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DRAT REPORT 2011/0284 (COD) of the Committee on Legal Affairs on the Proposed Common European Sales Law (CESL)[1]

As I will address issues of the Draft Report from the standpoint as a lawyer, it seems helpful to only focus on some practical topics that have also been mentioned in the attached "Explanatory Statement",[2] namely scope, good faith and fair dealing and finally remedies of the buyer.

1. Scope

1.1 Of course, there is hardly any doubt that the use of CESL in distance contracts[3] will certainly play a decisive role in the future, be it in b2b or b2c-contracts. Given the reservations and, even stronger, the rather destructive attitude of a number of Member States in the Council it could seem politically wise to restrict the application of CESL mainly to distance contracts. Whether this assumption, however, is a fair statement of facts, I do not know.

This having said, I take it that the drafters expressly have invited the general public to open a debate on the issue of scope.[4] The "Explanatory Statement" holds that "further work and analysis"[5] will be required in order to secure the full adaptation of CESL as proposed by the Commission in Art. 5,7 and 9[6] and – hopefully – underlines that the results of such further analysis "could be fed into the ongoing legislative process"[7].

At present, however, it seems – legally speaking - very doubtful whether it is sensible to restrict the application of CESL mainly to distance contracts as proposed in the Draft Report. I may remind the audience that the CCBE, representing more than one Million lawyers, has always favoured the use of CESL in all those sales contracts that were proposed by the Commission in the Artt. 5, 7 and 9.This still is my position.

1.2 Apparently, also the drafters themselves seem to have some doubts whether the restriction of the scope of CESL to distance contracts can and should fully be upheld, as there are at least three significant exceptions.

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[1] All comments contained in this paper represent strictly the opinion of this author only, they may not be attributed to the CCBE or its „Committee on European Private Law", as they have not yet debated the Draft Report.

[2] Draf Report, dated February 18, 2013, 2011/0284 (COD), p. 113/117 (hereinafter „Draft Report"). The CCBE-position can be found in the "CCBE-Position Paper on the Proposal for a Regulation on a Common European Sales Law (COM (2011) 0635), dated September 7, 2012.

[3] Draf Report – Art. 5 – para 1 – p. 35/117.

[4] Draft Report p. 36/117.

[5] Draft Report p. 114/117.

[6] All references to articles in this paper are to the respective provisions of CESLR or CESL.

[7] Ibid.

1.2.1 The drafters maintain in the "Explanatory Statement" as a justification for the restriction of the scope of CESL to distance contracts that there are still significant deficiencies in the Draft of the CESL, as presented by the Commission.[8] This may very well be so. But then the question arises whether any still existing problem areas of CESL will not see the light of the day in all those – exceptional - cases where the Draft Report enlarges the scope of CESL to cases where further elements have been added to the overall requirement of a distance contract. These cases are by no means insignificant.

1.2.2 First, in Art. 5 – para 1a – of the Draft it is stated that the CESL may also be used in such cases, where "the contract itself was not concluded by means of distance communication"[9]. It is somewhat hard to swallow the "justification" of this amendment offered by the drafters, namely that "it appears to be random to exclude those cases from the use of the CESL"[10]. The exception offered by the amendment in the Draft Report – in my view - will carry a significant practical importance in b2b-contracts. In these instances it is rather usual that the parties in a cross-border-transaction finally will meet face to face and sign the contract, after they had prepared the respective contract by the use of means of distance communication. Thus, any deficiencies of CESL will see the light of the day in all these cases.

1.2.3 Second, Art. 6 – para 1 – of the Draft now amends and thereby enlarges[11] the scope for the use of CESL to "linked and mixed purpose contracts". These contracts are defined in this Article as a "contract other than a sales contract, a contract for the supply of digital content or a related service contract". Generally speaking, this amendment makes quite some sense from a practical viewpoint,[12] as it includes sales contracts "mixed with a credit or linked with a credit agreement"[13]. This enlargement is vital for the practical acceptance of CESL.

1.2.4 This exception goes even further if one addresses Art. 6 – para 1 lit. b) – of the Draft Report. This provision holds that the rules of CESL will also apply in a contract that "includes any element other than the sale of goods, the supply of digital content or the provision of related services". The salient proviso is that the respective elements must be "divisible and their price can be apportioned".

1.3 Consequently, it is somewhat contradictory that the drafters of the Draft Report on the one hand maintain that there are deficiencies that need "further work and analysis"[14], whilst on the other hand – rightly so – they enlarge and clarify the scope of the CESL and thereby give up any rigid restriction to distance contracts.

