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1. Introduction

From the turn of the century, the field of EU contract law and EU consumer contract law has undergone a rapid and colorful transformation to say the least. In the ensuing chapters, we will embark on a journey in which we will explore this eventful transformation which has ultimately culminated in a proposal for a Common European Sales law which is to be transposed into the national contract laws of the Member States and EEA/EFTA States. This Common European Sales Law is intended to provide a second regime of contract law – parallel to the individual contract laws of the Member States and EEA/EFTA States. It is therefore clearly of great significance for the EU Member States and the EEA/EFTA States alike. The proposal for a Common European Sales Law is intrinsically connected to the internal market: it is hoped by the Commission that it will, in a time of recession, help to “kick start” economic growth in the EU/EEA and enable the businesses and consumers of these States to exploit the internal market phenomenon to its full potential. If this proposal is adopted, it will not only have an immense impact on the law of contract throughout the entire EU and EEA, but will also have a profound effect on the protection bestowed on the consumers of the internal market! It is the proposal’s effect on consumer protection against unfair terms in consumer contracts which will form the core of this thesis.

In short, this thesis aims to provide the reader with an understanding of the current status of the rules on unfair terms, as provided by two distinct EU legislative measures. These are, on the one hand, the Unfair Terms in Consumer Contracts Directive 93/13/EEC, and on the other, the rules of Chapter 8 of the Common European Sales Law, which provides rules concerning unfair terms in business-to-consumer (B2C) as well as business-to-business (B2B) contracts. The thesis is essentially divided into three sections. It mainly follows a descriptive methodology, particularly with regard to the first section. The thesis will, firstly, begin by exploring the rapid developments that have taken place since the turn of the century in the field of EU contract law and, more specifically, EU consumer contract law. This is essential to provide the reader with an understanding of the foundation from which the proposal for a Common European Sales law has emerged – as well as to enable the reader to comprehend the current trends and debates in these fields of law, which ultimately have an impact on the subject-matter of the thesis.

Secondly, in Chapter 6 of the thesis, we will shift our focus to the unfair terms rules of Directive 93/13/EEC, the case-law of the Court of Justice of the European Union (‘CJEU’) on

its provisions, and questions which remain unanswered in this respect. It is rather fascinating that, despite the fact that almost two decades have passed since the Unfair Terms Directive was adopted, there is very little case-law of the CJEU and its predecessor, the European Court of Justice ('ECJ') to be found to shed light on the provisions of the Unfair Terms Directive 93/13/EEC ('Directive 93/13/EEC' or 'the Directive'). This can, to some extent at least, be accredited to the inherent nature of consumer law; it commonly deals with contracts pertaining to 'low' monetary amounts and accordingly seldom finds its way before national courts – let alone the Court of Justice of the European Union! We will begin by exploring the circumstances leading to the adoption of the Directive and how the Directive relates to the internal market. Subsequently, the Directive's scope of application will be covered in detail, before we move on to examine the so-called 'fairness test' provided by the Directive. Finally, an account will be made of the legal consequences of unfairness and issues relating to enforcement.

The third part of the thesis - Chapter 7 - is devoted the unfair terms rules of the proposal for a Common European Sales Law. The objective is to examine those provisions of Chapter 8 which pertain to unfair terms in B2C contracts. In this context, the attention of the reader should be brought to the fact that the provisions of the Directive 93/13/EEC as well as of Chapter 8 of the proposal for a Common European Sales Law can be found in an Annex to the thesis. Using the knowledge that we will have acquired through the second section of the thesis, i.e. Chapter 6 on Directive 93/13/EEC, we will analyze the unfair terms provisions of the proposal for a Common European Sales law with the primary objective of determining whether the Common European Sales Law provides consumers with a level of consumer protection against unfair terms that is high enough that they shall not have to fear that in choosing to conclude a contract under the Common European Sales Law they will be subjecting themselves to a lower standard of protection against unfair terms in consumer contracts than they would enjoy under their national consumer contract law,

2. European Union Private law

European Union private law is a field of law which has been undergoing an immense transformation from the turn of the century. In the following chapters, we will examine recent developments in a specific area of EU private law - EU contract law – and, in particular, the field of EU contract law which focuses on contracts that are concluded with consumers, i.e. EU consumer contract law. For the purpose of understanding the origins of EU contract law

and EU consumer contract law, we have to start at the very beginning. First of all it should be noted that private law is the field of law which governs the mutual rights and obligations of private persons, irrespective of whether they are natural or legal persons.¹ We trace the idea that private law should play an important role in EU law back to the early days of the European Economic Community ('EEC') when the first president of the European Commission, Walter Hallstein, expressed the opinion that the Treaty establishing the European Economic Community ('EEC Treaty' or 'Rome Treaty') directed too great a focus on public law and not enough on private law.²

In the years and decades to come, the activities of the EEC, later the European Community ('EC') and finally the European Union ('EU'), have consistently expanded slowly but surely into the realm of private law,³ despite the lack of a comprehensive competence of the EU to adopt legislation in this field of law.⁴ Due to this lack of legislative competence in the field of private law, the EU was forced to adopt private law measures within the context of various EU policies, primarily in connection with the creation of the internal market through Article 114 of the Treaty on the Functioning of the European Union ('TFEU' which was previously named the 'Treaty establishing the European Community' or 'EC Treaty'),⁵ as is the case for consumer contract law.

It should also be emphasized that the Court of Justice of the European Union ('CJEU' which was previously named the European Court of Justice 'ECJ') has played an important role in the development of EU private law, particularly through the preliminary reference procedure of Article 267 TFEU as we will see later on in the chapters relating to Directive 93/13/EEC. Nevertheless, the principal part of EU private law originates from legislative harmonization measures of the EU having the primary purpose of establishing the internal market,⁶ as was the case with the Unfair Terms Directive 93/13/EEC. As we will see later on, the establishment of the Common European Sales Law is also raised on an internal market rationale.

¹ Christian Twigg-Flesner: "Introduction: key features of European Union private law", p. 1.

² Reiner Schulze: *European Private Law: Current Status and Perspectives*, p. 4.

³ *Ibid.*

⁴ Christian Twigg-Flesner: *The Cambridge Companion to European Union Private Law*, p. 1-2.

⁵ *Ibid.*

⁶ *Ibid.*

3. European Contract Law

3.1 Introduction

As we will see in the following chapters, the development of a common EU contract law took a huge leap at the turn of the century. This development has culminated in the legislative proposal for a Common European Sales Law ('PCESL').⁷ To understand the background of the Common European Sales law, a brief summary must be made of the binding and non-binding ('soft law') rules of European and EU contract law which had come into existence prior to the publishing of the European Commission's ('Commission') *Communication on European Contract Law*⁸ of 13 July 2001 which, as we will see, initiated a new phase in the development of EU contract law. The following chapter contains a brief overview of the non-binding or 'soft-law' initiatives which, together with the binding rules of contract law, have formed the groundwork from which the proposal for a Common European Sales law has evolved.

3.2 Private Initiatives in the Field of European Contract Law

3.2.1 The Principles of European Contract Law

The non-binding rules referred to as 'soft law' in the field of European contract law have predominantly been established by private initiatives, the most well known of these initiatives being the *Principles of European Contract Law*⁹ (PECL) which were drafted by the 'Commission on European Contract Law', a study group under the chairmanship of Professor Ole Lando, thus frequently referred to as the 'Lando Commission'.¹⁰ The subject matter of the PECL is restricted to the general law of contractual obligations, rather than to the narrower field of consumer contract law.¹¹ It must be stressed that the PECL are not legally binding.¹² They are intended for voluntary incorporation into contracts by contracting parties, e.g. when transnational contracts are drafted between parties who cannot agree upon a choice of law to govern their contract.¹³ In that sense, they may in some sense be regarded as the predecessor

⁷ European Commission: *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*. 2011/0284 (COD). Brussels 10 November 2011. COM (2011) 635 final.

⁸ Commission of the European Communities: *Communication from the Commission to the Council and the European Parliament on European Contract Law*. Brussels 11 July 2001. COM (2001) 398 final.

⁹ The *Principles of European Contract Law* were published in three parts, see the Bibliography.

¹⁰ Norbert Reich: „A European Contract Law: Ghost or Host for Integration?“, p. 429-430.

¹¹ The Commission on European Contract Law: *Principles of European Contract Law. Parts I and II.*, p. xxv.

¹² Ewan McKendrick: *Contract Law: Text, Cases and Materials*, p.12.

¹³ Ewan McKendrick: *Contract Law: Text, Cases and Materials*, p.12.

of the PCESL. More importantly, they form a fundamental part of the groundwork from which the text, which ultimately became the PCESL, was developed.

3.2.2 European Principles drafted by the Study Group on a European Civil Code

The work of the Lando Commission responsible for drafting the PECL has been discontinued, but its work has been assumed by the ‘Study Group on a European Civil Code’ which was established in 1999.¹⁴ This study group has taken upon itself the responsibility of drafting common *European Principles* for the most important features of the law of obligations as well as certain branches of the law of property in movables which are particularly relevant for the functioning of the internal market, building upon the previous work of the Lando Commission.¹⁵ As we will see, the work of this group has formed a part of the groundwork from which the text of the PCESL has been developed.

3.2.3 Acquis Principles

Another group, the ‘European Research Group on Existing EC Private Law’, known as the ‘Acquis Group’ for short, was established in 2002, replacing smaller networks founded in the 1990’s.¹⁶ Its principal objective is to formulate the existing principles of EU contract law on the basis of the *acquis communautaire*, namely the Treaties, regulations and directives as they have been applied and interpreted by the courts.¹⁷ These so-called *Acquis Principles* formed a part of the groundwork of the *Draft Common Frame of Reference*¹⁸ (‘DCFR’) which was later developed into the text of the PCESL.

3.2.4 UNIDROIT Principles of International Commercial Contracts

The UNIDROIT Principles of International Commercial Contracts (UNIDROIT PICC) must also be mentioned in this respect. They provide general rules for international commercial contracts and are intended to be applied when parties have agreed that their contract should be governed by them, when the parties have agreed that their contract be governed by general principles of law, as well as when the parties have not chosen any law to govern their

¹⁴ Hugh Beale et al.: *Cases, Materials and Text on Contract Law*, p. 5.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 6.

¹⁷ *Ibid.*

¹⁸ Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group): *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*.

contract.¹⁹ The Preamble further declares that the Principles may be used to interpret or supplement international uniform law instruments or domestic law and that the Principles may serve as a model for national and international legislators.²⁰

3.3. The Multi-level Character of Binding Rules of European Contract Law

By contrast, the binding rules of European contract law can originate from the national level of states as well as from international conventions such as the *UN Vienna Convention on Contracts for the International Sale of Goods* of 1980 (CISG).²¹ Moreover, such rules can be the result of legislative measures at EU level which are directed at specific areas of contract law.²² The fact that the rules of contract law flow from many different levels, i.e. the international, the European and the national levels, has sometimes been referred to as the ‘multi-level character’ of European contract law.²³

As we will see in the following chapters, the EU legislator has followed a fragmented rather than comprehensive legislative approach in the field of contract law, only adopting specific legislative measures, primarily in the form of directives, in those delimited areas in which it has deemed there to be a special need for harmonization – particularly within the field of consumer law. Accordingly, most of these directives are characterized by what we may call a ‘sector-specific’ nature, since each legislative measure is directed solely at a particular category of contract (such as distance selling contracts or doorstep selling contracts) or at a specific problem (such as unfair terms in consumer contracts).²⁴

4. The Origins of EU Consumer Contract Law

4.1 The Fundamental Connection with the Internal Market

EU consumer contract law is based on a fundamental connection with the phenomenon that forms the core of the EU - the objective of the economic integration of EU Member States which is to be realized through the establishment of the internal market. It is this connection that forms the cornerstone upon which EU consumer contract law has been founded. This subject requires a brief explanation. In short, to reach the objective of economic integration,

¹⁹ Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group): *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*.

²⁰ *Ibid.*

²¹ Hugh Beale et al.: *Cases, Materials and Text on Contract Law*, p. 3.

²² Ewan McKendrick: *Contract Law: Text, Cases and Materials*, p. 8.

²³ Hugh Beale et al.: *Cases, Materials and Text on Contract Law*, p. 4.

²⁴ Hugh Beale et al.: *Cases, Materials and Text on Contract Law*, p. 4.

the EU adopts ‘negative’ legislative measures that restrict or prohibit national rules that may have an adverse effect on free trade and market integration.²⁵ According to economic theory, such integration is ultimately in the interest of consumers since the choice of goods and services increases through greater competition, which correspondingly leads to greater quality and reduced prices to the benefit of consumers.²⁶ Despite this ‘consumer’ aspect of these ‘negative’ legislative measures, they clearly fall under the legislative competences of the EU due to the fact that they are associated with the establishment of the internal market.

By contrast, ‘positive’ EU legislative harmonization measures that are specifically intended to promote consumer interests are subject to the fundamental ‘principle of conferral’, also known as the ‘principle of attributed powers’, which is specified in Article 5 of the Treaty on European Union (‘TEU’).²⁷ According to this principle, the EU can only act “within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.”²⁸ As a result, competences that are not expressly conferred upon the EU in the Treaties remain with the Member States.”²⁹

As a result, the principle of conferral posed a certain impediment to EU action in the field of consumer law since, prior to the adoption of the Treaty on European Union³⁰ (‘Maastricht Treaty’ amendments of 1993), the EU did not have any express legislative competences to adopt ‘positive’ legislative measures concerning consumer protection.³¹ This hindrance did not, however, prevent such measures from emerging at EU level.³² Instead of being established on the basis of an official EU consumer policy, these measures therefore primarily came into existence under the cover of the EU’s internal market policy³³ and were therefore adopted under the legislative harmonization competences of the Rome Treaty, now found in Articles 114 and 115 TFEU.³⁴ The former permits the adoption of positive harmonization measures for the purposes of the internal market and has, as such, become the cornerstone of the EU consumer contract law program.³⁵ The justification for the use of Article 114 TFEU to adopt ‘positive’ legislative harmonization measures in the field of consumer protection was, at the time, and continues to be based on the notion that discrepancies in national consumer

²⁵ Geraint Howells and Stephen Weatherill: *Consumer Protection Law*, p. 108.

²⁶ *Ibid.*, p. 119.

²⁷ *Ibid.*, p. 119.

²⁸ Article 5(2) of the *Treaty on European Union*.

²⁹ *Ibid.*

³⁰ Treaty on European Union. (92/C 191/01). *Official Journal* C 191, 29 July 1992.

³¹ Geraint Howells and Stephen Weatherill: *Consumer Protection Law*, p. 119.

³² Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 45.

³³ Geraint Howells and Stephen Weatherill: *Consumer Protection Law*, p. 119.

³⁴ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 45.

³⁵ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 45.

protection legislation are harmful to market integration³⁶ since they have an adverse effect on competition and hinder cross-border trade.³⁷

4.2 The Maastricht Treaty and Beyond

Prior to the Maastricht Treaty, the ‘positive’ legislative measures adopted at EU level in the field of consumer law primarily took the form of ‘positive’ legislative harmonization measures adopted on the basis of the internal market policy (such as the Unfair Terms Directive 93/13/EEC) as well as non-binding ‘soft law’ measures, particularly European Council Resolutions, which reflected the emergence of a political will and commitment to the establishment of an official policy of consumer protection at EU level.³⁸ Thus, for two decades, legislative measures having an impact on consumer protection continued to be adopted in the name of harmonization, despite a lack of express competence to legislate in the field of consumer law.³⁹ By the early 1990’s, much progress had been made in this field: a multitude of legislative harmonization measures affecting consumer protection – primarily in the form of directives – had emerged.⁴⁰ In truth, an EU consumer policy, albeit an unofficial one, had come into existence.

