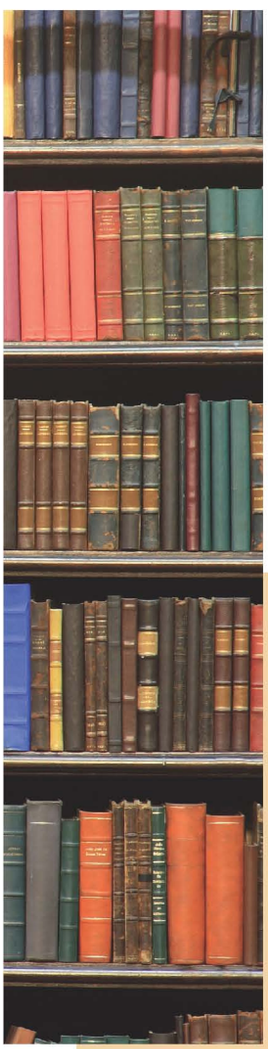
POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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LEGAL AFFAIRS

Unfair contract terms in B2C contracts

NOTE

Abstract

Because of its textual similarity to the Unfair Terms Directive 1993, Chapter 8 of the proposed CESL, on 'Unfair contract terms', can benefit from two decades of interpretative experience which is likely to provide a comparably high degree of instant legal certainty to contracting parties.

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CONTENTS

LIST OF ABBREVIATIONS

B2B	Business-to-Business
B2C	Business-to-Consumer
CESL	Common European Sales Law (proposal)
CJEU	Court of Justice of the European Union
EU	European Union
FS	Feasibility Study

EXECUTIVE SUMMARY

The text, structure and terminology of Chapter 8 CESL on 'Unfair contract terms' deliberately are quite similar to the Unfair Terms Directive 1993.

However, given the fact that the Unfair Terms Directive 1993 only provided for minimum harmonisation and that, in this respect, the self-standing nature that the Commission envisages for the CESL is functionally similar to full harmonisation, the European Commission had to make certain choices.

The black and grey lists contained in the CESL significantly increase legal certainty compared to the Unfair Terms Directive.

The wording of the unfairness test is deliberately close to the Unfair Terms Directive. Therefore, the interpretation by the CJEU of that directive will be relevant also for the interpretation of the CESL and vice versa, which should contribute to legal certainty with regard to both instruments.

1. BACKGROUND

In October 2011, the European Commission proposed a regulation of the European Parliament and of the Council on a Common European Sales Law (CESL).[1] The proposal is now before the Legal Affairs Committee of the European Parliament. In this context, the Committee organises a series of Workshops. With a view to those workshops the European Parliaments has requested a number of ad hoc briefing papers including the present one.[2]

This briefing note discusses unfair contract terms in business-to-consumer ('B2C') contracts. In particular, it provides, at the request of the European Parliament, 'critical replies to the following questions, based on the European Commission's proposal for a regulation on a Common European Sales Law':

1) 'Could you give a brief description, what is the meaning of 'unfair contract terms', notably what are the relevant categories, conditions and tests in relations between a trader and a consumer?'

2) 'How do you assess the relevant provisions in relation to existing EU law in terms of simplicity and legal certainty, as well as clarity of relation with national legislation? Would you have any suggestions for improvement in these regards?'

This note is structured in the following way: The first section explains the background against which the unfair terms provisions in the CESL must be understood and assessed. The second section analyses the unfairness test which is at the proposed regulation of unfair contract terms. The third section assesses the Commission's proposal in terms of simplicity, clarity and legal certainty proposal.

1.1. The Unfair Terms Directive 1993 and the 1999 Consumer Sales Directive

The laws of the Member States on unfair terms in consumer contracts were harmonised by Council Directive 93/13/EEC of 5 April 1993. That Directive was a minimum harmonisation measure: it left open for the Member States the possibility to provide consumers with a higher level of protection than required by the Directive.[3] Many Member States indeed adopted (or kept in place already existing) rules providing consumers further-reaching protection against unfair terms.[4] In 2008, the European Commission proposed a Directive on Consumer Rights.[5] Chapter V of that proposal, on 'Consumer rights concerning contract terms', was meant to broadly reflect the provisions of the Unfair Terms Directive 1993.[6] However, with a view to increasing legal certainty, the proposal contained two lists, a black list of