1.3.1 But from a practical viewpoint – and in line with what has been resolved by the CCBE in its position paper on CESL – it need to be stressed that the Parliament shall not underestimate the extreme importance of what has been said in Recital 34 c[15]. There it

[8] Draft Report p. 114/117.
[9] Draft Report p. 36/117.
[10] Ibid.
[11] Draft Report p. 37/117; vide the use of the word „also" in Art. 6 para 1.
[12] Vide Wendehorst, in Schulze, CESL, Commentary, Baden-Baden 2012, Art. 6 Note 12.
[13] Draft Report p. 37/117.
[14] Draft Report p. 114/117.
[15] Draft Report p. 20/117.

is held that the Commission should "work towards the development of European model contract terms".

1.3.2 Such model contract terms will be of enormous help for any trader, as it will offer a reliable instrument containing fair and equitable standard terms for b2c and b2b-transactions. There is no doubt that such terms will also to a very high extent mitigate any deficiencies of CESL, as they will offer reasonable solutions for day-to-day-conflicts without directly taking resort to the provisions of CESL.[16]

1.4 Thus, my conclusion in light of the broad exceptions of Art. 5 and 6 of the Draft Report is that – as a matter of fact – there is already today no general limitation of the scope of CESL to distance contracts. Furthermore, any deficiencies of CESL that, in the minds of the drafters, need to be further analysed will in practice only play a minor role in view of model contract terms[17] that will be supplied by the Commission for b2c and b2b-transactions in all European languages. This conclusion is strongly supported by Recital 34 a[18]. Pursuant to this provision the Commission shall also furnish a commentary providing "clarity and guidance" on the use of CESL. All in all, I still favour the alternative that the scope of CESL shall not mainly be restricted to distance contracts, but that the proposition of the Commission in Art. 5 shall be upheld.

2. Good Faith and Fair Dealing

The CCBE always was in favour of the incorporation of the principles of good faith fair dealing and fair dealing in the CESL.[19] Furthermore, the CCBE welcomed that general terms and conditions should be held invalid insofar as there were unfair, not only in b2c, but also in b2b-transactions. There was a general approval of the definition of good faith and fair dealing in Art. 2; and the CCBE also supported the propositions of the Commission in Art. 83 – 86.

This having said, my arguments take the following lines:

2.1 The new definition of good faith and fair dealing in Art. 2 para fe) of the Draft is inconsistent and raises concerns regarding its practical application.[20]

On the one hand the definition of good faith and fair dealing requires, as proposed by the Commission, "a conduct characterized by honesty and openness with regard to the other party". The Draft Report now has deleted the words "consideration of the interests" of the other party and has inserted quite a different parameter, namely that such conduct of honesty and openness shall "exclude an intention the only purpose of which is to harm"[21]. In practical terms, this latter concept is nothing else than the self-explaining idea that "no party should abuse its rights".[22]

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[16] The CCBE-Position Paper (Footnote 1) related the proposal of the Commission for official comments and model standard contract terms mainly to the issues raised by the concept of good faith and fair dealing.
[17] Recital 34 c.
[18] Draft Report p. 19/117.
[19] See Footnote 1).
[20] Vide also Schulte-Nölke, in Schulze, supra, Art. 2 Note 10 sequ.
[21] Art. 2 para fe, p. 27/117.
[22] Draft Report p. 27/117.

In analysing the amended Art. 2 para fe) I thus conclude that there is a clear discrepancy and an almost flagrant inconsistency between the standard of "honesty" and openness" on the one hand and the lack of an intention to follow a conduct that might and almost certainly will harm the interests of the other party on the other hand. Both standards within the overall meaning of good faith are clearly irreconcilable.

2.2 Even stronger, the new amendment, as proposed in the Draft Report in Art. 2 para fe), renders the entire concept of good faith and fair dealing unworkable. It is my considered opinion that the "former" concept of Art. 2 lit b) that included the element of "consideration of the interests" of the other party as being a vital part of the overall concept of good faith and fair dealing was by no means designed to prevent a party from following its own interests in negotiating any contract.