A breakthrough for the question of legislative competence took place on 1 November 1993 with the entry into force of the Maastricht Treaty.⁴¹ The Treaty established consumer protection as a formal competence of the EU, now found in Article 169 TFEU.⁴² The actual impact of this ‘breakthrough’, however, ultimately did not wind up being as intense as one might have expected – in fact, the development of the EU consumer policy has, in spite of this transformation, remained chained to the process of market integration via Article 114.⁴³ The reason for this is that the Maastricht amendments formally associated the EU’s consumer protection policy with the objectives of establishing the internal market.⁴⁴ In fact, Article 169(2)(a) TFEU explicitly states that the Union shall contribute to the attainment of the objectives of consumer protection “through measures adopted pursuant to Article 114 in the context of the completion of the internal market”. Moreover, Article 169(2)(b) provides that any EU action autonomous from internal market objectives can accordingly only “support,

³⁶ Geraint Howells and Stephen Weatherill: *Consumer Protection Law*, p. 124-126.

³⁷ Stephan Weatherill: *EU Consumer Law and Policy*, p. 13-14.

³⁸ Geraint Howells and Stephen Weatherill: *Consumer Protection Law*, p. 120-126

³⁹ Geraint Howells and Stephen Weatherill: *Consumer Protection Law*, p. 122-123.

⁴⁰ Stephan Weatherill: *EU Consumer Law and Policy*, p. 15.

⁴¹ Geraint Howells and Stephen Weatherill: *Consumer Protection Law*, p. 119-120.

⁴² Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 46.

⁴³ Stephan Weatherill: *EU Consumer Law and Policy*, p. 4.

⁴⁴ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 47.

supplement and monitor the policy pursued by the Member States”. The use of this provision, which essentially provides a less effective course of action than Article 114 TFEU, has in practice been fleeting.⁴⁵

5. A Decade of Rapid Transformation

5.1 Towards a European Civil Code?

The idea of a common European Civil Code first arose when the European Parliament adopted a Resolution in 1989,⁴⁶ and again in 1994,⁴⁷ in which it requested that the European Commission, the European Council and the Member States would begin working on a ‘Code of European Private Law’.⁴⁸ These requests of the Parliament did not, however, have the intended effect of placing a comprehensive harmonization in the field of private law of EU Member States on the EU’s political agenda,⁴⁹ but the seed had nonetheless been sown. This idea of creating a European Civil Code triggered a long and eventful journey which ultimately culminated less than six months ago in the proposal for a Regulation on a Common European Sales Law.⁵⁰ In the following chapters, we will explore the process of the ‘EU contract law’ project that has lead us to this proposal as well as its twin project: the ‘review of the consumer acquis’.

The ball began rolling on July 11 2001 when the European Commission (‘Commission’) issued the aforesaid *Communication on European Contract Law*⁵¹ to the European Parliament (‘Parliament’) and the European Council (‘Council’).⁵² Whereas the aforementioned Resolutions of the European Parliament of 1989 and 1994 called for a ‘Common Code of Private Law’, the European Commission’s Communication focused solely on the sub-category of contract law.⁵³ The purpose of this Communication was to broaden the debate by encouraging consumers, businesses, professional organizations, public administrations and

⁴⁵ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 113.

⁴⁶ European Parliament: *Resolution A21757/89 of the European Parliament on action to bring into line the private law of the Member States*, [1989] *Official Journal* C158/400.

⁴⁷ European Parliament: *Resolution A300329/94 of the European Parliament on the harmonization of certain sectors of the private law of the Member States*. 25 July 1994. *Official Journal* C 205, p. 518.

⁴⁸ Hugh Beale et al.: *Cases, Materials and Text on Contract Law*, p. 7.

⁴⁹ Hugh Beale et al.: *Cases, Materials and Text on Contract Law*, p. 7-8.

⁵⁰ European Commission: *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*. 2011/0284 (COD). Brussels 10 November 2011. COM (2011) 635 final.

⁵¹ Commission of the European Communities: *Communication from the Commission to the Council and the European Parliament on European Contract Law*. Brussels 11 July 2001. COM (2001) 398 final.

⁵² Ewan McKendrick: *Contract Law: Text, Cases and Materials*, p.8.

⁵³ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 157.

institutions, the academic world and all other interested parties to contribute to the discussion on a common contract law for the Member States of the EU.⁵⁴

The Commission had, moreover, become concerned about possible obstacles relating to cross-border trade within the internal market resulting from the diversity of national contract law in the Member States, leading it to examine different possibilities for the future of contract law within the EC in the said Communication.⁵⁵ The Commission's Communication provided four options intended to prompt the debate.⁵⁶ First, the Commission suggested that no action be taken by the EC, leaving interest groups and others to make recommendations relating to cross-border trade and problems connected thereto.⁵⁷ Secondly, to promote the development of common contract law principles leading to more convergence of national laws, encouraging the development of non-binding restatements of principles.⁵⁸ Thirdly, it raised the possibility of improving the quality of legislation already in place by focusing efforts on a review of the existing Directives by modernizing, extending and simplifying them.⁵⁹ It is here that we see the first inkling of a connection between what were later to become 'twin projects' on a common EU contract law, on the one hand, and on the review of the consumer acquis, on the other! Lastly, the Commission proposed an adoption a new comprehensive legislation at EC level taking the form of a Directive, Regulation or Recommendation, and ranging from an optional set of rules to rules that would apply unless specifically excluded to a full-fledged mandatory code.⁶⁰ In the resulting debate, the Commission received contributions from 180 interested parties, predominantly from the academic and business communities but also from governments and legal practitioners. Furthermore, the European Parliament, the European Council and the Economic and Social Committee each produced a response to the Commission's Communication.⁶¹ In short, the second and third options gained the most support of the responding parties⁶² although, as we will see as we proceed through the following chapters, the third and fourth options eventually became the basis of action for what was to become, on the one hand, the project on the review of the consumer acquis, and on the other, the project on the so-called Draft Common Frame of

⁵⁴ Commission of the European Communities: *Communication from the Commission to the Council and the European Parliament on European Contract Law*. Brussels 11 July 2001. COM (2001) 398 final, p. 6.

⁵⁵ Ewan McKendrick: *Contract Law: Text, Cases and Materials*, p. 8-9.

⁵⁶ Commission of the European Communities: *Communication from the Commission to the Council and the European Parliament on European Contract Law*. Brussels 11 July 2001. COM (2001) 398 final, p. 12.

⁵⁷ *Ibid*, p. 12-13.

⁵⁸ *Ibid*, p. 14-15.

⁵⁹ *Ibid*, p. 15-16.

⁶⁰ *Ibid*, p. 16-17.

⁶¹ Ewan McKendrick: *Contract Law: Text, Cases and Materials*, p. 8-9.

⁶² Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 158.

Reference⁶³ (DCFR) which ultimately gave rise to the text of the proposal for an optional instrument by the name of a 'Common European Sales law'.

5.2 The Notion of a Common Frame of Reference Emerges

On the basis of the outcomes of the broad consultation conducted in relation to the *Communication on European Contract Law*,⁶⁴ the Commission subsequently published another Communication on 12 February 2003 entitled *A More Coherent European Contract Law - An Action Plan*.⁶⁵ In this *Action Plan*, the Commission identified specific areas in which problems could undermine the functioning of the internal market and the uniform application of EC law.⁶⁶ In recognizing that the "overwhelming majority" supported the third option,⁶⁷ it proposed building upon a broad strategy of sector-specific legislation and non-regulatory measures.⁶⁸ In the *Action Plan*, the Commission referred to three different measures: firstly, a common frame of reference;⁶⁹ secondly, EU-wide general conditions⁷⁰ and thirdly, an optional instrument or non-sector-specific instrument.⁷¹

Accordingly, it was in this Action Plan that the notion of a 'Common Frame of Reference' ('CFR') first emerged. In the years to come, however, the true meaning of this concept became shrouded in mystery.⁷² It was originally understood to refer to a non-binding document encompassing the common principles and terminology of European contract law which was to be created through research and the combined efforts of interested parties. Such a CFR would serve the purpose of inspiring future legislation, influencing the revision of the existing EU legislation and thus serve to enhance the quality of the EU contract law acquis.⁷³ In this context, it the *Action Plan* certainly stated that:

The Commission may use this common frame of reference in the area of contract law when the existing acquis is reviewed and new measures proposed. It should provide for best solutions in terms of common

⁶³ Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group): *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*. Outline Edition. Edited by Christian von Bar et al. Munich 2009.

⁶⁴ Commission of the European Communities: *Communication from the Commission to the Council and the European Parliament on European Contract Law*. Brussels 11 July 2001. COM (2001) 398 final.

⁶⁵ Commission of the European Communities: *Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law. An Action Plan*. Brussels 12 February 2003. COM (2003) 68 final.

⁶⁶ *Ibid*, p. 6-14.

⁶⁷ *Ibid*, p. 5.

⁶⁸ *Ibid*, p. 2..

⁶⁹ *Ibid*, p. 2.

⁷⁰ *Ibid*, p. 2.

⁷¹ *Ibid*, p. 23.

⁷² Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 113-114.

⁷³ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 113-114.

terminology and rules, i.e. the definition of fundamental concepts and abstract terms such as “contract” or “damage” and of the rules” which apply, for example, in the case of the non-performance of contracts. In this context contractual freedom should be the guiding principle; restrictions should only be foreseen where this could be justified with good reasons.”⁷⁴

Hence, we may conclude that one of the primary objectives of the CFR project was, at least initially, to ensure conformity in the existing and future *acquis*.⁷⁵ In addition to this objective, however, the CFR was also seen as providing a way to promote conformity between the contract laws of Member States as well as potentially providing a basis for a non-sector-specific measure, for instance an optional instrument.⁷⁶

In the following year of 2004, the Commission published yet another Communication entitled *European Contract Law and the Revision of the Acquis - the Way Forward*,⁷⁷ which addressed the reactions to the 2003 *Action Plan*.⁷⁸ In this Communication, the Commission formally established the connection between the EU contract law project and the parallel review of the *acquis*.⁷⁹ As we will see, the CFR project’s ties to the review of the consumer *acquis* initially had a great influence on the development of the CFR, although this connection was later severed. In *The Way Forward*, the Commission affirmed the ‘toolbox’ function of the CFR as means to improve the quality and coherence of the existing *acquis* as well as future instruments in the field of contract law.⁸⁰

In *The Way Forward*, the Communication moreover introduced a possible structure and content of the CFR.⁸¹ In respect of the structure, it stated that the CFR would first set out common fundamental principles of contract law, including guidance on when exceptions to such fundamental principles would be required; secondly, it would contain definitions of key concepts to support the aforementioned fundamental principles; thirdly, the CFR would complete the principles and definitions with model rules, which would form the bulk of the

⁷⁴ Communication from the Commission to the European Parliament and the Council: *A More Coherent European Contract Law. An Action Plan*, p. 16.

⁷⁵ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 113-114.

⁷⁶ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 113-114.

⁷⁷ Commission of the European Communities: *Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the acquis – the Way Forward*. Brussels 11 October 2004. COM (2004) 651 final.

⁷⁸ *Ibid*, p. 2.

⁷⁹ See, for example, the following: “the Commission will use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law. At the same time, it will serve the purpose of simplifying the *acquis*. The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders”. *Ibid*, p. 3.

⁸⁰ *Ibid*, p. 3.

⁸¹ *Ibid*, p. 3.

CFR.⁸² Moreover, it pointed out that a distinction between model rules applicable to contracts concluded between businesses or private persons, on one hand, and model rules applicable to contracts concluded between a business and a consumer, on the other, could be envisaged.⁸³

The Way Forward also described how the CFR was to be created, confirming that the Commission's role at the preliminary stage would be a financial one whereas the substantive contribution to the CFR would be provided, in collaboration with stakeholder experts and Member States' experts by researchers, by a network of researchers consisting of scholars from a broad spectrum of European legal traditions, including the members of the so-called 'Network of Excellence' comprised of the aforementioned 'Study Group on a European Civil Code' and the 'Acquis Group', amongst others.⁸⁴

Accordingly, it was therefore envisaged that the CFR would be divided into two steps: the preparatory stage and the final stage, essentially making a distinction between an 'academic' draft CFR, i.e. the document resulting from the preparatory stage of research, on the one hand, and the document that would be known as the final or 'political' CFR, on the other, i.e. the final outcome after political scrutiny of the academic work.⁸⁵ At the end of 2007 an *Interim Outline Edition of the Draft Common Frame of Reference on European Contract Law*⁸⁶ (DCFR) was presented to the Commission and, subsequently, to the European Parliament in February of 2008. By the end of 2009, the final product, i.e. the model rules, comments and comparative notes, became available in print, consisting of six volumes containing approximately 6.100 pages.⁸⁷

5.3 The Rise of the DCFR and Controversies Regarding its Fate

At the end of 2007 an *Interim Outline Edition of the Draft Common Frame of Reference on European Contract Law*⁸⁸ (DCFR) was presented to the Commission and, subsequently, to the European Parliament in February of 2008. By the end of 2009, the final product, i.e. the

⁸² Commission of the European Communities: *Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the acquis – the Way Forward*. Brussels 11 October 2004. COM (2004) 651 final., p. 11.

⁸³ *Ibid*, p. 11.

⁸⁴ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 113-114.

⁸⁵ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 113-114.

⁸⁶ Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group): *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*. Outline Edition. Edited by Christian von Bar et al. Munich 2009.

⁸⁷ Nils Jansen and Reinhard Zimmermann: "A European Civil Code in all but Name: Discussing the Nature and Purposes of the Draft Common Frame of Reference", p. 98.

⁸⁸ Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group): *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*. Outline Edition. Edited by Christian von Bar et al. Munich 2009.

model rules, comments and comparative notes, became available in print, consisting of six volumes containing approximately 6.100 pages.⁸⁹

At the time of the DCFR's conclusion, there was much debate and controversy regarding the fate of this project, particularly whether it was to become a foundation upon which a 'European Civil Code' would be built. As we will see in the ensuing chapters, however, the text of the DCFR ultimately ended up forming the groundwork the text of the proposal for a Common European Sales Law rather than a 'European Civil Code'. Although it cannot, of course, be excluded that the academic DCFR will at some point in time be used to for the purposes of harmonizing the private laws of the individual Member States, such a plan certainly does not seem to be on the EU's current agenda. We now turn our focus to the DCFR's twin project – the review of the consumer acquis. In the following chapters we will explore, firstly, why there was perceived to be a need to review the existing EU directives on consumer law; secondly, the notorious concept of 'maximum harmonization'; thirdly, the rise of the proposal for a *Consumer Rights Directive* which was intended, amongst other things, to repeal Directive 93/13/EEC and finally, the emergence of the Consumer Rights Directive 2011/83/EU and the current status of the EU consumer policy. After we conclude our analysis of the 'review of the consumer acquis' project, we will explore the proposal for an optional Common European Sales Law which constitutes the latest link in the chain of the 'EU Contract Law' project and, more importantly, the subject of this thesis.

5.4 Review of the Consumer Acquis

5.4.1 A Fragmented Approach

The consumer acquis require each Member State to transpose the relevant EU consumer rules into national law and to establish administrative structures responsible for providing market surveillance and enforcement. Moreover, this EU consumer framework offers judicial and out-of-court dispute resolution mechanisms, consumer education and information and provides special roles for consumer organizations.⁹⁰ Thus, EU consumer law has clearly had a great impact on consumer protection in the Member States. For the most part, this impact has been held to have had a positive effect on the establishment of the internal market, for example by increasing competition and providing consumers with a higher level of consumer

⁸⁹ Nils Jansen and Reinhard Zimmermann: "A European Civil Code in all but Name: Discussing the Nature and Purposes of the Draft Common Frame of Reference", p. 98.