[1] *Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law*, Brussels, 11.10.2011 COM(2011) 635 final.
[2] JURI Request for three *ad hoc* briefing papers for a Workshop on the Proposal for a Regulation on a Common European Sales Law (Framework contract IP/C/JURI/FWC/2009-064/LOT1).
[3] See Article 8, Directive 93/13/EEC.
[4] For a detailed analysis, see H. Schulte-Nölke, C. Twigg-Flesner & M. Ebers (eds.), *Consumer Law Compendium; The Consumer Acquis and its transposition in the Member States* (Munich: Sellier, 2008), pp. 341 ff.
[5] Proposal for a directive of the European Parliament and of the Council on consumer rights, Brussels, 8.10.2008, COM(2008) 614 final.
[6] *Loc. cit.*, note 5, Explanatory Memorandum, p. 9.

terms which in all circumstances are considered unfair, and a grey list of terms which are deemed unfair unless the trader proves otherwise. The idea was that these lists would apply in all Member States and could only be amended by the comitology procedure provided for by the Directive.[7] After lengthy negotiations, eventually neither Chapter V nor the black and grey lists contained in the Annexes II and III to the proposal were adopted by the European legislator; the final text of the Consumer Rights Directive as it was adopted in 2011 does not contain any provisions on unfair terms.[8]

As a result, the *acquis communautaire* concerning unfair terms in consumer contracts has remained largely unchanged since the Unfair Terms Directive 1993 was adopted almost two decades ago.[9]

1.2. The proposal for a Common European Sales Law

Chapter 8 of the proposed CESL is dedicated to 'Unfair contract terms'. The chapter consists of three sections, containing eight articles in total. The focus in this note will be on the first two sections, containing general provisions and provisions on B2C contracts respectively; the third section does not concern us here since it relates only to B2B contracts.

Given the fact that the Unfair Terms Directive 1993 only provided for minimum harmonisation and that the objective of the proposal for a CESL is to make available a 'self-standing uniform set of contract law rules including provisions to protect consumers',[10] the European Commission had to make choices with a view to providing a comprehensive regulation of unfair terms in consumer contracts.

In this respect, the subject of unfair contract terms differs from certain other subjects that are part of the consumer contract law acquis, in particular the subjects that did make it to the final text of the Consumer Rights Directive, which aims at targeted full harmonisation. With regard to these latter subjects, which include, for example, information duties and withdrawal rights in distance and off-premise contracts (see chapters 2 and 4 respectively of the proposed CESL), the Commission could (and did indeed) limit itself to restating the rules contained in the Consumer Rights Directive without changing its substance.

[7] Ibidem, p. 10.

[8] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights. The only provision that relates to unfair terms is that of Article 22 on additional payments, which provides for a prohibition of payments in addition to the remuneration for the trader's main obligation where no express consent by the consumer has been given for such additional payments. In addition to this prohibition, the Article provides that where consent has been inferred by the trader's use of default options which have not been rejected by the consumer, the consumer is entitled to reimbursement of any such payments made. In fact, this provision thus bans terms that have not been individually negotiated and that require the consumer to conclude an additional contract for the supply of another good or service and to pay for such additional good or service. This provision has been taken over in Article 71 CESL (see below).

[9] It should, however, be noted that other consumer protection directives, most notably the 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, *Official Journal* 1999, L 171/12, also have an impact on unfair terms, as derogations of the rights conferred to consumers under such directives are often included in standard terms. The mandatory nature of these directives has the effect that such derogations operate as unfair and thus not binding terms. In this regard, it is important to realise that Article 7 paragraph (1) of the Consumer Sales Directive uses the same wording ('shall … not be binding on the consumer') as does Article 6 paragraph (1) of the Unfair Terms Directive.

[10] *Loc. cit.* note 1, Explanatory Memorandum, pp. 4 and 11.

1.3. Differences between the proposal and the feasibility study

- The European Commission's drafting was informed by the work of an Expert Group whose task was to develop a Feasibility Study (FS) on a possible future European contract law instrument. The text of the FS was made public by the European Commission. The main differences between the FS and the Commission's proposal on the subject of unfair terms in B2C contracts include the following: in the FS the current Article 82 (Duty of transparency in contract terms not individually negotiated) contained a second sentence pointing out that 'Terms are not presented in an accessible way if they are in a place where the consumer cannot be expected to find them.'[11]

- The FS did not, as Article 83 does, limit the unfairness control to terms that have not been individually negotiated.[12]

- The FS contained a rule to the effect that for the purpose of Article 83 a term is supplied by the business if a version of it was included in terms originally supplied by the business, even if it has subsequently been the subject of negotiations with the consumer.[13]

- The rule contained in the grey list, in Article 85 (w), was blacklisted in the FS.[14]

- The terms dealt with in Articles 70 (Duty to raise awareness of not individually negotiated contract terms) and 71 (Additional payments in contracts between a trader and a consumer) of the Commission's proposal, in Chapter 7 on 'Contents and effects', were considered unfair under the FS rules located in its Chapter 8,[15] while a rule which deemed certain surprising standard terms to be unfair was deleted altogether by the Commission.[16]

Some of these Commission choices will be further discussed below. Here it should be pointed out that each of these modifications made by the Commission to the FS text reduced the level of consumer protection (albeit sometimes only slightly).