2.2.1 In my reading and interpretation of this Article[23], the core element of such "consideration of the interests of the other party" was to offer a guideline for drafting and adjudicating any standard terms of contract pursuant to the unfairness test in Art. 83 and 86. The internal and systemic link between the definition of good faith and fair dealing in Art. 2 lit. b) and the respective unfair tests in Art. 83 sequ. is evident, as the latter provisions expressly refer to the standard of good faith and fair dealing. Thus, any lowering of the standard of good faith and fair dealing has a direct effect on the fairness of standard contract terms, both in b2c and b2b-transactions. This is simply not acceptable. The reasons to be given are the following:

2.2.1.1 First, one has to take into account that a trader who drafts and then supplies any standard contract terms thereby fully makes use of its freedom of contract. However, by the same token, he will restrict the – equal – freedom of contract of the other party to the simple choice of "take it or to leave it". This salient element of contract law is reflected in Art. 83 and in Art. 86, as there is an express reference to Art. 7. This provision relates to an "individually negotiated" term, thereby requiring the drafter of to grant to the other party the chance to influence the respective contract term according to its own interests in line with its contractual freedom. Thus, if the supplier of standard terms does not grant such an opportunity to the other party, then there is – as a matter of fact - a considerable lack of "openness" and good faith on the part of the supplier of the standard contract terms pursuant to Art. 2 lit b).

2.2.1.2 Thus, the party supplying such terms simply may not and shall not use its own contractual freedom and is not allowed to simply follow its own interest when negotiating a contract. Art. 83 and Art. 86 prevent the supplier of standard contract terms from doing so, provided that these terms are held to be unfair.

2.3 Moreover, any unfair standard contract term will then and must be adjudicated as evidencing a lack of "consideration of the interests" of the other party. The reason for so arguing rests on the finding that any such term supplied to the other party is necessarily and almost solely influenced by considerations that are beneficial to that party itself, as they will deviate from the general standard of Art. 80. This Article excludes the applicability of the unfairness tests of Art. 83 sequ., if and insofar as the standard contract terms simply reflect the "rules" of CESL. These rules are seen as equitably balancing the interests of both parties.

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[23] Vide Graf von Westphalen NJOZ 2012, 441 sequ.

2.4 Such lack of "consideration" of the interests of the other party, reflected in the standard contract terms supplied by one party, will in a vast number of cases create a "significant imbalance of the rights and obligations" of the parties arising out of the respective contract (Art. 83) or "grossly deviate from good commercial practice" pursuant to Art. 86.

2.5 Thus, in order to properly adjudicate any standard contract term as being unfair pursuant to Art. 83 sequ., there is simply the logical need to insert into the general concept of good faith and fair dealing contained in Art. 2 b) the element of due "consideration of the interests" of the other party.

2.6 If, however, the amendment of Art. 2 para fe) of the Draft Report were to be accepted, there would be a harsh contradiction to the established regime of Art. 3 of the Directive 93/13/EWG, as the – unrestricted - concept of good faith is considered to be the decisive benchmark of its unfairness test.[24] This concept, as developed by many ECJ-decisions,[25] does not accept any conduct deemed to be in line with the requirements of good faith in Art. 3, if – to use the words of the Draft Report - it only falls short of demonstrating an intention by the trader to harm the consumer. Consequently, there will also be a gross conflict between Art. 6 Rome I on the one hand and the amended version of Art. 2 para fe) of the Draft Report on the other hand.

2.7 Furthermore, the Draft Report holds that the proposed amendment of good faith and fair dealing Art. 2 para fe) shall also be reflected in the new version of the unfairness test in b2b-transactions of Art. 86.[26] In this Article the Draft Report has changed the word of "good commercial practice" into the "customary commercial practice". However, both versions of the unfairness test of Art. 86 CESL and in the Draft Report require that such commercial practice must also be "contrary to good faith and fair dealing".

2.8 In my opinion the change of the word "good" to "customary" commercial practice in Art. 86 is not acceptable for the following reasons:

2.8.1 Apparently both elements – "customary practice" and "good faith and fair dealing" - must be met in order to adjudicate any standard contract term as being unfair in a b2b-transaction pursuant to Art. 86. Thus, if any such term is deemed to be "customary", e.g. a full-fledge disclaimer of liabilities of consequential damages, including loss of profit in a large sales contract, then Art. 86 will not come into operation, even though there might be some arguments that the rigidity of any such disclaimer would violate the principles of good faith and fair dealing leaving the damaged party without redress. But if the supplier of such contract term then is able to argue and to demonstrate that he had had no intention to harm his counter-part pursuant to the amendment of Art. 2 para fe) of the Draft, then there will also be no infringement of the requirement of good faith and fair dealing. Thus, the disclaimer will be held to be fair and valid.