⁹⁰ M. Elvira Méndez-Pinedo: "Overview of European consumer credit law: Protection of consumers with foreign currency mortgages in the aftermath of the Icelandic crisis", p. 106.

protection.⁹¹ As we have seen, the consumer acquis has, nevertheless, reflected a very fragmented approach since it has simply targeted specific problems or categories of contracts instead of addressing, in a comprehensive manner, the entire range of issues which concern the field of consumer law. The incoherence resulting from this fragmentation and the fact that the interaction of the consumer acquis with domestic legal systems has been less than perfect due to inconsistent application of the rules at national level resulted in the view that reform of the consumer acquis was unavoidable and necessary.⁹²

5.4.2 A Fork in the Road – The Launch of a New Phase?

Accordingly, after a long period of sector-specific consumer directives, a new phase was introduced in 2001 in connection with the creation of a new EU contract law, consisting of the redrafting and restructuring of the consumer acquis with the objective of making it more coherent. As we will see in the ensuing chapters, this phase has by no means come to a close: for the most part, the Member States remain governed of the sector-specific directives. It therefore seems appropriate to provide a very brief overview of the current core of the consumer acquis – particularly the more restricted part of the acquis concerned with consumer contract law. Firstly, there are seven consumer directives which lay at the heart of EU consumer contract law. In addition to the Unfair Terms Directive 93/13/EC which (together with the unfair terms rules of the PCEsL) forms the subject of this thesis, we have the brand-new Consumer Rights Directive⁹³ (which, as we will see, has repealed and replaced the Doorstep Selling Directive⁹⁴ and the Distance Selling Directive⁹⁵), the Package Travel Directive⁹⁶, the Timeshare Directive⁹⁷, the Consumer Sales Directive⁹⁸, the Price Indication

⁹¹ Hans Schulte-Nölke: “The way forward in European consumer contract law: optional instrument instead of further deconstruction of national private laws”, p. 131.

⁹² Hans Schulte-Nölke: “The way forward in European consumer contract law: optional instrument instead of further deconstruction of national private laws”, p. 132.

⁹³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

⁹⁴ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

⁹⁵ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

⁹⁶ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

⁹⁷ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

⁹⁸ Directive 99/44/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.

Directive⁹⁹ and the Injunctions Directive¹⁰⁰. Secondly, there are three additional Directives concerned with pure consumer law with certain distinct characteristics as compared to the other Directives. These are the Distance Selling of Financial Services Directive¹⁰¹, Unfair Commercial Practices Directive¹⁰² and Consumer Credit Directive¹⁰³.¹⁰⁴ Finally, there are various directives which apply to business to consumer (B2C) as well as business to business (B2B) transactions, but also provide protection for the weaker party.¹⁰⁵

Since one of the very objectives of the CFR projects was to provide a toolbox to be used *inter alia* in the review of the consumer acquis, these two projects were clearly intended to be carried out in close relation to one another. However, following a dramatic transformation in the political atmosphere at EU level after the rejection of the *Treaty Establishing a Constitution for Europe*¹⁰⁶ in the French and Dutch referendums,¹⁰⁷ a radical change of course was made in September of 2005, when the CFR process had only just barely begun - the 'Network of Excellence' of scholars had only just been formed in May earlier that year.¹⁰⁸ At the very first 'European Discussion Forum on Contract Law', an event which was organized by the British EU presidency gathering all the parties involved in the EU contract law project,¹⁰⁹ the new European Commissioner Kyprianou announced that from that point forward, "topics [...] relevant to the review of the consumer acquis" would be given priority over the review of the general contract law acquis, i.e. the DCFR project.¹¹⁰ At this point the Commission nevertheless still envisaged "useful synergies between the work on the review of the acquis and the work on the CFR,"¹¹¹ although, as we will see, the nexus between these

⁹⁹ Directive 98/6/EC of the European Parliament and of the Council of February 1998 on consumer protection in the indication of the prices of products offered to consumers.

¹⁰⁰ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

¹⁰¹ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services.

¹⁰² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

¹⁰³ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers.

¹⁰⁴ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 165-166.

¹⁰⁵ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 165-166.

¹⁰⁶ *Treaty establishing a Constitution for Europe*. Published in the *Official Journal* on 16 December 2007, C 310, p. 1.

¹⁰⁷ Martijn W. Hesselink: "The Consumer Rights Directive and the CFR: two worlds apart?" p. 3.

¹⁰⁸ Martijn W. Hesselink: "Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive", p. 9.

¹⁰⁹ Martijn W. Hesselink: "The Consumer Rights Directive and the CFR: two worlds apart?" p. 4.

¹¹⁰ Martijn W. Hesselink: "Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive", p. 9.

¹¹¹ Martijn W. Hesselink: "The Consumer Rights Directive and the CFR: two worlds apart?" p. 4.

two projects was ultimately severed. As a result of this declaration, the academics in the ‘Network of Excellence’ were put under pressure to focus their work on those fields which would be of direct use for the review of the consumer acquis.¹¹² Nonetheless, the ties between these two projects were soon to be severed.

On 8 February 2007, the Commission issued a document entitled *The Green Paper on the Review of the Consumer Acquis*.¹¹³ This Green Paper represented the explicit commitment of the Commission to the review of the consumer acquis and narrowed the scope of review down to eight EU consumer contract directives.¹¹⁴ It explained the necessity of such a review resulting from the two-fold fragmentation of the existing consumer acquis: firstly, in that the existing consumer contract directives were (and continue, for the most part, to be) based on the ‘minimum harmonization’ approach which allows Member States to adopt stricter rules of consumer protection in their national laws, and secondly, in that the incoherence between the fragmentary and sector-specific directives had resulted in many issues having been regulated inconsistently or left open.¹¹⁵ According to the Commission, these ‘problems’ had triggered “increased compliance costs” for businesses,¹¹⁶ essentially posing a hindrance to free trade and the establishment of the internal market and as a result, action needed to be taken. The *Green Paper* therefore offered three options for the review of the consumer acquis, which we will discuss below. Let it suffice, for the time being, to point out, however, that the EU contract law project and the DCFR were not mentioned in one word in the entire document. The *Green Paper* essentially represents a milestone in the development of the two parallel projects as it marks the ultimate severance of the ties between them.

5.4.3 A Comprehensive Review of Eight Consumer Contract Directives

The process of the review of the eight directives¹¹⁷ focused, *inter alia*, on assessing to what extent these directives remained in sync with the objectives of the internal market and of the EU’s consumer protection policy.¹¹⁸ An important element of this phase was the creation of an ‘*EC Consumer Law Compendium*’ by an international team of scholars led by Hans

¹¹² Hans Schulte-Nölke: “Scope and Role of the Horizontal Directive and its Relationship to the CFR”, p. 34.

¹¹³ Commission of the European Communities: *Green Paper on the Review of the Consumer Acquis*. Brussels 8 February 2007. COM (2007) 744 final.

¹¹⁴ *Ibid*, p. 4.

¹¹⁵ *Ibid*, p. 7.

¹¹⁶ *Ibid*, p. 7.

¹¹⁷ These are the Unfair Terms Directive, Doorstep Selling Directive, Package Travel Directive, Timeshare Directive, Distance Selling Directive and Consumer Sales Directive, Price Indication Directive and Injunctions Directive.

¹¹⁸ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 106.

Schulte-Nölke. It provided a complex study on the Member State's different methods of implementation of the eight directives. The findings resulting from the team's research were that the divergent implementation practices of the Member States had a detrimental effect on the internal market.¹¹⁹

Accordingly the eight directives were to be 'reviewed as a whole and individually to identify regulatory gaps and shortcomings'.¹²⁰ Various modern factors were to be taken into consideration, especially concerning e-commerce, the effect of copyright and technological developments in the market (e.g. regarding digital services such as music download and new methods of transaction such as online auctions).¹²¹ The *Green Paper* made a number of proposals, one of them being the possibility of adopting a so-called 'vertical approach', involving a separate directive-by-directive approach,¹²² whereas another of the Commission's proposals entailed the adoption of a 'mixed approach', i.e. using a horizontal instrument in addition to vertical action, when necessary.¹²³

The Commission argued that the directives shared various common aspects (such as the concept of a 'consumer') which could be regulated concurrently in a single horizontal instrument.¹²⁴ The structure of such an instrument would, according to the *Green Paper*, be divided into a general part which would include the Unfair Commercial Practices Directive (2005/29/EC) and horizontal concepts such as the notion of a 'consumer' or a 'professional', and the second part would regulate the contract of sale.¹²⁵ The Commission subsequently raised a number of questions, *inter alia* concerning the degree of harmonization to be desired for such an instrument, i.e. whether there should be a shift towards maximum harmonization¹²⁶ instead of the minimum harmonization approach which, as we have seen, had been applied to the consumer contract directives up to that point. Since this question has ultimately had a profound impact on the development of EU consumer contract law the concepts of 'minimum' harmonization and or 'maximum' harmonization (also referred to as 'full' or 'total' harmonization) need to be explained before we advance any further.

¹¹⁹ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 106.

¹²⁰ Commission of the European Communities: *Green Paper on the Review of the Consumer Acquis*. Brussels 8 February 2007. COM (2007) 744 final, p. 5.

¹²¹ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 106.

¹²² Commission of the European Communities: *Green Paper on the Review of the Consumer Acquis*. Brussels 8 February 2007. COM (2007) 744 final, p. 9.

¹²³ *Ibid*, p. 9-10.

¹²⁴ *Ibid*, p. 9.

¹²⁵ *Ibid*, p. 9.

¹²⁶ *Ibid*, p. 11.

5.4.4 The Shift from Minimum Harmonization to Maximum Harmonization

After the adoption of the *Single European Act*¹²⁷ (SEA) and especially after the Maastricht Treaty entered into force, there was a steady progression in the use of ‘minimum’ harmonization measures at European level owing to the perceived advantage of this approach, i.e. that it allows diversity and flexibility amongst the domestic legal systems.¹²⁸ A ‘minimum’ harmonization measure, such as the Unfair Terms Directive 93/13/EC, requires a minimum level of rules to be implemented in all Member States while Member States remain free to take more restrictive measures.¹²⁹

Minimum harmonization measures aim to establish a baseline of protection in a particular field of law in order to remove threats to the operation of the internal market.¹³⁰ The initial idea behind the minimum harmonization approach was that cross-border trade and movement would be promoted if individuals could depend on a minimum level of rights regardless of the legal system of the Member State in question.¹³¹ Furthermore, it has been considered to diminish the risk that Member States will compete to offer lower standards of protection than each other, since standards which are less strict than the obligatory standards required under minimum harmonization will be prohibited.¹³² However, it should be noted Articles 114, for example, does not expressly refer to minimum harmonization and, as we will see shortly, the focus has as a matter of fact gradually been shifting away from minimum harmonization in the last decade, towards ‘maximum’ or ‘full’ harmonization.¹³³

As we saw in Chapter 5.4.2, the Commission, amongst others, has in recent years argued that minimum harmonization undermines the purpose of harmonization since it leaves the choice whether or not to set standards above the baseline provided by the minimum harmonization measure in question to the Member States’ discretion. It is argued that, as a consequence, such measures subject individuals and businesses to the possibility of incongruous rules on consumer protection throughout the EU¹³⁴ which, according to the Commission, results in “fragmentation of the internal market to the detriment of consumers and businesses”.¹³⁵ In the next chapter we will see what effect this criticism has had on the

¹²⁷ *Single European Act* of 17 February 1986. *Official Journal* L 169 of 29 June 1987.

¹²⁸ Josephine Steiner and Lorna Woods: *EU Law*, p. 368.

¹²⁹ Angus Johnston and Hannes Unberath: “European private law by directives: approach and challenges”, p. 87.

¹³⁰ *Ibid.*, p. 87-88.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Josephine Steiner and Lorna Woods: *EU Law*, p. 368.

¹³⁴ Josephine Steiner and Lorna Woods: *EU Law*, p. 368.

¹³⁵ Commission of the European Communities: *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Consumer Policy Strategy 2002-2006*. Brussels 7 May 2002. COM (2002) 208 final, p. 12-13.

review of the consumer acquis. On the other hand, a ‘maximum’, ‘full’ or ‘total’ harmonization measure requires Member States to ensure that their domestic legal system provides precisely what is required by the relevant directive; no more, no less. Accordingly, it does not leave the Member States any room to regulate the field of law in question to a different degree than is provided for by the relevant legislative measure; they cannot adopt additional provisions covering the same sector, even relating to purely internal situations.¹³⁶

5.4.5 A Proposal for a Consumer Rights Directive arises – Repealing Directive 93/13/EEC?

On 8 October 2008, the Commission submitted a ‘horizontal’ *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*¹³⁷ (PCRD). Although, as we have seen, the Consumer Rights Directive was originally intended to cover eight consumer directives, the final proposal only focused on the four directives which lay at the core of EU consumer contract law; Directive 93/13/EC on Unfair Terms, the Doorstep Selling Directive 85/577/EEC, the Distance Selling Directive 97/7/EC and the Consumer Sales Directive 99/44/EC..¹³⁸

A justification for the proposal can be found in the explanatory memorandum in which it was claimed that the existing consumer acquis had, as a result of the minimum harmonization approach, lead to a “fragmented regulatory framework across the Community which [caused] significant compliance cost for businesses wishing to trade cross-border”.¹³⁹ The Commission saw this as a barrier to cross-border transactions, since it resulted in lower confidence levels among consumers¹⁴⁰ and accordingly proposed ‘full targeted’ harmonization of the aforementioned directives, as is made clear by Article 4 of the PCRD: “Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection”. The four directives were subsequently to be repealed.¹⁴¹

¹³⁶ Angus Johnston and Hannes Unberath: “European private law by directives: approach and challenges”, p. 88.

¹³⁷ *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*. 2008/0196 (COD). Brussels 8 October 2008. COM (2008) 614 final.

¹³⁸ Geraint Howells and Reiner Schulze: *Modernising and Harmonising Consumer Contract Law*, p. 3-4.

¹³⁹ *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*. 2008/0196 (COD). Brussels 8 October 2008. COM (2008) 614 final, p. 3.

¹⁴⁰ Hans-W. Micklitz and Norbert Reich: “Crónica de Una Muerte Anunciada: The Commission Proposal for a ‘Directive on Consumer Rights’”, p. 471.

¹⁴¹ *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*. 2008/0196 (COD). Brussels 8 October 2008. COM (2008) 614 final, p. 19. (See Recital 64).

The PCRD was met with criticism not only from the academic community but also from consumer organizations, especially with regard to the application of the full harmonization approach to key issues of consumer protection such as the unfair contract terms and the right of withdrawal¹⁴² and, correspondingly, the fact that the existing level of consumer protection would have to be lowered in many Member States due to the loss of stricter national provisions resulted in heavy criticism by commentators.¹⁴³

The academic community was, moreover, very much taken aback by the fact that the PCRD did not mention at all the EU contract law project which, *nota bene*, the Commission had itself launched seven years earlier.¹⁴⁴ Absolutely no reference was made to the DCFR (or the Acquis Principles for that matter¹⁴⁵), whether in the preliminary recitals or in the Commission's explanatory memorandum¹⁴⁶ despite the CFR's intended role to serve as a toolbox for the review of the consumer acquis.¹⁴⁷ To put it in the words of Martijn W. Hesselink (taken from a briefing note which he prepared for a European Parliament expert hearing): "this is quite astonishing in light of the fact that the whole purpose of the Common Frame of Reference was meant to be that it could serve as a toolbox for the Commission when revising the *acquis communautaire* in the area of contract law."¹⁴⁸ In this context, it should furthermore be noted that the level of consumer protection provided by the PCRD was significantly lower than the level adopted in the DCFR.¹⁴⁹

Despite the lack of a 'political' CFR at the time of the Proposal, it should not be overlooked that the DCFR had already come into existence at this point in time, as it had been published and become publicly available almost a year earlier.¹⁵⁰ Despite this fact, a comparison of the text of the DCFR and CRD reveals that where the DCFR had sought to address the consumer contract acquis it nonetheless had little impact on the text of the

¹⁴² Živa Drol-Novak, Slovene Consumers' Association: "EU contract law as a tool for facilitating cross-border transactions: a point of view from consumers", p. 6.