[11] Article 80 FS.
[12] Article 81 FS.
[13] Article 81 paragraph 2 FS.
[14] Article 83 (h) FS.
[15] See Articles 86 and 88 FS.
[16] Article 87 FS.

2. THE MEANING OF 'UNFAIR CONTRACT TERMS'

This section provides a brief description of the meaning of 'unfair contract terms' in the sense of Chapter 8 of the proposed CESL. In particular, it addresses, as requested, 'the relevant categories, conditions and tests in relations between a trader and a consumer'.

2.1. General outline of Chapter 8 CESL and exclusions of the unfairness test

The regulation on standard terms in Chapter 8 CESL clearly builds on the content of the Unfair Terms Directive. The chapter consists of 8 articles: section 1 (art. 79-81) applies to all contracts which are governed by the Common European Sales Law, section 2 (art. 82-85) applies only to contracts between a trader and a consumer (hereinafter: B2C contracts) and section 3 (art. 86) applies only to contract where both parties are traders (hereinafter: B2B contracts). Articles 83 and 86 CESL contain the general clauses indicating when a clause in a B2C contract or a B2B contract is unfair. When it is established that a clause is unfair, article 79 paragraph (1) CESL indicates that such clause 'is not binding on the other party'. In this context, 'not binding' means not only that the consumer can successfully contest the term's effects, but also that the consumer does not even have to raise the unfairness in a dispute; the court must leave the term unapplied of its own motion.[17]

However, terms which reflect rules in the CESL itself are excluded from the unfairness control (Article 80 paragraph 1). This exception follows a similar exception in the Unfair Terms Directive, of which Article 1(2) provides that the Directive does not apply to contractual terms that reflect mandatory or regulatory provisions and provisions of international conventions. It should be noted that roughly half of the Member States have implemented this exclusion, whereas the other half have not.[18]

A second exclusion from the unfairness test concerns terms defining the main subject matter of the contract and the appropriateness of the price to be paid, in so far as the trader has complied with the duty of transparency set out in Article 82. This exclusion, too, is copied from the Unfair Terms Directive, in this case the provision of Article 4 paragraph (2). The 'main subject matter of the contract' refers to the obligation which is characteristic to the contract – in the case of a sales contract or a contract for the supply of digital content the goods that are bought and the digital content that is purchased, in the case of a related service the service that will be rendered. The price refers to the obligation that is to be paid in exchange of the characteristic obligation. The exclusion is based on the idea that, even though the parties may not have negotiated about the standard terms of business, they will

[17] See along line CJEU of cases starting with Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero and Others* [2000] ECR I-04941. The Court summarises and restates its position in Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi* [2009] ECR I-04713. On the relationship between the Directive (and its interpretation by the CJEU) and the CESL see further below Section 2.3.

[18] See Chr. von Bar, E. Clive (eds.), *Principles, definitions and model rules of European Private Law. Draft Common Frame of reference (Full edition), Volume 1*, Munich: Sellier European law publishers, 2009, Comment B at Article II.–9:403 DCFR, p. 648-649.

have either negotiated about these core terms of the contract or, at least, the consumer will have made an individual choice about the adequateness of the exchange. If the possible disparity between these core obligations would be considered by a court, this would imply that the court would have to evaluate the adequacy of the price (‘*iustum pretium*’). Such an intervention is not deemed acceptable in most Member States, but it is in a significant minority of Member States.[19] Under the present draft of Article 80 paragraph (2), the core terms may not be tested by the court when the CESL applies. In other words, agreed prices, even if one could consider them to be unfair, are binding on consumers, as long as they are stated in plain and intelligible language (and there is no defect of consent).[20] In our view, such an approach probably is most in line with the principle of freedom of contract, which underlies the whole of the CESL.

The provisions on unfair contract terms are mandatory: the parties cannot exclude the application of the Chapter or derogate from it or vary its effects (Article 81). (Moreover, in B2C a partial choice for the CESL is not permitted – see Article 8 paragraph 3 of the proposed Regulation.)

2.2. Article 83 CESL

Article 83 defines the meaning of ‘unfair’ in contracts between a trader and a consumer. The test contains, in paragraph 1, several elements and a preliminary condition.