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[24] Wolf, in Wolf/Lindacher/Pfeiffer, AGB-Recht, 5th edi., Munich 2010, Art. 3 Note 12.
[25] EuGH C-137/08, EuZW 2011, 27 – Pénzügyi; EuGH C-618/10, NJW 2012, 2257 – Banco Espanol.
[26] Draft Report p. 73/117.

2.8.2 Then, the pertinent legal question will arise whether any such disclaimer being held to be "customary" can – legally speaking - be validly held as being part of the programme of fair dealing, even though such unilateral disclaimer deprives the other party of the fundamental rights laid down in Art. 87 para 2. This provision rests on the basic understanding that no party shall be entitled to "substantially" deprive the other party "of what that party was entitled to expect under the contract". If that legal conclusion were to be accepted as being "customary", then the equilibrium of rights and obligations will be fundamentally destroyed – a result that simply cannot legally be upheld on the basis of good faith, regardless of any "customary" commercial practice.

2.8.3 Furthermore, the factual connotation and implication whether any conduct of a party is held to be a "customary" commercial practice or not, necessarily has to be based on an autonomous interpretation pursuant to Art. 4. Given the divergent standards of the unfairness test in b2b-transactions in the Member States, it will be extremely hard to find any common denominator in the foreseeable future.

2.8.4 Thus, this factual element of a "customary" commercial practice inserted into the unfairness test of Art. 86 is severely damaging the entire concept of good faith and fair dealing, as a necessary basis for adjudicating any standard contract term as being unfair.

2.9 The essence of this conclusion is strongly supported by Article 7 of the Late-Payment-Directive 2011/7/EU.[27] Pursuant to this Article any belated payment shall be held to be "grossly unfair", if it deviates "from good commercial practice and good faith". If one were to accept the amendment of Art. 86 in the Draft Report, thereby replacing the word "good" by "customary", then two further questions need to be answered:

2.9.1 First, why should the test of unfairness in Art. 7 of the said Directive should become operative for late payments only, whilst a different standard on the basis of a much lower test were to be applied pursuant to Art. 86 in cases of unfairness of any standard contract terms? Is it not much more convincing and equitable to apply the same standard in Art. 7 of said Directive and also in Art. 86 for all standard contract terms, including payment conditions, as has been provided for in the CESL?

2.8.2 Second, Art. 7 of said Directive is applicable also for individually negotiated unfair payment terms, whilst Art. 86 only applies for unfair standard contract terms, not for those terms that have been individually negotiated. Thus, in accepting the amended version of Art. 86 the unfairness test of standard contract terms in b2b-transactions would be much more generous than the test pursuant to Art. 7 of the Late Payment Directive for payment terms individually agreed upon. This, clearly, is highly contradictory and not acceptable.

2.9 Finally, I want to underline that I have no particular objections concerning the amendment to Art. 2 para 2 in the Draft Report insofar as there will be no remedies available to the creditor in case of a breach, i.e a non-performance of a duty arising out of the principles of good faith and fair dealing. I am not yet a fierce partisan of the so called "sword-doctrine"[28]. But this theory does not cause too much harm, as long as

[27] ABl. L 48/1.
[28] Vide Schulte-Nölke, in Schulze, supra, Art. 2 Note 10.

the underlying principles of good faith and fair dealing are upheld, as presented in the version of Art. 2 lit. b) of the Commission. Thus, I can live with the so called "shield"-doctrine in line with the amendment in Art. 2 para 2 of the Draft Report.

3. Remedies

3.1 The CCBE-position, supported by a majority of the national delegations, concerning the intricate issues of remedies of the buyer in Chapter 11, namely the lack of a hierarchy of rights available to the consumer in case of a breach of contract, was to fully support the proposition made by the Commission.[29] As the drafters, however, have offered three alternatives of amendments in their "Explanatory Statement"[30], I would like to briefly comment and offer my personal views in this respect.

3.2 In regard of Chapter 9 of CESL I take it that the high level of consumer protection is an essential part of CESL. I also want to underline that the coherence of the amendments in the Draft Report have cleared the relation to Rome I in a sensible manner. This having said, my personal preference rests with the second alternative offered in the "Explanatory Statement"[31]. Therefore, the consumer should be required to give notice within a reasonable time – e.g. one month – after he first became aware of the non-performance of the seller. If the consumer fails do so comply with this deadline, then he will be barred from being entitled to terminate the contract due to such non-performance. Such loss of right is in line with the overall principle of Art. 2 holding that any creditor shall observe a conduct in consideration of the interests of the other party.

[29] Vide Footnote 1).
[30] Draf Report p. 115 sequ./117.
[31] Draf Report p. 116/117.