¹⁴³ Živa Drol-Novak, Slovene Consumers' Association: "EU contract law as a tool for facilitating cross-border transactions: a point of view from consumers", p. 6.

¹⁴⁴ Hans-W. Micklitz and Norbert Reich: "Crónica de Una Muerte Anunciada: The Commission Proposal for a 'Directive on Consumer Rights'", p. 473.

¹⁴⁵ It should also be kept in mind that the self-proclaimed purpose of the Acquis Principles according to Article 1:101 (2) is to: "serve as a source for the drafting, the transposition and the Interpretation of European Community Law", although this was not reflected in the Proposal on a Directive on Consumer Rights, see Hans-W. Micklitz and Norbert Reich: "Crónica de Una Muerte Anunciada: The Commission Proposal for a 'Directive on Consumer Rights'", p. 473.

¹⁴⁶ Martijn W. Hesselink: "The Consumer Rights Directive and the CFR: two worlds apart?" p. 1.

¹⁴⁷ Geraint Howells and Reiner Schulze: *Modernising and Harmonising Consumer Contract Law*, p. 4.

¹⁴⁸ Martijn W. Hesselink: "The Consumer Rights Directive and the CFR: two worlds apart?" p. 1-2.

¹⁴⁹ Martijn W. Hesselink: "The Consumer Rights Directive and the CFR: two worlds apart?" p. 10.

¹⁵⁰ Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 129.

PCRD.¹⁵¹ As commentators have pointed out, these divergences reflect a disappointing lack of interaction between the two projects,¹⁵² especially in light of the large investment of time and resources that had been made in the CFR project.¹⁵³

This disappointment reverberates in the following assessment of the PCRD by a group of scholars, comprised of Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner and Reinhard Zimmermann, which has met a number of times at the Hamburg Max Planck Institute to discuss key issues concerning the revision of the consumer acquis:

This proposal does not appear to have benefitted from either the DCFR or the Acquis Principles. It is so severely defective that it has been rejected by just about every commentator who has examined it and it shows that the conceptual tools for an ambitious harmonization of European contract law still appear to be lacking. This may be one reasons why the Commission now appears to content itself with the consolidation of merely two of the existing directives¹⁵⁴ in the field of consumer contract law. The new Consumer Rights Directive, even if it is enacted in the course of this year, will thus probably be a fairly unambitious, intermediate step within the process of an acquis revision [...]¹⁵⁵

As the following chapter reveals, their prediction came true.

5.4.6 Directive 2011/83/EU on Consumer Rights – A Step Backwards

The Consumer Rights Directive 2011/83/EU¹⁵⁶ (CRD) was eventually adopted on 25 October 2011 after having undergone drastic changes. After much deliberation, the Council ultimately agreed on a general approach for consumer rights which consisted of a shorter version of the PCRD.¹⁵⁷ Meanwhile, the European Parliament had planned a vote on a revised version of the PCRD, still aiming to repeal and replace the four directives but allowing the Member States to adopt or maintain stricter rules on certain specified issues.¹⁵⁸ Eventually, however, the European Parliament decided to pursue an inter-institutional instrument, rather than to vote on this revised proposal.¹⁵⁹

¹⁵¹ Geraint Howells and Reiner Schulze: *Modernising and Harmonising Consumer Contract Law*, p. 5

¹⁵² Lucinda Miller: *The Emergence of EU Contract Law: Exploring Europeanization*, p. 129.

¹⁵³ Geraint Howells and Reiner Schulze: *Modernising and Harmonising Consumer Contract Law*, p. 5

¹⁵⁴ As we will see in the next chapter, the final version of the Directive on Consumer Rights only repeals two of the four directives originally covered by the Proposal.

¹⁵⁵ Horst Eidenmüller et al.: “Towards a Revision of the Consumer Acquis”, p. 1079.

¹⁵⁶ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

¹⁵⁷ Caroline Cauffman: “The Consumer Rights Directive – Adopted”, p. 1.

¹⁵⁸ Caroline Cauffman: “The Consumer Rights Directive – Adopted”, p. 1.

¹⁵⁹ Caroline Cauffman: “The Consumer Rights Directive – Adopted”, p. 1.

An agreement was finally reached between the European Commission, European Parliament and the Council of Ministers on the text of the CRD and subsequently, the European Parliament adopted the Consumer Rights Directive 2011/83/EU by a great majority (615 for, 16 against, 21 abstentions) on 10 October 2011.¹⁶⁰ The agreement merged the Council's modifications with the Parliament's revised proposals, resulting in a text with a much more restricted scope of application than what was provided for in the original PCRD; instead of insisting upon full harmonization across the board, this compromise allowed Member States to adopt or maintain a higher level of consumer protection with regard to certain issues.¹⁶¹

As we have seen, the Commission originally aimed to review eight consumer directives to simplify and improve the existing consumer acquis. The scope was narrowed considerably in the 2008 PCRD - down to four directives¹⁶². Although the Consumer Rights Directive 2011/83/EU (CRD) still touches upon all four directives,¹⁶³ the final CRD is clearly the product of compromise; instead of repealing all four directives as was initially planned in the PCRD, only two directives (Directive 85/577/EEC on Doorstep Selling and Directive 97/7/EC on Distance Selling) are repealed and replaced by the CRD.¹⁶⁴ On the other hand, and of most importantly for this thesis, the Unfair Terms Directive 93/13/EEC as well as the Consumer Sales Directive 1999/44/EC were not repealed. Instead, they were only amended in such a way as to require Member States to inform the Commission about the adoption of national rules in certain areas.¹⁶⁵

According to Caroline Cauffman, the CRD generally increases the minimum level of consumer protection in the EU. She claims that even those Member States which are considered to offer a high level of consumer protection will need to introduce some stricter rules of consumer protection into their domestic legal systems. In some cases, however, the CRD reduces the current minimum level of consumer protection in the EU. She explains that where the CRD provides for maximum harmonization, it will require some Member States to reduce the level of consumer protection they currently offer with regard to certain issues. Cauffman concludes that in any case, the current Directive 2011/83/EU on consumer rights is at least a preferred alternative to the original PCRD, since it is no longer provides for

¹⁶⁰ Press Release of the European Commission on 23 June 2011: "Consumer Rights: 10 ways the new EU Consumer Rights Directive will give people stronger rights when the shop online", MEMO/11/450.

¹⁶¹ See Article 3(2) of the Consumer Rights Directive 2011/83/EU.

¹⁶² Directive 93/13/EC on Unfair Terms; the Doorstep Selling Directive 85/577/EEC; Distance Selling Directive 97/7/EC and the Consumer Sales Directive 99/44/EC.

¹⁶³ Caroline Cauffman: "The Consumer Rights Directive – Adopted", p. 1.

¹⁶⁴ Recital 64 of Directive 2011/83/EU on Consumer Rights.

¹⁶⁵ Recital 63 and Articles 32 and 33 of Directive 2011/83/EU on Consumer Rights.

undifferentiated maximum harmonization, but instead allows Member states to adopt or maintain a higher level of consumer protection with regard to certain specified issues, and particularly because the unfair terms rules of the Directive 93/13/EEC and rules on non-conformity in consumer sales, which were the most likely to reduce the level of consumer protection, were ultimately not included in the final version of the CRD.¹⁶⁶

On a more somber note, Martijn W. Hesselink feels that the Directive is unlikely to improve considerably the overall coherence of European contract law, not only because only four of the eight consumer law directives were ultimately included in the review (although, as we have seen, the Directive only merges two of these four directives into the instrument), but also because other aspects of European contract law which are unrelated to consumer contract law have been excluded entirely.¹⁶⁷ Disappointingly, Hesselink explains that:

In this respect, nothing will change: European rules for B2C and B2B contracts will evolve entirely independently, without any harmonization whatsoever. As a consequence, very little of the original coherence objective of the review appears in the explanatory notes [to the Proposal]. The new reason for the review is to improve the specific B2C internal market by reducing ‘compliance costs’ for businesses and increasing consumer confidence by removing the risk that in cross-border contracts they may encounter a higher (!) level of consumer protection than the one they are used to at home. The coherence objective has been rendered subordinate and adapted to this new goal: only the coherence of the regulatory framework for this specific internal B2C market matters any more. [...] In other words, since the Action Plan in 2003, when many became convinced – some to their delight, others with horror – that the CFR process paved the way to a European Civil Code (or to a European code of Contract Law), the Commission now very much appears to have taken a first step toward a European Code of Consumer Law [...].¹⁶⁸

On this note, we turn our focus to the successor of the DCFR, more generally, of the EU contract law project. Before doing so, the attention of the reader must be drawn specifically to the following words of Hesselink, stated above: *“The new reason for the review is to improve the specific B2C internal market by reducing ‘compliance costs’ for businesses and increasing consumer confidence by removing the risk that in cross-border contracts they may encounter a higher (!) level of consumer protection than the one they are used to at home”*. This crucial point also hits home with regard to the proposal for a Common European Sales law and should accordingly be kept in mind while reading the following chapter as well as Chapter 7.

¹⁶⁶ Caroline Cauffman: „The Consumer Rights Directive - Adopted“, p. 2.

¹⁶⁷ See also an interesting article on changes which Hans-W. Micklitz would have liked the CRD to make to the unfair terms acquis: Hans-W. Micklitz: “The Proposal on Consumer Rights and the Opportunity for a Reform of European Unfair Terms Legislation in Consumer Contracts”.

¹⁶⁸ Martijn W. Hesselink: “Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive”, p. 9 - 10.

5.5 The Proposal for a Common European Sales Law – A New Form of Harmonization

Following a request in June 2007 by the presidency of the European Council to “continue its work on evaluating the consistency and coherence of the provisions of contract law in Community law, including consumer contract law”,¹⁶⁹ the ‘political’ CFR project was brought back to life under the auspices of Commissioner Kuneva.¹⁷⁰ On 3 September 2008 the European Parliament adopted a Resolution supporting the creation of a CFR by putting forward proposals for the future developments of the project; later that year, the academic DCFR was presented by the ‘Network of Excellence’.¹⁷¹

In 2010, an ‘Expert Group on Contract Law’ and a ‘Key Stakeholder Experts Group’ were established to provide the Commission with assistance on this project.¹⁷² The Commission asked the Expert Group to conduct a feasibility study on a draft instrument of European contract law.¹⁷³ On 3 May 2011, the Expert Group published its ‘Feasibility Study’¹⁷⁴ and invited any interested parties to give feedback by 1 July 2011; the final product of this study was a text consisting of 189 Articles designed to form a complete set of contract law rules covering issues relevant to a contractual relationship within the internal market of the European Union.¹⁷⁵ The Commission received 106 contributions as a result of the consultation on the Feasibility Study.¹⁷⁶

Meanwhile, the Commission had adopted a *Green Paper on policy options for progress towards a European Contract Law for consumers and businesses*¹⁷⁷ on 1 July 2010, discussing the possible options for an instrument of European contract law.¹⁷⁸ The Commission subsequently held a public consultation that lasted until 31 January 2011 and resulted in 320 responses.¹⁷⁹ In the context of the ‘Stockholm Program’ of May 2010, the Council asserted its position that the CFR should be a “non-binding set of fundamental principles, definitions and model rules to be used by the lawmakers at Union level to ensure

¹⁶⁹ Presidency Conclusions of 20 July 2007, p. 8.

¹⁷⁰ Hans Schulte-Nölke: “Scope and Role of the Horizontal Directive and its Relationship to the CFR”, p. 34.

¹⁷¹ European Commission’s Directorate General for Justice’s website: ‘Background’ of contract law.

¹⁷² *Ibid.*

¹⁷³ Commission Expert Group on European Contract Law: *Feasibility study for a future instrument in European Contract Law*. May 2011.

¹⁷⁴ Commission Expert Group on European Contract Law: *Feasibility study for a future instrument in European Contract Law*. May 2011.

¹⁷⁵ European Commission’s Directorate General for Justice’s website: ‘Expert Group’.

¹⁷⁶ European Commission’s Directorate General for Justice’s website: ‘Expert Group’.

¹⁷⁷ Commission of the European Communities: *Green Paper on policy options for progress towards a European Contract Law for consumers and businesses*. Brussels 1 July 2010. COM (2010) 348 final.

¹⁷⁸ *Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses*.

¹⁷⁹ European Commission’s Directorate General for Justice’s website: ‘Common European Sales Law to boost trade and expand consumer choice’.

greater coherence and quality in the lawmaking process” and subsequently invited the Commission to submit a proposal on a Common Frame of Reference.¹⁸⁰

The Commission’s proposal was introduced on 11 October 2011 in the form of an ‘optional instrument’, more specifically a *Proposal for a Regulation on a Common European Sales Law* (PCESL) for B2B as well as B2C contracts, offering a single set of rules for cross-border contracts in all 27 EU Member States.¹⁸¹ The text of the PCESL is very similar to the Expert Group’s ‘Feasibility Study’, which in turn was based on the DCFR.¹⁸² It integrates most provisions of the Consumer Rights Directive 2011/83/EU, although some important derogations can be found.¹⁸³ According to the Commission, this instrument will break down barriers to cross-border trade, namely the divergent sales laws of the 27 Member States. In the words of Vice-President Viviane Reding, the EU’s Justice Commissioner: “the optional Common European Sales Law will help kick-start the Single Market, Europe’s engine for economic growth. It will provide firms with an easy and cheap way to expand their business to new markets in Europe while giving consumers better deals and a high level of protection.”¹⁸⁴ The last part of this statement will be the subject of discussion in Chapter 7, in which we will explore whether the PCESL truly does provide consumers with a high level of protection against unfair terms in B2C contract concluded under the rules of the PCESL.

According to the Commission, the PCESL seeks a new form of harmonization. According to Reding, it is not intended to substitute the national Civil Codes or to interfere with the coherence of those codes. Instead, it provides an additional set of uniform contract law rules available in each national legal order, which traders and consumers can choose to apply to their cross-border transactions to make them “less complicated and less expensive”.¹⁸⁵ As we will see in Chapter 7, the application of the PCESL is restricted to cross-border contracts, although national governments are left the option of making the rules apply to domestic contracts as well; moreover, it is “deliberately targeted” at contracts for the sale of goods, including online contracts concerning digital content products, since goods account

¹⁸⁰ *Note from the Presidency to the General Affairs Council/European Council no. 17024/09 on The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, p. 33.

¹⁸¹ *European Commission proposes an optional Common European Sales Law to boost trade and expand consumer choice*. Press Release of the European Commission on 11 October 2011.

¹⁸² Martijn W. Hesselink: “How to opt into the Common European Sales Law? Brief comments on the Commission’s proposal for a regulation”, p. 195.

¹⁸³ Ursula Pachl: “The Common European Sales Law – Have the Right Choices Been Made? A Consumer Policy Perspective”, p. 9.

¹⁸⁴ *European Commission proposes an optional Common European Sales Law to boost trade and expand consumer choice*. Press Release of the European Commission on 11 October 2011.