First, there is the condition that the term ‘has not been individually negotiated within the meaning of Article 7’. This condition is controversial because it may lead to legal uncertainty in spite of the elaborate definition in Article 7: whether a term is individually negotiated remains largely a factual matter, to be proven by the parties. Moreover, it may focus litigation on the wrong question (whether the clause was individually negotiated rather than whether the clause was unfair). It was not present in the Feasibility Study (see Article 81 FS).[21]

If the condition nevertheless is adopted by the European Parliament and Council, it is not clear whether this condition should be placed here, in the definition of unfairness, or rather than in Article 80 (Exclusion from unfairness test), as it represents a ground for exclusion from the unfairness test rather than an element of the unfairness test itself.

Pursuant to the actual test then, a 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’. ‘Good faith and fair dealing’ are defined, in Article 2 of the proposed regulation, as ‘a standard of conduct characterised by honesty, openness and consideration for the interests of the other

[19] See Von Bar/Clive 2009, p. 649, who report that 9 Member States have enabled the possibility to monitor the balance between the main obligations.
[20] See Chapter 5 of the CESL.
[21] With regard to both aspects, it is important to realise that nowadays terms that may seem as individually negotiated for a specific contract, may very well have been pre-drafted and simply incorporated in the contract by the use of the functions of a word processor (either through the use of a macro or through the copy-and-paste-functions of the word processor), without this becoming apparent as the text may be in the same font and lay-out as the rest of the contract document, and terms may even look personalised – and thus appear to be individually negotiated – through simple tools as adding the name of the consumer at the appropriate places through the use of macros.

party to the transaction or relationship in question.' The notion refers to the requirement of 'good faith' in the Unfair Contract Terms Directive, but adds the element 'fair dealing' to that notion. As such, the notion of 'good faith and fair dealing' is taken from the Draft Common Frame of Reference (in particular Article II.–9:404 DCFR (Meaning of "unfair" in contracts between a business and a consumer), where it is used to bring the Article into line with other provisions of the DCFR.[22] In the Definitions preceding the text of the DCFR,[23] it is indicated that 'good faith and fair dealing' refers to an objective standard of conduct. It seems clear that the definition of the notion in Article 2 of the proposed regulation tries to identify what the required objective standard of conduct adds to the unfairness test in order to provide more legal certainty to the parties.[24] The wording of Article 2 of the proposed regulation follows the text of Article I.–1:103 Draft Common Frame of Reference (DCFR) (Good faith and fair dealing). The Comments to that Article articulate that the element 'honesty' has its normal meaning, whereas the reference to 'openness' denotes an element of transparency in a person's conduct. With the requirement 'consideration for the interests of the other party to the transaction or relationship in question', finally, is not meant that the other party's interests will have to be preferred, but a basic level of consideration will be required.[25] What consideration in a particular case is required will depend on the circumstances, including the nature of the contract – in the case of a one-off contract less may be expected than in the case where the parties have a long-standing relationship and where an element of trust has developed between the parties. Within the context of the contracts currently regulated in the CESL, particularly relevant will be the situation where the seller also provides related services – in which case a more personal relationship may exist between the parties – or where the consumer is more or less 'locked-in' to the relation with the seller, e.g. because of technical standards requiring the consumer to purchase further goods or digital content from the same seller or in the same format in order to be usable on the carrier provided to him.

In our view, the most important part of the definition refers to the (need for) consideration of the interests of the other party. Even though such a reference, by definition, is somewhat vague, it clearly indicates what elements a court has to look for when assessing the fairness or unfairness of a term. In other words, therefore, a term is unfair, and therefore not binding on the consumer, if it is so one-sided that it does not reflect due consideration for the interests of the consumer.

2.3. Relevance of CJEU case law on Unfair Terms Directive 1993

The wording of the test in Article 83 CESL is very similar to the wording of Article 3 of the Unfair Terms Directive 1999. This raises the question of how the case law of the Court of Justice of the European Union (CJEU) interpreting that Directive may be relevant for determining the meaning of provisions in the CESL, including, in particular, the unfairness test contained in Article 83 CESL, but also of the wording 'not binding on the other party' (i.e. the consumer) in Article 79 CESL, which is identical to the terminology of Article 6 paragraph 1 Unfair Terms Directive 1993.

[22] See Von Bar/Clive 2009, p. 634.
[23] The list of definitions applies for all the purposes of the DCFR, Article I.–1:108 DCFR (List of definitions) indicates.
[24] See Von Bar/Clive 2009, 'Definitions', p. 72.
[25] See Von Bar/Clive 2009, p. 89.

The similarity between the two tests (and the sanctions) obviously was a deliberate choice made by the Commission. At first sight this suggests that they should be interpreted as being identical. However, it should be reminded that the Directive merely means to indicate a minimum level of consumer protection that the Member States are obliged to introduce and maintain in their legislation, whereas the CESL is meant to become a self-standing uniform set of contract law rules including all the relevant consumer protection, i.e. the equivalent of full harmonisation.