¹⁸⁵ Viviane Reding: “The optional Common European Sales Law – Seizing the opportunity!” Speech made on 10 November 2011 at the Conference on European Contract Law in Warsaw, Poland.

for the majority of trade within the EU.¹⁸⁶ That being said, it must be now be explained why the Commission has found this additional set of contract rules to be necessary in EU law.

According to the Commission, the differences between national sales and consumer laws have a dissuasive effect on cross-border trade, costing Europe an estimated 26 billion Euros each year. In other words, these differences can be regarded as constituting an obstruction to the proper functioning of the internal market. According to the Commission's sources, only 9.3 percent of all enterprises within the EU currently participate in cross-border trade.¹⁸⁷ The Commission holds that this is due to the fact that businesses who wish to take part in cross-border trade have to familiarize themselves with the requirements of the relevant national consumer and sales legislation of the individual country or countries, obtain legal advice and amend their contracts accordingly; moreover, if the trader operates online, he may have to adapt his website to the mandatory requirements that apply in the product's country of destination. The Commission explains that businesses cannot overcome these obstacles without acquiring transaction costs which have a great impact on small- and medium-sized enterprises (SMEs).¹⁸⁸ The Commission holds that it costs traders an average of 10.000 Euros to expand their business into the market of another member state, amounting to up to 7 percent of the annual turnover of a 'micro enterprise'; such enterprises constitute 92 percent of all SMEs in the EU. The Commission furthermore notes that according to a Eurobarometer study, 71 percent of European companies stated if they had the choice, they would use one single European contract law for all cross-border sales to consumers from other EU countries. Thus, the Commission explains, the PCESL is intended to provide just that: a common, yet optional, regime of contract law that is identical for all 27 Member States and accordingly empowers SMEs to expand into new markets.¹⁸⁹

As reported by the Commission, the divergences between the consumer and sales legislation of Member States also have a great impact on cross-border B2C transactions. Apparently, 44 percent of consumers stated that uncertainty pertaining to their rights

¹⁸⁶ Viviane Reding: "The optional Common European Sales Law – Seizing the opportunity!" Speech made on 10 November 2011 at the Conference on European Contract Law in Warsaw, Poland.

¹⁸⁷ *European Commission proposes an optional Common European Sales Law to boost trade and expand consumer choice*. Press Release of the European Commission on 11 October 2011.

¹⁸⁸ *A Common European Sales Law to Facilitate Cross-border Transactions in the Single Market*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, p. 2.

¹⁸⁹ *European Commission proposes an optional Common European Sales Law to boost trade and expand consumer choice*. Press Release of the European Commission on 11 October 2011.

discourages them from buying goods from other EU countries.¹⁹⁰ Their uncertainty often relates to concerns about their rights to redress if something were to go wrong with the sale.¹⁹¹ Another problem, which is essentially the other side of the coin, is that those consumers who are confident enough to proactively seek to buy from other EU countries - particularly online - are often refused sales or delivery by the trader.¹⁹² According to the Commission, this is because of the burden placed upon traders by Article 6 of *Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations*¹⁹³ (Rome I Regulation) which states that whenever a business directs its activities to consumers in another Member State it has to comply with the contract law of that Member State. Therefore, in situations where the mandatory consumer protection provisions of the Member State of the consumer provide a higher level of protection, such mandatory rules of consumer law must be respected by traders.¹⁹⁴ In Chapter 7, we will see the manner in which the PCESL intends to circumvent this rule of private international law. Not all traders are willing to take on this burden of getting acquainted with the rules of foreign legislation, and as a result, at least 3 million consumers are said to encounter this problem every year.¹⁹⁵¹⁹⁶ The PCESL will provide a common regime of contract law for all the Member States of the EU. It furthermore aims to provide the same “high” level of consumer protection in all Member States, enabling consumers to rely on the Common European Sales Law as a “mark of quality”. We will revisit this pledge of “high” consumer protection providing a “mark of quality” in Chapter 7, with a focus on the protection that Chapter 8 of

¹⁹⁰ *A Common European Sales Law to Facilitate Cross-border Transactions in the Single Market*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, p. 3

¹⁹¹ *A Common European Sales Law to Facilitate Cross-border Transactions in the Single Market*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, p. 3

¹⁹² *A Common European Sales Law to Facilitate Cross-border Transactions in the Single Market*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, p. 3

¹⁹³ *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*. *Official Journal* 4 July 2008. L 177/6.

¹⁹⁴ Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, p. 2.

¹⁹⁵ *A Common European Sales Law to Facilitate Cross-border Transactions in the Single Market*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, p. 3.

¹⁹⁶ However, Ursula Pachl points out that this Article 6(2) of the Rome I Regulation does not stipulate a legal obligation for businesses to adapt their contract terms *a priori* to the legislation of the consumer’s country of residence. Only in the case of court litigation would the judge have to assess whether, in light of Article 6, the trader directs its activities to the consumer’s country. If Article 6 would be found applicable, the judge would then assess whether the law chosen by the trader had deprived the consumer of better protection provided by national law. For a closer look at this as well as other points of criticism, see Ursula Pachl: “The Common European Sales Law – Have the Right Choices Been Made? A Consumer Policy Perspective”, p. 5.

the PCEsL offers consumers against unfair terms in B2C contracts. The Commission moreover states that the PCEsL will provide consumers with a wider choice of products at lower prices as a result of increased competition in addition to providing them with certainty regarding their rights in cross-border transactions. Finally, it is intended to increase transparency and consumer confidence.¹⁹⁷

Despite the claims of the Commission, it has been argued that the adoption of this instrument would lead to a series of disadvantages for EU consumers, especially with regard to the inevitable dilemma relating to the level of consumer protection to be provided by the CEsL. It goes without saying that a high level of consumer protection which takes into account the best practices in Member States clearly is not an attractive prospect for businesses. Consequently, the application of the CEsL would prove to be an unattractive choice for traders – it must be kept in mind that, after all, this instrument is purely optional. Yet, as it has commonly been pointed out, if the level of protection were simply to be average, the result would be what is commonly referred to as a ‘race to the bottom’, meaning that businesses would seek to apply the CEsL in countries with high consumer protection in order to circumvent and undermine the national standards - to the obvious detriment of the consumers of such states. Ursula Pachl claims that although the Commission declares that consumers would benefit from a “high level of protection in all Member States” and would be able to rely on the CEsL as a “mark of quality”, a number of weak points can be found in the consumer protection currently provided by the PCEsL. For instance, she notes that the level of protection secured in the CRD is not maintained in all respects, e.g. the PCEsL’s definition of the ‘consumer’ concept is not in conformity with the CRD’s consumer concept. At the same time, and more importantly for the purposes of this thesis, the level of protection is also inadequate in other fields, particularly, as we will see in Chapter 7, in relation with the rules of PCEsL on unfair contract terms.¹⁹⁸ Furthermore, Pachl holds that there is an obvious risk that the CEsL will undermine consumer protection not only in cross-border transactions, but ultimately in domestic contracts, since the PCEsL leaves Member States the choice of expanding the CEsL into the dimension of domestic contracts as well. For these reasons, as well as others which will not be explored here, Pachl has come to the conclusion that the PCEsL is ill-suited for B2C contracts.¹⁹⁹

¹⁹⁷ *European Commission proposes an optional Common European Sales Law to boost trade and expand consumer choice*. Press Release of the European Commission on 11 October 2011.

¹⁹⁸ Ursula Pachl: “The Common European Sales Law – Have the Right Choices Been Made? A Consumer Policy Perspective”, p. 11-12.

¹⁹⁹ *Ibid*, p. 4.

Clearly, this optional instrument, as manifested in the proposal for a *Regulation on a Common European Sales Law*, applying to B2B and B2C contracts alike, will have an impact on the legal landscape of unfair terms in EU consumer contract law. It devotes an entire chapter – Chapter 8 of the PCESL – to rules on unfair terms in B2C and B2B contracts. Thus, it can be said that a new nexus has been established between the two projects of the CFR and the review of the consumer acquis, albeit as two parallel levels of law, in that they both deal with consumer contract law, including rules on unfair terms.

We now turn our focus to the current EU legal landscape on rules pertaining to unfair terms in consumer contracts. In Chapter 6, we will explore the rules that are provided on this subject by the minimum harmonization Directive 93/13/EEC on Unfair Terms. As we will see, a number of questions remain unanswered in this field of law, despite the fact that almost two decades have passed since the Directive was adopted. Subsequently, in Chapter 7, we will compare the PCESL's rules on unfair terms in consumer contracts with those of the Directive. Moreover, we will explore the level of protection that is provided against unfair terms to those consumers who choose to conclude a contract under the rules of the PCESL, rather than under the national consumer contract rules of their Member State, focusing on the question of whether the PCESL does, in fact, provide a consumers with a “high level” protection against unfair terms in B2C contracts, which EU consumers can rely on as a “mark of quality”.

6. Directive 93/13/EEC on Unfair Terms

6.1 Introduction

6.1.1 The Leader Becomes a Follower

Directive 93/13/EEC on Unfair Terms in Consumer Contracts was the first major European intervention into the heart of national contract law.²⁰⁰ It embodies a significant contribution to the development of the EU consumer policy and has even been called the ‘the cornerstone of the EU private law architecture’²⁰¹ with roots extending back to the early stages of the development of the EU's consumer policy.²⁰² This Directive was under construction for almost 20 years,²⁰³ the first draft proposals dating back to the 1970's. Between 1975 and 1977 the Commission produced a few draft proposals which were discussed by governments’

²⁰⁰ Ewan McKendrick: *Contract law: Text, Cases and Materials*, p. 468.

²⁰¹ Paolisa Nebbia: “Unfair contract terms”, p. 216.

²⁰² Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 6.

²⁰³ Stephen Weatherill: *EU Consumer Law and Policy*, p. 115.

experts, but in the ensuing years, an enormous burst of legislative activity took place in this field of law at national level: in 1976, the Federal Republic of Germany adopted legislation on unfair contract terms and in 1977 the United Kingdom followed suit, followed shortly thereafter by France in 1978.²⁰⁴ In 1977, the Consumers' Consultative Committee expressed a desire for action against unfair contract terms at European level.²⁰⁵

However, the introduction of different regulatory frameworks on unfair terms at domestic level inevitably had a delaying effect on the adoption of such measures at European level, since it prevented the Member States from reaching the level of consensus necessary to proceed with its work in this field. Moreover, there were conflicting opinions on the appropriate level of social regulation on the matter and of the acceptable amount of Community involvement in its achievement. For this reason, as well as owing to commitments in other areas and to shortage of staff, the Commission's work on unfair terms was suspended for almost ten years.²⁰⁶ In 1980, a request for a Directive was made by the European Parliament,²⁰⁷ and in 1984 work on a directive on unfair terms resumed and the Commission published a consultation paper entitled *Unfair Terms in Contracts Concluded with Consumers*. Nonetheless, another six years passed before the Commission presented its first proposal for a directive on unfair terms on 24 July 1990. This proposal had its first reading in the European Parliament in October 1991 and subsequently, the Commission submitted an amended proposal²⁰⁸ based on Article 95 EC (114 TFEU)²⁰⁹. This proposal, which had been adopted by the Commission on 4 March 1992,²¹⁰ was a total reformulation of the initial version of the text²¹¹ and represented a nexus between the opening of the internal market for consumer goods and services on the one hand and the protection of consumers against unfair terms on the other. Thus, discussion in the Council recommenced on the reformulated text and the scope of application of the Directive. On 22 September 1992, the Council adopted an agreement on a common position, which contained a compromise and resulted in a significant reduction of the scope of application and the level of consumer

²⁰⁴ Paolisa Nebbia: "Unfair contract terms", p. 216.

²⁰⁵ Stephen Weatherill: *EU Consumer Law and Policy*, p. 115.

²⁰⁶ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 7.

²⁰⁷ Stephen Weatherill: *EU Consumer Law and Policy*, p. 115.

²⁰⁸ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 7.

²⁰⁹ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 123.

²¹⁰ *Amended Proposal for a Council Directive on Unfair Terms in Consumer Contracts*. COM (1992) 66 final, [1992] OJ C 73, 7-12.

²¹¹ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 7.

protection.²¹² It was in this phase that the Commission's amended proposal was transfigured into its final form.²¹³

On 5 April 1993, almost two decades after the Commission had presented the first draft proposals on the subject of unfair terms, the final text was at last adopted as the 'Council Directive relating to the approximation of the laws and administrative provisions of Member States concerning unfair terms in consumer contracts' 93/13/EEC,²¹⁴ providing partial harmonization of consumer contract law in Member States, i.e. minimum harmonization.²¹⁵ Because this legal process took such a long time, the legal landscape of the Member States had, by this time, undergone a radical transformation. As a result, the adoption of this directive was somewhat redundant as well as difficult to fit within the domestic frameworks which had already come into existence by this time. Instead of triggering legislative reform in the field of unfair contract terms and leading the way for the Member States, the European Community essentially became a follower in this respect.²¹⁶

6.1.2 The Rationale for Directive 93/13/EEC - The Internal Market Argument

The Single European Act²¹⁷ introduced qualified majority voting into the Council via Article 95 EC (Article 114 TFEU) which accelerated the development of an indirect consumer protection policy through the possibility of harmonizing the Member States' standards of consumer protection from the European level without having to obtain a unanimous consensus between the Member States. This qualified majority voting resulted in the diminished capacity of individual Member States to impede the will of the Community, even when a Member State felt that important issues concerning social policy were at stake. Thus, a Member State could be forced to lower its own legislative standards in order to comply with a minimalist preference of the majority.²¹⁸ However, the Member States came to realize that treating national rules of market regulation as nothing more than a barrier to trade, instead of taking into account their broader social function, would lead to a constraint of the long-established and highly-developed national efforts of consumer protection. So instead, a flexible Community framework was needed, capable of accommodating the individual national traditions. For this reason, the minimum harmonization approach represented a

²¹² Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 123.

²¹³ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 7.

²¹⁴ Official Journal L 95, 21 April 1993, 29.

²¹⁵ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 127.

²¹⁶ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 8.

²¹⁷ *Single European Act* of 17 February 1986. *Official Journal* L 169 of 29 June 1987.

²¹⁸ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 9.

compromise in this respect, in many ways similar to the rationale of the *Cassis de Dijon*²¹⁹ mandatory requirements, i.e. that market integration should not pose a threat to certain important non-market interests.²²⁰ Thus, the minimum harmonization approach restricts the extent to which the Directive undermines existing contract law traditions at domestic level.²²¹

Resultantly, Article 8 of the Directive permits Member States to “adopt or retain the most stringent provisions compatible with the Treaty” in the area covered by the Directive, “to ensure a maximum degree of protection for the consumer.” This approach ensures that consumers can enjoy the minimum level of protection guaranteed by the Directive regardless of where they chose to buy goods or services.²²² However, as will be recalled from Chapter 5.4.6 on Directive 2011/83/EU on Consumer Rights, the existence of these divergences between the national legal systems of the Member States ultimately have the effect that traders cannot use the same standard form contract throughout the European Union, which arguably poses a hindrance to cross-border trading and the internal market at large.

As we have seen, the Proposal for the CRD intended to repeal Directive 93/13/EEC on Unfair Terms and to replace the minimum standards with maximum standards via the full harmonization approach. This part of the proposal, i.e. regarding Directive 93/13/EEC, was met with much criticism due to the fact that it would lower consumer protection in many Member States²²³ and ultimately, only two out of the four original directives were repealed and replaced by the consolidated CRD, i.e. the Doorstep Selling Directive 85/577/EEC and the Distance Selling Directive 97/7/EC, whereas the CRD only amended the Unfair Terms Directive 93/13/EEC and Consumer Sales Directive 1999/44/EC but did not subject them to the maximum harmonization approach. As a matter of fact, the only amendment made by the CRD to the Unfair Terms Directive 93/13/EEC was to “require Member States to inform the Commission about the adoption of specific national provisions in certain areas”, as stated in recital 63. Thus, the Directive has now been amended to include a new ‘Article 8A’ which states that:

1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:
 - extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or,

²¹⁹ Case C-120/78, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

²²⁰ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 9.

²²¹ Stephen Weatherill: *EU Consumer Law and Policy*, p. 116.

²²² Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 9.

²²³ See, for instance, ‘The Opinion of the European Economic and Social Committee on ‘The Proposal for a Directive of the European Parliament’’, C 317/54 OJ 23.12.2009 and ‘The Opinion of the Committee of the Regions on consumer rights (2009/C 200/14)’, C 200/76 OJ 25.8.2009.

- contain lists of contractual terms which shall be considered as unfair,
- 2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.
- 3. The Commission shall forward the information referred to in paragraph 1 to the other Member States and the European Parliament. The Commission shall consult stakeholders on that information.²²⁴

6.1.2 The Nexus between Directive 93/13/EEC and the Internal Market

Although the *Cassis de Dijon*²²⁵ case is most widely known for its impact on the free movement of goods, it also had a great influence on the understanding of the nexus between national consumer protection initiatives in Europe and the objective of ensuring the free flow of trade and factors of production. *Cassis de Dijon* expressly states that the divergences between national consumer legislation can act as a hindrance to the free flow of goods. However, in the absence of Community harmonization within a specific field, Member States are allowed to take or to maintain reasonable measures to prevent unfair trade practices.²²⁶ According to Hans-W. Micklitz and Stephen Weatherill, the effect of this judgment is that upholding such national legislation amounts to recognizing that individual Member States maintain certain powers and responsibilities which are not invalidated by the process of market integration. Micklitz and Weatherill hold that: “In such circumstances the limits of negative laws are reached, which implies a need to shift the emphasis towards positive law. Traditionally, this would take the shape of Community legislative action in the field to establish free trade on common rules throughout the Community while ensuring that an appropriate level of protection is also secured”.²²⁷ Therefore, positive integration in the field of consumer protection has been seen as the sole solution to the medley of national initiatives acting as lawful impediments to trade. It thus comes as no surprise that most of the EU’s consumer protection measures were adopted after the *Cassis de Dijon* judgment was given and that the Commission has thereafter reiterated that the development of the EU consumer policy has been “an essential corollary of the progressive establishment of the internal market”.²²⁸ This is the setting in which Directive 93/13/EEC on Unfair Terms emerges in 1993. It seeks to protect the consumer, as the contractual party which is typically the weaker party to a contract,²²⁹ for the purposes of the facilitation of the internal market.

²²⁴ See Article 32 of Directive 2011/83/EU on Consumer Rights.

²²⁵ Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 00694.

²²⁶ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 9-10.

²²⁷ Hans W. Micklitz and Stephen Weatherill: “Consumer Policy in the European Community: Before and After Maastricht”, p. 289.

²²⁸ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 10.

²²⁹ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 127.

Adopted under Article 95 EC (114 TFEU), Directive 93/13/EEC thus differs from national rules on unfair terms which have the sole objective of protecting the weaker party to a transaction; it has the distinct characteristic of establishing a nexus between consumer protection and the establishment of the internal market²³⁰ by eradicating the obstacles resulting from the dissimilar national rules on unfair terms. There are two sides to this coin, i.e. the purpose relating to the facilitation of the internal market: on the one hand, the advantages of the consumer, and on the other, an increased efficiency for traders. As clarified by the Commission in the explanatory memorandum to the 1990 Proposal,²³¹ the underlying idea is that consumers will lack the confidence to take advantage of the new prospects provided by the completion of the internal market, e.g. the ability to purchase goods and services at more favorable prices in other Member States than in their own state of residence, unless they can rely on some assurance that they will not be disadvantaged by unfair contracts.²³² This protective purpose is also expressed in the recitals of the Directive, particularly in recitals 6 and 8-10.²³³

The other side of the coin, i.e. the perspective of the trader, is that Directive 93/13/EEC is intended to contribute to the removal of obstacles by decreasing the skepticism, doubt and other difficulties accompanied with trading, e.g. transaction costs and uncertainty regarding whether contract terms would be valid under the legislation of another Member State. Moreover, the Directive aims to remove dissimilarities between traders when selling goods or providing services in other Member States than their own, thereby expelling distortions of competition, as reflected in recitals 2 and 7.²³⁴ Through the minimum harmonization approach, the European legislator thus aspired to promote and enhance cross-border transactions.²³⁵ However, as we have seen in earlier chapters, these very reasons have in later years been given to justify the replacement of the minimum harmonization approach with that of full harmonization, i.e. the so-called ‘minimax debate’ encompassing the CRD. Ultimately, however, the maximum harmonization approach was deemed unsuitable for the rules on unfair terms, due to the effect it would have had on consumer protection, and accordingly these rules continue to be subjected to minimum harmonization under Article 114 TFEU, see Chapter 5.4.6.

²³⁰ Paolisa Nebbia: “Unfair contract terms”, p. 216.

²³¹ Explanatory Memorandum to the 1990 Proposal, COM (90) 322 final, p. 2.

²³² Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 11.

²³³ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 127.

²³⁴ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 11-12.

²³⁵ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 127.

6.2 The Scope of Application *Ratione Personae* of Directive 93/13/EEC

6.2.1 Setting the Stage – The Parties Involved in the Conclusion of a ‘Consumer Contract’

Before we embark on an exploration of the scope of application of the Unfair Terms Directive 93/13/EEC, it must be stressed, as Micklitz reminds us, that the Directive determines its scope of application autonomously and without regard to the corresponding provisions of Member States in this field of law.²³⁶ This reality must constantly be borne in mind as we edge our way through the following chapters on the subject of the Directive’s scope of application. We will begin our analysis of this subject with the scope *ratione personae* and then turn our focus to the scope *ratione materiae*. The examination of the latter will be divided into two categories, the first dedicated to a discussion of the kinds of contracts which may fall outside the scope of the Directive and the subsequent section to the kinds of terms which can and cannot fall under the scope of the Directive’s control of fairness.

The scope of application *ratione personae* of Directive 93/13/EEC is defined in Article 1(1) of the Directive. This provision explains that the purpose of the Directive is to harmonize the domestic legislation of Member States “relating to unfair terms in consumer contracts concluded between a seller or supplier and a consumer.” Attention must be drawn to two important aspects within this statement. Firstly, the Directive only applies to ‘consumer contracts’. Secondly, such ‘consumer contracts’ must be concluded between representatives of two distinct categories of contractual parties. It follows that in order to understand which contracts fall under the scope of the Directive, one must first become acquainted with the ‘players’ involved. At opposite ends of the contractual relationship forming a ‘consumer contract’ in the sense of the Directive’s Article 1(1), are, on the one hand, the ‘consumer’, and on the other, the ‘seller or supplier’, commonly referred to as the ‘business party’. As will be illustrated below, Directive 93/13/EEC does not make a distinction between privately owned and publicly owned business parties. Hence, both types fall under the scope *ratione personae* of Directive 93/13/EEC. We will begin by exploring the concept of the ‘consumer’ and then move on to explore who can, under Directive 93/13/EEC, fill the position of the consumer’s counterpart: the so-called ‘seller or supplier’.

²³⁶ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 128.

6.2.2 The 'Consumer' Concept

Different notions of the 'consumer' concept exist throughout Europe, not only between the Member States but also within the consumer acquis, although all these definitions have in common that they, at the very least, include natural persons acting outside of business, sometimes requiring them to act exclusively for private purposes. A number of the Member States' definitions also include legal persons, e.g. Spain and Belgium.²³⁷ In EU law, the notion of a 'consumer' varies according to the diverse focuses and objectives of EU policies and legislation. In most of the consumer contract directives, the consumer concept is based on a 'transaction' definition which provides that a 'consumer' is a natural person who, in the transaction covered by the relevant directive, is acting for purposes which are unrelated to his trade or profession, a delimitation which was first used in the Brussels Regulation²³⁸ and subsequently applied to secondary legislation.²³⁹

According to the consumer contract acquis, only natural persons can fall under the 'consumer' concept²⁴⁰ although the Commission made the following note in the Green Paper on the Review of the Consumer Acquis: "[...] some businesses, such as individual entrepreneurs or small businesses may sometimes be in a similar situation as consumers when they buy certain goods or services which raises the questions whether they should benefit to a certain extent from the same protection provided for to consumers. During the review the widening of the definitions to cover transactions for mixed purposes should be considered."²⁴¹ Nonetheless, the definition of the 'consumer' concept provided by the new Consumer Rights Directive 2011/83/EU explicitly states that only natural persons can fall under the scope of the concept.²⁴² Thus far, the review of the consumer acquis has therefore not resulted in such an expansion of the 'consumer' concept.

That having been said, our focus now shifts to the 'consumer' concept of Directive 93/13/EEC. Article 1 of Directive 93/13/EEC states that the Directive applies to contracts concluded between a 'seller or supplier' and a 'consumer'. Article 2(b) provides a definition of the 'consumer' concept, stating that: "'consumer' means any natural person who, in

²³⁷ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 29.

²³⁸ Council Regulation 44/2001 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1972] OJ L12/1.

²³⁹ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 69-70.

²⁴⁰ Ása Ólafsdóttir and Eiríkur Jónsson: *Neytendaréttur*, p. 29-30.

²⁴¹ Commission of the European Communities: *Green Paper on the Review of the Consumer Acquis*. Brussels 8 February 2007. COM (2007) 744 final., p. 15.

²⁴² See Article 2(1) of the Consumer Rights Directive 2011/83/EU: "'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession".

contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession". This delineation of the 'consumer' concept is obviously a reflection of the typical 'transaction' definition commonly provided in the EU consumer contract directives as explained above. As Nebbia observes, the Directive is silent on the subject of the burden of proof, thereby indicating that conventional rules on *onus probandi* apply, i.e. that the person wishing to rely in the protection provided by the Directive has to establish that he acted as a consumer when concluding the contract in question.²⁴³

It should be noted that the 'consumer' party to a 'consumer contract' in the meaning of Directive 93/13/EEC can only be a natural person, whereas, the 'seller or supplier' may be either a natural or a legal person.²⁴⁴ A more problematic element of this definition, however, is posed by the requirement that the consumer be 'acting for purposes which are outside his trade, business or profession'. Nebbia holds that the notion of 'purpose' in this definition must be understood to refer to the 'objective destination' of the goods or services purchased. Although the nature of the goods or services obtained (e.g. baby carriage or a health insurance policy) or from the status or profession of the purchaser (e.g. a student, retiree or homemaker etc.) frequently imply whether or not the purpose of the transaction is to meet the personal or family needs of the consumer, incertitude may nonetheless arise in 'grey area' situations where these factors do not provide a definitive indicator of the purpose for which the transaction is carried out. The same applies in situations when the goods or services obtained can be used for both personal as well as professional purposes,²⁴⁵ for instance when a self-employed lawyer purchases a computer.

In 'grey area' situations, the question therefore ensues how the 'consumer' concept of Directive 93/13/EEC should be interpreted. According to Nebbia, two possible means of interpretations arise. The first option entails that the Directive's scope of protection could be confined to purchases which are exclusively intended to fulfill personal needs. Accordingly, the 'consumer' concept would be restricted to natural persons that actually consume the goods or services purchased. It would consequently not refer to natural persons who use the goods or services obtained to produce or to distribute other goods or services. As Nebbia points out, this approach does not necessarily aspire to protect the weaker party to a contract. It rather

²⁴³ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 74.

²⁴⁴ Stephen Weatherill: *EU Consumer Law and Policy*, p. 117.

²⁴⁵ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 69.

directed at protecting the party to a contract that takes part in a transaction to fulfill personal needs or the needs of its family.²⁴⁶

The alternate possibility, sometimes referred to as the ‘competence-based approach’, would be to interpret the ‘consumer’ concept in such a way as to refer to any natural person who is in a technically inferior position compared to the counterparty to the contract, who, by reason of that party’s business or profession, possesses expert knowledge in the relevant field of business. According to this approach, as Nebbia observes, a contractual party would only be considered to be acting for purposes within its trade, business or profession (and thus be excluded from the ‘consumer’ concept) when concluding a contract which is a direct expression of its trade and where the party possesses both technical knowledge and competence. She states that the sole fact that goods may be useable in the relevant trade, business or profession would consequently not in and of itself result in the natural person being excluded from the scope of the ‘consumer’ concept, as long as that person acts outside its field of competence.²⁴⁷

So which of these two approaches should be applied when interpreting the ‘consumer’ concept of Directive 93/13/EEC? The answer is, of course, to be found in the case-law of the ECJ. In short, the Court has consistently employed the former approach when interpreting the ‘consumer’ concept of the EU consumer contract directives. In *Di Pinto*²⁴⁸ the ECJ was faced with the question of whether a trader who had accepted an offer to advertise the sale of its business in a periodical published by Di Pinto could, in the context of that particular transaction, fall under the scope of the ‘consumer’ concept of Article 2 of the Doorstep Selling Directive 85/577/EEC. The trader claimed that he should be awarded the protection provided by the Directive to a ‘consumer’ since the sale of the business in question had not been an act performed within the context of his professional activity. The ECJ rejected the trader’s argument on the grounds that Article 2 does not make a distinction between the normal acts of a business and acts which are exceptional in nature. It stated that “acts which are preparatory to the sale of a business, such as the conclusion of a contract for the publication of an advertisement in a periodical, are connected with the professional activity of the trader; although such acts may bring the running of the business to an end, they are

²⁴⁶ Paolisa Nebbia: “Unfair contract terms”, p. 217.

²⁴⁷ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 71.

²⁴⁸ Case C-361/89 *Criminal Proceedings against Di Pinto* [1991] ECR I – 1189.

managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader.”²⁴⁹

From the judgment in *Di Pinto* we can therefore draw the conclusion that, in deciding whether or not a contractual party falls under the scope of the ‘consumer’ concept, the ECJ directs its focus towards the question of whether the particular transaction was in fact concluded to fulfill professional needs rather than personal needs or the needs of the contractual party’s family. If this question is answered in the affirmative, then it has no bearing on the ECJ’s decision whether or not the professional purpose was exceptional in nature, rather than being ‘typical’ for that relevant profession. Thus, if the contract was not concluded for personal purposes or to fulfill the needs of the contractual party’s family, then that party will be excluded from the scope of the ‘consumer’ concept.

Similarly in *Dentalkit*,²⁵⁰ the ECJ had to adjudicate whether or not a trader who concluded a contract regarding the purchase of dental hygiene products, “not for the purpose of a trade he was already pursuing but a trade to be taken up only at a later date”, could be regarded a consumer within the meaning of Articles 13(1) and 14(1) of the Brussels Convention.²⁵¹ The ECJ established that:

*[...] only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character. Accordingly, it is consistent with the wording, the spirit and the aim of the provisions concerned to consider that the specific protective rules enshrined in them apply only to contracts concluded outside and independently of any trade or professional activity -or purpose, whether present or future.*²⁵²

In *Idealservice*,²⁵³ the only case directly concerning Directive 93/13/EEC, the ECJ confirmed once again that contractual parties taking part in transactions for the purpose of trade or professional activity cannot benefit from the protection awarded by the Directive to consumers. This case concerned a businessman acting through a company to supply automatic drink dispensers which were intended for the sole use of the company’s employees. The

²⁴⁹ *Di Pinto*, para 14-16.