Therefore, the better view seems to be that the standard contained in Article 83 of the proposal is meant to include *at least*, that is as a minimum, whatever is unfair in the sense of Article 3 of the Unfair Terms Directive 1993. This means that the case law of the CJEU interpreting that standard is relevant for the interpretation of Article 83 of the proposed CESL, at least as a minimum. Having said that, not all cases can be transposed directly and unconditionally into the context of the CESL. For example, the important *Freiburger Kommunalbauten* case,[26] where the CJEU ruled that the unfairness of a term must be determined in the light of the national rules that would apply if the term did not set it aside, must be understood in the context of the CESL as referring to the second national system, i.e. the CESL, and not to the first national regime (insofar as the matter is within the scope of the CESL).

[26] Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I-03043.

3. SIMPLICITY, CLARITY AND LEGAL CERTAINTY

This section assesses the relevant provisions in relation to existing EU law in terms of simplicity and legal certainty (3.1), as well as clarity of relation with national legislation (3.2).

3.1. Institutional environment

With regard to the control of unfairness of contract terms under the Unfair Terms Directive 1993 the Court of Justice of the European Union has had a deliberate hands-off approach. In particular, in *Freiburger Kommunalbauten*[27] the Court ruled that it is for the national court to decide whether a contractual term is unfair under Article 3 paragraph (1) of Unfair Terms Directive 1993. It did so on the basis of the following considerations:[28]

> 'It should be noted (...) that in referring to concepts of good faith and significant imbalance between the rights and obligations of the parties, Article 3 of the Directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated (...). (...)
>
> As to the question whether a particular term in a contract is, or is not, unfair, Article 4 of the Directive provides that the answer should be reached taking 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. It should be pointed out in that respect that the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law.
>
> It follows (...) that in the context of its jurisdiction under Article 234 EC to interpret Community law, the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question.'

These considerations do not apply in the same way to the Chapter on Unfair contract terms in the CESL. As said, under the CESL the national law to which consideration has to be given is the second national regime, i.e. the CESL itself, notably the non-mandatory rules contained in it from which the term under consideration deviates.

This may have far reaching institutional implications. For, while the Court with its *Freiburger Kommunalbauten* ruling effectively has avoided being flooded by cases, when it comes to interpreting Art. 83 CESL the Court will not be able to shift this case load to the national courts: when references for a preliminary ruling are made the Court will have to go into the substance of the question whether a certain type of terms actually is unfair. This means that there is a real risk that the work load of

[27] *Loc. cit.* note 20.
[28] Ibidem,

the Court will significantly increase when the CESL will come into force. That, in turn, may have important detrimental implications for legal certainty: if, because of the Court's increased workload, the parties have to wait ever longer for an answer to the question whether a certain type of clauses is unfair, that could make their contractual relationship become significantly more uncertain (irrespective whether in that particular case the parties had opted for the CESL or that the first national regime applies and the preliminary question was about the interpretation of the Unfair Terms Directive, or any other Directive for that matter). This raises the question whether the time has not come for the EU create a new Court of first instance (or a special new chamber of the General Court) for civil law cases.

3.2. Certainty and simplicity compared to Unfair Terms Directive

How well does Chapter 8 of the CESL in terms of simplicity and legal certainty when compared to the Unfair Terms Directive 1993?

The Unfair Terms Directive 1993 has raised many questions and there have already been several preliminary rulings by the CJEU. In these circumstances, the European Commission had a choice. It could either have proposed for the CESL a text that was simpler, settling a number of outstanding issues and thus providing more legal certainty, and that was well coordinated, also conceptually and terminologically, to the remainder the CESL. Or, it could stay as close as possible to the text of the Directive, which would have the advantage of the possibility to benefit from two decades of experience and interpretative solutions provided by the CJEU. The Commission clearly opted for the latter solution. The expert group in its Feasibility Study, starting also from the 1993 Directive had tried to simplify the text and to match it better terminologically with the other provisions in the CESL. A good example is the introduction of the provision on surprising standard terms (Article 87 FS), which not necessarily reflects an attempt to prevent the use of *unfair* terms in B2C contracts, but relates to the question whether or not a standard term has been incorporated into the contract. Similarly, give the difficulty of proving whether or not a term that was pre-drafted has been the subject of individual negotiations, the expert group chose to delete the requirement that a term may not have been individually negotiated in order for it to be considered unfair, and rather to focus on the question whether the term, in its original form, was supplied by the business (Article 81 paragraph (1) FS), and clarifying that if a term had been the subject of subsequent negotiations, it would still fall within the scope of the unfairness test (Article 81(2) FS). This would obviously have enlarged the scope of the unfairness test, but also have improved legal certainty as to the question whether or not the test was applicable if the parties had discussed the existence of a particular term, or even negotiated about its content, but ultimately had not changed the term.