²⁵⁰ Case C-269/95 *Francesco Benincasa v. Dentalkit Srl* [1997] ECR I – 03767.

²⁵¹ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 7 September 1968 which is parallel to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988. The former has now been replaced by the aforementioned Brussels Regulation of 22 September 2000.

²⁵² *Dentalkit*, para 17-19. (Italics reflect the author’s emphasis).

²⁵³ Case C-541/99 *Cape Snc v. Idealservice Srl* [2001] ECR I – 9049.

goods and services purchased were in other words completely unconnected to the actual professional activity or the trade of this trader. Two distinct questions were raised by the Italian court *Giudice di pace di Viadana* in this case through the preliminary reference procedure.²⁵⁴ Firstly, the court asked whether a businessman who purchases goods or services for purposes that are entirely separate from his professional activity or trade should be considered a ‘consumer’ in the sense of Article 2(b) of the Directive. Secondly, it asked whether a legal person could be found to fall under the scope of the ‘consumer’ concept. The ECJ did not address the former of these two questions.²⁵⁵ Instead, it simply established that a legal person cannot, according to the wording of Article 2(b) of the Directive, qualify as a consumer.²⁵⁶

Accordingly, it may perhaps be deduced that even if goods or services are obtained to fulfill personal needs or the needs of the family, such a contract would nonetheless fall outside the scope of Directive 93/13/EEC as long as the purchaser acts through his business to conclude the contract in question. Irrespective of this deduction, however, it must be noted that in light of the ECJ’s case-law described above it can hardly be seen why it should make any difference that the automatic drink dispensers were obtained for the, as the Italian court put it, “sole benefit of the company’s employees, which is wholly unconnected with and remote from [the company’s] normal trade and business”.²⁵⁷ As we have already seen, it does not matter in the ECJ’s view whether the professional purpose was exceptional in nature or intended to fulfill a typical purpose of the professional activity. Instead, the key issue is whether the contract in question is concluded “outside and independently of any trade or professional activity”, solely for to fulfill personal needs or the needs of the family. It is difficult to see how goods or services obtained for the benefit of the employees of a business, to be used on business premises and, presumably, predominantly during business hours, can be found to fit that requirement of being independent of any trade or professional activity. This train of thought will be revisited below in relation to the so-called ‘mixed contracts’ towards which we now turn our focus.

Yet another ‘grey area’ regarding the scope of the ‘consumer’ concept relates to so-called ‘mixed contracts’, i.e. contracts regarding the purchase of a good or a service that can serve personal as well as professional needs. Such contracts are commonly conducted by, albeit not excluded to, self-employed persons. As Nebbia notes, the problem lies in the fact that

²⁵⁴ Which was at the time provided for in Article 177 of the EC Treaty but is now found in Article 267 TFEU.

²⁵⁵ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 29-30.

²⁵⁶ *Idealservice*, para 15-16.

²⁵⁷ *Ibid*, para 10.

although it may be possible to distinguish the proportional personal need versus the proportional professional need of the goods or services obtained, a contractual party either is or is not a consumer. It goes without saying that it cannot be held to be a partial consumer. In *Gruber*,²⁵⁸ the ECJ was asked whether a farmer who bought tiles for the roof of a farm building which was used partly for private and partly for professional purposes should be considered a consumer for the purposes of the special rules on jurisdiction provided for consumer contracts in Article 13 of the Brussels Convention.²⁵⁹

The ECJ established that in such ‘mixed contracts’ the contractual party will only be awarded the status of a consumer²⁶⁰ if the “link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety.”²⁶¹ In the context of this case it may be noted that Micklitz is of the opinion that if a consumer were to deceive the other contractual party with regard to the true purpose of the contract, e.g. if he has maintained that the contract is a part of his professional activity despite this only being true to a small degree, he would consequently be held to have waived his protection. Accordingly the good-faith counterparty to the contract would not be subject to the special rules of Article 13 and 14 of the Brussels Convention on jurisdiction.²⁶²

The ECJ’s judgment in *Gruber* was based on the fact that the rules regarding jurisdiction for consumer contracts constituted a derogation from the general principle of the Brussels Convention, i.e. that the courts of the resident state of the defendant should have jurisdiction. For this reason the ECJ concluded that such rules must be interpreted strictly. Moreover, the Court held that the special rules laid down by the Convention to protect the consumer, as the party deemed to be the weaker party, only cover contracts that are “concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual’s own needs in terms of private consumption” and concluded that such protection is unwarranted in the case of contracts for the purpose of a trade or professional activity.²⁶³

Nebbia has subjected this judgment to three interesting critical remarks which shed light on its weak points. She points out that the Court does not explain the reason why the professional purpose of the contract, even when it is not predominant but is simply is not so fleeting as to

²⁵⁸ Case C-464/01 *Johann Gruber v. Bay Wa* [2005] ECR I – 00439.

²⁵⁹ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 73.

²⁶⁰ Paolisa Nebbia: “Unfair contract terms”, p. 218.

²⁶¹ *Gruber*, para 39.

²⁶² Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 134.

²⁶³ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 73.

be ‘marginal’, necessarily has to result in the application of the general principle of jurisdiction is not explained. She explains that although Advocate General Jacobs suggests in this case that “inasmuch as a contract is entered into for the customer’s trade or professional purposes, he must be deemed to be on an equal footing with the supplier. And that position of equality – his deemed business and legal experience, and resources, vis-à-vis those of the supplier – cannot be undermined by the fact that the contract also serves private purposes”. In her opinion, Advocate General’s argument is based on criteria taken from the competence-based approach, which the ECJ, as we have seen, has rejected. Moreover, Nebbia notes that it is not clear what a ‘negligible’ or ‘marginal’ link would actually constitute in practice and wonders where exactly the proportional line should be drawn.²⁶⁴ Clearly, these two points of criticism are directed at issues which the ECJ may very well clarify in future case-law.

The third point of criticism, however, is of a nature which is more difficult to respond to. Nebbia observes the ruling in this case is based on the presumption that such a distinction can actually be made in the first place. She explains that although it may be easy to make such a distinction in the case of a car or a computer, it would, in her opinion, ultimately prove impossible in other situations such with regard to a contract for the supply of electricity or water to the home of a doctor who has set up a medical practice in his or her own home. In this context, Nebbia asks to what extent it would be possible to argue that the link with the profession is ‘negligible’?²⁶⁵

It is in this context which we return our focus to the question of whether the purchase of the automatic drink dispensers in *Idealservice* could perhaps have been held to constitute a ‘consumer contract’ if the purchase had not been made specifically through a legal person. It may certainly be argued that such a contract constitutes a ‘mixed contract’ since it, on the one hand, serves to fulfill the (personal) biological need of individuals to drink fluids, and on the other, the (professional) need of a business for functioning employees. The question therefore becomes: is the link between the contract and the trade or profession so slight as to be marginal, and has therefore only had a negligible role in the context of the supply in respect of which the contract was concluded, when considered in its entirety? It is exactly in situations such as this one that it becomes so overtly apparent how difficult it can be to apply the *Gruber* test. How can a ‘proportional’ distinction possibly be made with regard to such a fundamental

²⁶⁴ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 73.

²⁶⁵ *Ibid.*

biological necessity as is the case here? It remains to be seen how the ECJ will respond to situations as difficult and unclear as this one in the future.²⁶⁶

6.2.3 The 'Seller or Supplier' Concept - The Business Party

Just as there are different notions of the 'consumer' concept in existence throughout Europe, so are there different notions in EU consumer law of the party with whom the consumer deals. However, EU legislation does not use a uniform term for the other party to the consumer contract, as it does with regard to the 'consumer' concept. That party, commonly known as the 'business party', is given various titles in the consumer contract directives, e.g. 'trader', 'supplier', 'seller' or 'creditor'. Despite this fact, these directives have two elements in common with regard to the business party. Firstly, it can just as easily be a legal person as a natural person and secondly, the business party always acts for purposes relating to that person's trade, work or profession.²⁶⁷

The diverse titles and definitions of the business party can mostly be accredited to the need to include a wide range of different economic agents in each respective directive, varying, for instance, from the supplier, to the producer to the credit institution. Nonetheless, the inconsistent definitions of this contractual party in the consumer contract directives have sometimes been made the subject of criticism.²⁶⁸ For instance, Nebbia claimed it difficult to justify use of the different terms in, for example, the Doorstep Selling Directive 85/577/EEC and the Distance Selling Directive 97/7/EC, the former using the term 'trader' to imply a "natural or legal person who, for the transaction in question, acts in his commercial or professional capacity" and the latter employing the term 'supplier' (a term, as she points out, which is usually used to refer to the provision of a service) defined as "any natural or legal person who [...] is acting in his commercial or professional capacity". As she notes, it was commonly hoped that the revision of the consumer acquis would bring about more coherent definitions in this respect.²⁶⁹ For that reason, it must be mentioned that with the adoption of the Consumer Rights Directive 2011/83/EU, which repealed and replaced the two Directives

²⁶⁶ Nebbia's proposes as a solution that recourse be had to other indicators in the determination of whether or not a particular contract shall be considered a 'consumer contract'. Since dealing as a business often results in several advantages, e.g. a stronger bargaining power, access to stores that only sell to traders and retailers and the ability to recover value added tax on the purchases made, she proposes that in such cases, the one who chooses to enjoy such benefits, e.g. by asking for a VAT receipt or by using stationery with the trader's business letterhead, should not also be able to enjoy the benefits awarded to consumers. In deciding whether or not to apply consumer rules, Nebbia finds that the ECJ should investigate such matters. *Ibid*, p. 74.

²⁶⁷ *EC Consumer Law Compendium: Comparative Analysis*, p. 734.

²⁶⁸ *Ibid.*, p. 92.

²⁶⁹ *Ibid.*, p. 92.

which were taken as an example, the aforesaid definitions have been superseded by the wide-ranging concept of a ‘trader’, defined in Article 2(2) of the CRD as “any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for the purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive”. Directive 93/13/EEC, however, remains unaffected in this respect despite the original intention for it be repealed and replaced by the CRD.

As will be recalled from the previous chapter, Article 1(1) of Directive 93/13/EEC provides that the provisions of the Directive only apply to contracts which are concluded between a ‘consumer’ on the one hand and a ‘seller or supplier’ on the other. Article 2(c) of the Directive defines the latter concept as: “any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.” Most Member States have transposed the terms ‘seller’ and ‘supplier’ in conformity with Directive 93/13/EEC, albeit in part under the more general terms of “professional” or “business”, although express definitions have not been provided in some Member States, particularly in France and in Luxembourg. Interestingly, Belgium law, furthermore, has the peculiarity of providing separate rules concerning contracts between consumers and practitioners of liberal professions based on special legislation dealing with ‘unfair terms in consumer contracts with practitioners of liberal professions’. Malta, moreover, has the distinction that any category or class of persons can be designated to constitute a ‘trader’ by Order of the Minister responsible for Consumer Affairs, subsequent to the consultation of a special Consumer Affairs Council and publication in the Gazette.²⁷⁰

That being said, it must be stressed that the notion of the business party in Article 2(c) of Directive 93/13/EEC is autonomous to European law and is to be interpreted widely. Hence, the concept ‘seller or supplier’ covers all natural and legal persons in the course of their business or profession, encompassing a broad range of professions as heterogeneous as, for example, farmers and freelancers.²⁷¹ More surprisingly, it has been held by Nebbia that, despite the terminology of ‘seller’ or ‘supplier’, the scope of the Directive should not be restricted to the provision of goods or services, since the Directive does not make any reference to the sale of goods or supply of services. Consequently, a seller or supplier would be defined as a natural or legal person, who, in contrast to the consumer, is acting for purposes associated with his trade, business or profession, for instance if he is buying a

²⁷⁰ *EC Consumer Law Compendium: Comparative Analysis*, p. 379-380.

²⁷¹ *EC Consumer Law Compendium: Comparative Analysis*, p. 379.

service or goods instead of selling. In this context, Nebbia names as an example of such a transaction a situation where a car dealership purchases a car from an individual for the purposes of reselling it.²⁷² It remains to be seen whether the ECJ will take the same view as Nebbia in this regard.

Irrespective of the purpose associated with the business party's trade, business or profession, the question arises whether Directive 93/13/EEC requires the intention of the business to make a profit (often referred to as the 'animo lucri' requirement). According to the authors of the *EC Consumer Law Compendium*, several arguments support the view that a profit motive is, with regard to all of the consumer contract directives, irrelevant, for instance that the intention to make a profit concerns an internal business factor, which, in some circumstances, can only be proven with difficulty and which businesses can often manipulate, for example by transferring profits within a corporate group. More specifically with regard to Directive 93/13/EEC, the profit motive has been held to be irrelevant to the question of the Directive's scope of application *ratione personae* for the reason that, as we will explore in the subsequent chapter, the Directive does not make a distinction between privately owned business parties and publicly owned business parties.²⁷³

6.2.4 Public Sector Undertakings

According to Article 2(c), the counterparty to the consumer in a 'consumer contract' falling within the scope of Directive 93/13/EES can be either privately owned or publicly owned. Recital 14 further states that the Directive "also applies to trades, businesses or professions of a public nature." This aspect of the definition, i.e. that the nature of the owner of the business party has no bearing on the Directive's scope of application, constitutes an important, albeit controversial, element of the 'seller or supplier' concept. By comparison, the German version of the Directive states that the Directive is also applicable if the business or professional activity is attributable to the area of public law,²⁷⁴ whereas the French version refers to a 'professional activity, whether public or private'.²⁷⁵ In light of the above, it can at any rate, according to Nebbia, be assumed that the Directive extends to private law contracts between

²⁷² Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 92.

²⁷³ *EC Consumer Law Compendium: Comparative Analysis*, p. 734.

²⁷⁴ "dem öffentlich-rechtlichen Bereich zuzurechnen ist."

²⁷⁵ "activité professionnelle, qu'elle soit publique ou privée".

consumers and public legal persons or bodies. What remains unclear, however, is whether public service contracts fall within the scope of the Directive, as private law contracts do.²⁷⁶

According to a report composed for the Commission in 1997 on the subject of public services, numerous terms and conditions under which public services are provided, irrespective of whether they are provided within a contractual frame or not, are likely to be found unfair in the sense of Directive 93/13/EEC. For this reason, this aspect of the ‘seller or supplier’ concept, as defined by Article 2(c), has the prospect to have a considerable impact on consumer protection. However, this potential impact is subject to two limitations which must be accounted for briefly. Firstly, the Directive only applies to contractual relationships and secondly, Article 1(2) of the Directive stipulates that “contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions” are not subject to control under the Directive.²⁷⁷

The affect of these limitations is uncertain and remains to be settled. First of all, as Nebbia points out, it is not clear what exactly amounts to a ‘contractual’ provision of a service or goods, for the simple reason that, at present, a collective conception of the notion of a ‘contract’ does not even exist. Nonetheless, it has commonly been held that the provision of a public service should at least not be excluded from the Directive for the sole reason that the relationship with the recipient of the public service is, in certain Member States, governed by regulations instead of a contract. This view is supported by the Annex to the *procès verbal* to the Directive which provides that: “The Commission states that the concept ‘contract’ as referred to in Article 2 also covers transactions by which supplies or services are provided in a regulatory framework”. This indicates that the sole fact that public services are often provided under terms found within a regulatory framework rather than in a typical contract should not exclude such services from the Directive’s scope of application. Nonetheless, the Commission has not given any further indication on this matter, nor has there been any discussion on this subject on behalf of the Member States.²⁷⁸

The second limitation to the prospective impact of the definition found in Article 2(c) on the protection of consumers against unfair terms stems from the ambivalent meaning of the expression ‘mandatory statutory or regulatory provisions’ found in Article 1(2) of the Directive. This provision poses problems with respect to the determination of to what extent the terms of public service undertakings can be included within the scope of Directive

²⁷⁶ *EC Consumer Law Compendium: Comparative Analysis*, p. 736.