However, the Commission reverted most of these changes with a deliberate view to bringing Chapter 8 as close as possible to the text of the Unfair Terms Directive 1993. The aim clearly was to benefit as much as possible form the interpretative certainty provided so far by the CJEU in relation to the Unfair Terms Directive. Even though the expert group's text is simpler and clearer and for that reason may provide more legal certainty in the long run, arguably the Commission's choice for continuity with the wording of the Unfair Terms Directive is likely to provide more instant predictability of interpretation which may increase businesses' inclination to opt into the CESL.

In addition, while thus leaving the general framework unchanged the proposal significantly enhances legal certainty compared to the Unfair Terms Directive by adding the black and grey lists contained in Articles 84 and 85. These lists will make the interpretation of the very general and open ended concept of unfairness in Article 83 (see above, Section 2.2) much more predictable than is currently the case under the Unfair Terms Directive. It should be remembered, in this regard, that the list of clauses contained in the Annex to the Directive not only is much shorter than the grey and black lists contained in the Articles 84 and 85 of the proposed CESL, i.e. 17 compared to (11+23 =) 34 respectively, also, and more importantly, the list contained in the Annex to the directive is only an indicative, non-binding list and therefore did not have to be transposed, as such, into national law.[29] Given the fact that most sellers for whose use the CESL was designed are likely to sell under general terms of business and given the fact that they will wish to draft these standard terms respecting as closely as possible the relevant legal provisions, here the CESL will offer sellers a crucial benefit when compared to a choice (active or passive, through conflict of law rules) for national law (i.e. the first national system): as many national laws do not contain black or grey lists, under these laws the application of the unfairness test is much more unpredictable then under the relevant provisions of the CESL: under the CESL, the open clause is accompanied by the black and grey lists, which provide clarity as to the question which clauses are in any case unfair (blacklisted clauses) and which are normally unfair, but could be justified by the trader in a particular case (grey listed clauses). Where such lists are missing under national law, even for such 'clear' cases of possibly unfair terms a court would have to weigh all circumstances of the case, taking into account many factors the parties themselves may not even have realised as being relevant to the question whether or not a term is unfair. Moreover, since the contents of the national black and grey lists, where they do exist, differ from country to country, the risk of (good faith) non-compliance of the seller's standard terms with unfair terms regulation is multiplied in cross-border situations, whereas the CESL provides for a uniform set of black- and grey listed terms that would be applicable in all Member States. An additional advantage of the use of, in particular, a black list of unfair terms, is that it clearly facilitates the possibility for consumer organisations and a public authority to combat the use of unfair terms in B2C contracts by using collective action mechanisms and, if need be, for the public authority to use alternative means, e.g. to impose an administrative fine.

A potential source of legal uncertainty, however, is the restrictive definition of the concept of 'consumer' in Article 2 sub f of the proposed Regulation in combination with so-called radiation-effect (*Ausstrahlungswirkung*) of the proposed black and grey lists. According to the definition, a consumer is a natural person who is acting for purposes which are outside that person's trade, business, craft, or profession. In case of mixed-purpose contracts – e.g. a person buys a suit to wear both at a wedding and professionally, a suitcase to be used for holidays and business travels, a desktop computer to be used as word processor and for online gaming – the contract is also concluded for professional purposes, which suggests that the buyer is not a consumer but a trader. In many legal systems with black and grey lists, in such cases the courts have interpreted the general unfairness-test in such manner that the fact that a clause is blacklisted or grey listed for 'proper' consumer contracts, counts as an important factor for determining whether that clause is also

[29] See explicitly the preliminary recitals to the directive 'for the purposes of this Directive, the annexed list of terms can be of indicative value only') and CJEU 7 May 2002, case C-478/99, [2002] *ECR,* p. I-4147 (*Commission/Sweden*).

unfair in cases where the buyer is not formally a consumer but nevertheless is comparable to a consumer, e.g. in the case of a mixed-purpose contract where the professional use is 'not insignificant', but nevertheless not predominant.[30] Whether under the application of the CESL a similar development will follow, is uncertain. As these contracts are formally considered to be B2B contracts under the CESL, we will not further develop this point.

As indicated above (Section 1.1), the original proposal for the Consumer Rights Directive contained provisions largely reflecting the provisions of the Unfair Terms Directive 1993. Article 31 paragraph 1 of that proposal added to the transparency principle as regulated under the 1993 Directive that the 'contract terms shall (…) be legible'. These additional words have not been taken in Article 82 CESL (nor in Article 80 FS), but were introduced in Article 14 paragraph 1 for distance and off-premise contracts, and Article 20 paragraph 1 sub d for on-premise contracts, both to be read in conjunction with Article 13 paragraph 1 sub d CESL. For reasons of clarity and legal certainty it would seem proper to add the same phrase also to the text of Article 82 CESL.

3.3. Clarity of relation to national law

The relation of the CESL to national law is relatively straightforward. Strictly speaking, according to the proposal the CESL will itself be (or apply as) national law, i.e. as a 'second national regime'. See the Explanatory Memorandum:[31]

> 'the Common European Sales Law... is to be considered as a second contract law regime within the national law of each Member State'

The relationship between the second national regime (i.e. the CESL) and the remainder of national law is also quite clear. In the case of a valid and effective choice for the CESL, the national rules covering the same subject (i.e. the first regime), in this case unfair contract terms, will not apply, if these rules would provide a different level of consumer protection (be it higher or lower) than the CESL (think, for example, of more extensive black and grey lists, or the absence of such lists, under national law). See explicitly Article 11 (Consequences of the use of the Common European Sales Law) of the proposed regulation:

> 'Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules.'

May there nevertheless be any residual role to play for national law? That is not entirely excluded. In several Member States, terms have been policed not only on the basis of specific unfair terms legislation but also on the basis of general doctrines of good faith and fair dealing and of immorality. Whereas the effect of general good faith clauses in national civil codes will also be neutralised by Article 11 of the Regulation since the duty of good faith and fair dealing is a matter addressed in the rules of the CESL, in Article 2 to be precise, this is not the case for doctrines of immorality. See explicitly the proposed preliminary recital 27:

> 'All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under

[30] Cf. CJEU 20 January 2005, case C-464/01, [2005] *ECR*, p. I-439 (*Gruber/Bay Wa*)
[31] *Loc. cit.* note 1, Explanatory Memorandum, p. 6.

Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include (...) the invalidity of a contract arising from (...) immorality'.

The recital only mentions the invalidity of the entire contract on the ground of immorality. However, as said, the application of doctrines of immorality of contract in the Member State laws is not limited to policing entire contracts; it can also focus on certain immoral clauses. In practice, the most obviously immoral clauses are already blacklisted by Article 84. Think, in particular of clauses excluding or limiting liability for death or personal injury (Article 84, sub a) and loss or damage caused deliberately or through gross negligence (Article 84, sub b). Nevertheless, the fact that the invalidity of contract clauses on the ground of immorality, in the Commission's proposal, remains outside the scope of the CESL will lead to some legal uncertainty and will make the instrument become less self-standing. An example is a penalty clause, which is merely grey listed (Article 85, sub e), but which is considered to be unenforceable for reasons of public policy in England and Wales.

Another residual role for national law in the area of unfair terms regulation remains with regard to subjects that are not covered in the CESL and where the seller's standard terms derogate from the applicable national law. An example is a clause under which title in the goods passes at delivery. As the moment of passing of ownership is not covered by the CESL, whether or not such a clause derogates to the detriment of the consumer from the otherwise applicable legal provisions is to be determined on the basis of national law (i.e. the first regime). Whereas such a clause may be simply reflecting the law where national law indicates that ownership only passes at delivery, it operates as a retention of title clause in national systems where ownership would otherwise pass when the contract is concluded. This suggests that the clause may be considered unfair in the Member States where ownership otherwise would have passed at the moment when the contract is concluded, and fair in the Member States where ownership passes at delivery.

A final word on the relation between the CESL and national law pertains to the exclusion of the unfairness test in Article 80 paragraph (1) of the CESL. As indicated above, this provision excludes terms which reflect rules in the CESL itself from the unfairness control. Whereas this exclusion may be applied without much difficulty in the national context and in the DCFR, as both national contract law and the DCFR contain a more or less comprehensive system of rules that apply to contractual relations, the exclusion raises particular concerns within the context of the CESL. Currently, Article 80 paragraph (1) CESL only indicates that terms that reflect provisions of the CESL are excluded from the scope of the unfairness test. The interplay between the provisions of the CESL and those of the otherwise applicable national law requires clarification whether the exclusion also applies with regard to the possibility to test contractual terms that reflect (in the wording of the Directive) 'mandatory or regulatory provisions' of the national contract laws of the Member States and provisions of international conventions, in areas that have not been regulated in the CESL. This is particularly relevant since the corresponding exclusion of Article 1 paragraph (1) of the Unfair Terms Directive is implemented in roughly half of the Member States, but not in the other half.[32] If this matter is not clarified, there is a substantive chance that in the Member States that have implemented the

[32] See Chr. von Bar, E. Clive (eds.), *Principles, definitions and model rules of European Private Law. Draft Common Frame of reference (Full edition), Volume 1*, Munich: Sellier European law publishers, 2009, Comment B at Article II.–9:403 DCFR, p. 648-649.

exclusion in their (first) national contract law, the unfairness test under the CESL would not be applied to terms reflecting the applicable national law, whereas the test could be applied in Member States that have not implemented the exclusion in their (first) national contract law. In this respect, it should be noted that with regard to matters not regulated in the CESL, the applicable national law will indicate whether a term is in accordance with that national law, but the court hearing the case may be located in another Member State, and the first Member States may have implemented the exclusion of the Directive whereas the second may not, or vice versa. In our view, the CESL should clearly indicate whether or not this additional exclusion of the unfairness test applies. Secondly, if it were decided that the exclusion of terms reflecting 'mandatory or regulatory provisions' of national contract law is to be added to the exclusions of the unfairness test, we believe that the term 'mandatory or regulatory provisions' requires reconsideration. In particular, it is unclear whether terms reflecting default rules of national contract law are included in the exclusion. Article II.–9:406 DCFR (Exclusions from the unfairness test) uses the – much clearer – expression 'provisions of the applicable law', indicating that, both terms that are in agreement with mandatory law and terms reflecting default rules of national law are excluded from the unfairness test.

CONCLUSIONS AND SUGGESTIONS

In conclusion, our assessment of Chapter 8 of the proposed CESL in terms of simplicity and legal certainty, as well as clarity of relation with national legislation, is positive.

The wording of the unfairness test is deliberately close to the Unfair Terms Directive 1993. Therefore, the interpretation by the CJEU of that Directive will be relevant also for the interpretation of the CESL and vice versa, which should contribute to legal certainty with regard to both instruments.

In addition, the black and grey lists contained in the CESL significantly increase legal certainty compared to the Unfair Terms Directive.

Therefore, with a view to clarity, simplicity and legal certainty, we only have one suggestion to make: Article 80 paragraph (1) CESL should clarify whether terms reflecting the applicable national rules and provisions of international conventions, in areas that have not been regulated in the CESL, are excluded from the scope of the unfairness test or not. In a broader sense, in particular if we include the institutional environment, we would suggest for the EU legislator to reconsider its judicial organisation and ask itself whether the time has not come for the introduction of a new court of first instance for civil cases or a new special branch of the General Court entirely dedicated to private law cases.

If the European Parliament wants to further increase the level of consumer protection, an important question which, however, was not explicitly asked to us for the present report, we suggest for European Parliament to consider restoring some of the rules as they were formulated in the Feasibility Study before they were modified by the European Commission. Within the scope of B2C-contracts, such modifications could include, in particular, reconsidering (1) the limitation of the unfairness control to not individually negotiated terms (Article 81 FS, now Article 83 CESL), (2) the deletion of the provision of Article 81(2) FS that, for the purposes of Article 83, a term is supplied by the business if a version of it was included in terms originally supplied by the business, even if it has subsequently been the subject of negotiations with the consumer, (3) the deletion of the paragraph on the presentation of the terms regarding the duty of transparency (Article 80 FS, now Article 82 CESL) and (4) the deletion of the provision on surprising standard terms (Article 87 FS). These changes to the text of the Feasibility Study have not been explained by the European Commission and appear to have been introduced only in order to stay closer to the text of the existing Unfair Terms Directive. Moreover, as some of the proposals in the now changed text of the Feasibility Study have a firm basis in national contract laws, these changes could effectively lead to a decrease in consumer protection on these points in Member States.

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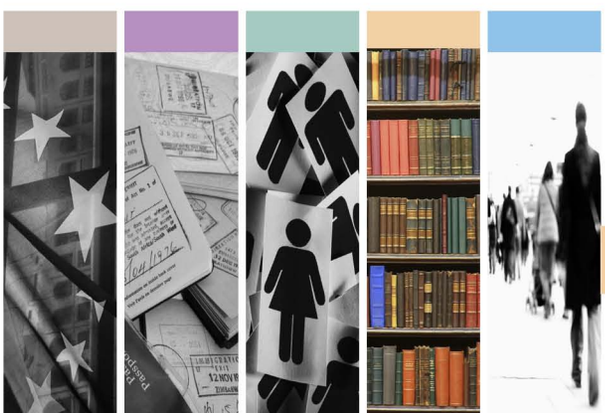

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