²⁷⁷ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 95.

²⁷⁸ *Ibid.*, p. 95-96.

93/13/EEC. In short, Article 1(2) has been considered by academics to refer to contractual terms which reflect statutory or regulatory provisions of Member States, including, interestingly enough, ‘default’ rules despite the utilization of the word ‘mandatory’. In fact, the concept of ‘mandatory statutory or regulatory provisions’ has been held to apply to default rules irrespective of whether such rules would always apply to a particular contract for the sole reason that their exclusion is prohibited (i.e. the rules are mandatory in nature) or whether they are purely optional, meaning that parties remain at liberty to apply different rules if they so choose.²⁷⁹

This concept will be discussed in greater detail in Chapter 6.4.4, but suffice it to say, for the time being, that it is disputed whether terms regarding public services in the form of, for example, an ordinance or a similar administrative act fall within the scope of application of the Directive²⁸⁰ due to the express stipulation of Article 1(2) that terms reflecting statutory or regulatory provisions of Member States are excluded from the control of fairness. As we have already seen, the Commission has stated that the notion of ‘contract’ is not limited to the traditional notion of the term; rather, it extends to transactions which are provided in a regulatory framework.²⁸¹ Accordingly, a conflict arises between the provisions of Article 1(2) and Article 2(c), the latter of which clearly intends for the terms of publicly owned business parties to fall under the scope of the fairness control. This issue remains to be settled by the ECJ or even the EU legislator, but, as can be seen from the Commission’s Report of 2000 on the implementation of Directive 93/13/EEC,²⁸² the Commission is certainly of the opinion that public services “cannot be excluded from the scope of the Directive in respect of ‘mandatory provisions’” due to the fact that they are “included in the definition of the ‘seller or supplier’, i.e. professional”. The report goes on to state that this understanding is further supported by the fact that the Commission has previously held that the concept of ‘contract’ encompasses transactions involving supplies of goods or services in a regulatory framework.²⁸³

The exclusion of ‘mandatory statutory or regulatory provisions’ from the scope of the Directive’s fairness control, as stipulated by Article 1(2), has been held to be particularly problematic in relation to public services, not only because such ‘mandatory’ provisions and terms reflecting those provisions are particularly prevalent in the context of public services,

²⁷⁹ Chris Willett: “General Clauses on Fairness and the Promotion of Values Important in Services of General Interest”, p. 72.

²⁸⁰ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 130-131.

²⁸¹ *Ibid*, p. 95-96.

²⁸² Commission of the European Communities: *Report from the Commission on the Implementation of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts*. COM (2000) 248 final.

²⁸³ *Ibid*, p. 15.

but also because evidence indicates that such terms may, to a great extent, be unfair in the sense of the rules of Directive 93/13/EEC. As noted by Chris Willett, it can therefore be concluded that the presumption of the fairness of such terms may, in fact, in many cases be undeserved.²⁸⁴ As stated above, the findings of the 1997 report on public services indicated that extensive difficulties exist in supervising the contents of public service contracts in the Member States. The report found that national courts have traditionally been very reluctant to review the terms under which public services are been provided due to the fact that they often consider such services to be governed by regulation rather than contract.²⁸⁵ Subsequently, the Commission Report of April 2000 on the application of this Directive found that, in practice, “whole swathes of the economy are not subject to control in respect of unfair contractual terms.”²⁸⁶

With the above in mind, it becomes apparent that the determination of the interpretation of Article 1(2) in the future case-law of the ECJ will have an immense impact on the Directive’s fairness control. If the concept of ‘mandatory statutory and regulatory provisions’ were to be interpreted in such a way as to include, to a great extent, the terms under which public services are provided, the result would evidently be that many terms which are unfair in substance in the sense of the Directive 93/13/EEC, would nevertheless be excluded from its fairness control. This would have serious consequences, as it would result in a restriction of the protection awarded to consumers against unfair terms in consumer contracts. However, as the authors of the *EC Consumer Law Compendium* have observed, yet another problem will surface if the ECJ determines terms relating to public services to fall outside the scope of the Directive’s fairness control by reason of Article 1(2): the fact that the public/private divide is delineated differently in each Member State would then essentially leave it to the discretion of the national legislator of each Member State to decide whether terms in public service contracts are subject to the fairness control of Directive 93/13/EEC or not.²⁸⁷

Irrespective of prospective problems relating to the ECJ’s future interpretation of Article 1(2), it must be mentioned briefly that the provision has already lead to widespread difficulties. According to Nebbia, the fact of the matter is that not only does the ambiguity of Article 1(2) lead to divergences between the Member States’ interpretation of the ‘mandatory statutory or regulatory’ exception and, thereby, to divergences in the extent that they

²⁸⁴ Chris Willett: “General Clauses on Fairness and the Promotion of Values Important in Services of General Interest”, p. 72.

²⁸⁵ *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 96.

²⁸⁶ Commission of the European Communities: *Commission Report on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, p. 27.

²⁸⁷ *EC Consumer Law Compendium: Comparative Analysis*, p. 736.

determine public services to fall outside of the scope of the Directive, but, furthermore, it even remains unclear within some individual Member States to what extent public services should be excluded from the control of unfair terms. Hence, Nebbia concludes that the obscure exclusion of ‘mandatory statutory or regulatory provisions’ under Article 1(2), combined with the requirement that public services be provided within a ‘contractual framework’, essentially act to undermine the objective of the Directive which is clearly reflected in Article 2(c): to include within the Directive’s fairness control the terms of contracts that are concluded between a consumer and a publicly owned business party.²⁸⁸

6.3 The Scope of Application Ratione Materiae of Directive 93/13/EEC – Excluded Contracts

6.3.1. Contracts in the field of succession rights, family, employment and company law

Recital 10 to the Directive states that contracts relating to, inter alia, employment, succession rights, rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements must be excluded from the scope of the Directive, since such contracts are not concluded between sellers or suppliers and consumers. The Directive itself, however, does not contain any provisions which declare that the aforesaid contracts fall outside the scope of the Directive’s fairness control. For this reason, Micklitz holds that the content of Recital 10 can only have an explanatory function rather than actually constituting an official exclusion of the aforesaid contracts from the Directive’s scope of application.²⁸⁹

As Recital 10 explains, the preclusion of the stated contracts is based on the rationale that such contracts are not concluded between sellers or suppliers on the one hand and consumers on the other. In light of the unofficial status of this exclusion, the question emerges whether this rationale is actually valid. According to the authors of the *EC Consumer Law Compendium*, contracts which relate to succession rights and rights under family law do, in fact, not normally constitute ‘consumer contracts’ within the meaning of the Directive.²⁹⁰ Nonetheless, academics such as Micklitz have maintained that there are, as a matter of fact, some arrangements in employment and company law where certain terms do not place a private contractual party in the typical positions of an employee, on the one hand, or a person having a holding in a company, on the other, but rather into the position of a consumer.

²⁸⁸ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 103.

²⁸⁹ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 132.

²⁹⁰ *EC Consumer Law Compendium: Comparative Analysis*, p. 380.

Micklitz explains that this occurs, for instance, in the case of terms regarding the purchase of goods or services within the scope of an employment relationship or terms concerning a private investment in a mutual fund.²⁹¹

Furthermore, the authors of the *EC Consumer Law Compendium* state that a ‘consumer contract’ can be present in company law contracts that concern the acquisition of company rights as a capital investment without a business function. Resultantly, they draw the conclusion that it is implausible that Member States can justifiably exclude contracts relating to employment or the incorporation and organization of companies or partnership agreements from the scope of the Directive’s fairness control, particularly in consideration of the fact that, according to the wording of the Recital as well as the preparatory works, the exceptions offered by Recital 10 are only intended to apply in the absence of a consumer contract.²⁹²

Nevertheless, a number of Member States exclude some or all of the aforesaid contracts from the scope of the fairness control. The national provisions of Cyprus and Ireland expressly exclude contracts relating to employment, succession rights, rights under family law and the incorporation and organization of companies or partnerships from the scope of application of the fairness control. Furthermore, the Dutch provisions do not apply to contracts of employment and Estonia and Germany both exclude company law contracts from the scope of the fairness control. Moreover, all of the contracts stated in Recital 10 were expressly excluded in the United Kingdom until this restriction was abolished in 1999.²⁹³ In light of the above, it may be concluded that these unwarrantable restrictions of the Directive’s control of fairness in the aforesaid Member States constitute a derogation from the rules of Directive 93/13/EEC. This derogation cannot be justified with reference to Article 8, since it does not provide consumers with increased protection against unfair terms in consumer contracts. As a result, these restrictions of the Directive’s scope of application may be held to constitute a failure to transpose correctly into national law the provisions of the Directive as they are obligated to do under Article 10(1) of Directive 93/13/EEC.

6.3.2 Real Property Contracts

It has been held in academic literature that real property contracts are not included within the Directive’s scope of application since Recital 5 implies that Directive 93/13/EEC only applies to “contracts for the sale of goods or services.” This is further reflected in the English

²⁹¹ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 132.

²⁹² *EC Consumer Law Compendium: Comparative Analysis*, p. 380-381.

²⁹³ *Ibid.*

transposition²⁹⁴ of Article 4(1) of the Directive, in which the term ‘goods’ only encompasses moveable objects.²⁹⁵ With regard to the Directive, this issue was not made any clearer, as Nebbia points out, by the fact that the only reference to immovable property, a term found in the annex to the 1990 proposal which concerned the purchase of timeshare interests in land, was not included in the subsequent texts of the proposal. The underlying problem affiliated with the idea that real property contracts are excluded from the scope of the Directive is that the corresponding concepts for ‘goods’ in other Member States do include immovable property, e.g. the Italian term ‘*beni*’ and the French term ‘*biens*’.²⁹⁶

In this context, Nebbia notes that it must always be kept in mind, as the ECJ emphasized in *CILFIT*,²⁹⁷ that EU legislation is drafted in several languages and that different versions are all equally authentic. The interpretation of a provision of EU legislation therefore involves a comparison of the different language versions. Moreover, EU law uses terminology which is unique to it and legal concepts thus do not necessarily have the same meaning in EU law they do at national level in the individual Member States. The ECJ’s judgment in *CILFIT* also makes it clear that every provision of EU law must be placed in its context and interpreted in light of the provisions of EU law as a whole, taking into account its objectives and its state of evolution up to that point.²⁹⁸

Against this background, Nebbia explains that although the notion of ‘goods’ is not defined in the EU Treaties, recourse may be had to the case-law of the ECJ and an array of directives which incorporate this particular term. She notes that in *Commission v. Italy*,²⁹⁹ for instance, ‘goods’ were defined as “products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions”.³⁰⁰ Furthermore, she notes that the VAT Directive³⁰¹ defines the ‘supply of goods’ as meaning “the transfer of the right to dispose of tangible property as owner, including, inter alia, ‘(a) certain interests in immovable property’, (b) *rights in rem* giving the holder thereof a right of user over immovable property”, which in her opinion confirms that the term ‘goods’ can be understood in a manner independent of the traditional meaning of the English language. Moreover, she

²⁹⁴ In the case of *Newham LB v. Kathun* [2004] EWCA Civ 55, the English Court of Appeal found that both the Directive and the English implementing act apply to contracts which relate to land.

²⁹⁵ *EC Consumer Law Compendium: Comparative Analysis*, p. 380.

²⁹⁶ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 133.

²⁹⁷ Case C-286/81 *CILFIT Srl and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 03415.

²⁹⁸ *CILFIT*, para 18-20.

²⁹⁹ Case C-7/68 *Commission of the European Communities v. Italian Republic* [1968] ECR I - 00423.

³⁰⁰ *Commission v. Italy*, para 1.

³⁰¹ Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes.

observes that a specific exclusion is usually provided in directives if the scope of the directive in question is not meant to include land-related contracts.³⁰²

The points illustrated by Nebbia certainly indicate that the fact that Recital 5 of the Directive uses the term ‘goods’ should not result in the exclusion of contracts relating to real property transactions from the Directive’s control of fairness. So does the judgment of the ECJ in *Freiburger Kommunalbauten*.³⁰³ In this case, the *Bundesverfassungsgericht* made a reference to the ECJ for a preliminary ruling in a case which concerned the alleged unfairness of a particular term in a contract. This contract involved the sale of a parking space which was located in a multi-storey parking garage. Neither one of the parties raised the question of whether this particular contract fell within the Directive’s scope of application and, more importantly, nor did the ECJ. This case can therefore be said to confirm, albeit indirectly, that Directive 93/13/EEC does not exclude contracts relating to immovable property from its scope of application.

6.4 The Ratione Materiae Scope of Application of Directive 93/13/EEC – Which Terms?

6.4.1 Introduction

The Directive’s scope of application *ratione materiae* is determined by three limitations³⁰⁴ which will be explored in the following chapters. The first of these limitations concerns the fairness control: according to Article 3 of the Directive, it does not apply to terms which have not been individually negotiated. The second and third limitations of the Directive’s scope of application *ratione materiae* stem from the fact that the Directive specifically excludes two categories of terms from the scope of the Directive, even if they have been individually negotiated.³⁰⁵ The first of these limitations is established by Article 4(2) of the Directive, which provides that terms that relate to the definition of the ‘main subject matter of the contract or the adequacy of the price or remuneration, on the one hand, against the services or goods supplied in exchange, on the other’ are excluded from the fairness control of the Directive, provided that those terms are expressed in plain, intelligible language. The second limitation is found in Article 1(2) of the Directive. It excludes terms that reflect ‘mandatory statutory or regulatory provisions’ from the fairness control. As we have already seen in

³⁰² Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 133.

³⁰³ Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Cp. KG v. Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I – 03403.

³⁰⁴ Paolisa Nebbia: “Unfair contract terms”, p. 216.

³⁰⁵ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 130.

Chapter x.x above, the most problematic aspect of this provision relates to the effect it has on the application of the Directive to terms under which public services are provided.³⁰⁶

6.4.2 *Individually negotiated terms*

Contrary to the original intentions of the Commission, Article 3(1) of the Unfair Terms Directive 93/13/EEC states that terms that have been individually negotiated fall outside the scope of application of the Directive.³⁰⁷ The draft Directive originally did not contain any such restrictions. However, the first year of discussion in the Council was characterized by a conflict of opinion between the delegations which, on the one hand, wished to see the Directive cover all contract terms (as was the position of the Scandinavian countries and France who still have not included such limitations through the implementing measures) and, on the other, felt that only standard contract terms should be covered by the Directive's fairness control. The latter of these opinions was based on the view that the inclusion of individually negotiated terms within the fairness control constituted³⁰⁸ a "drastic restriction of the autonomy of the individual".³⁰⁹ The inclusion of such terms was furthermore held, particularly by the German delegation, to be contrary to the proper functioning of market economies.³¹⁰ The Parliament discussed this issue in detail and adopted an amendment that only excluded those contracts from the application of the fairness control in which all of the terms had been individually negotiated.³¹¹

An interesting compromise which clearly strived to ensure a high level of consumer protection against unfair terms was presented in an amended proposal of the Commission in March 1992. In this proposal, the Commission suggested that Article 2(1) of the original proposal be divided into two separate articles with the result that Article 3(1) would only apply to contractual terms which had not been individually negotiated whereas Article 4(1) would be applicable to all varieties of terms. The key difference between these prospective provisions was that an extra condition would have had to be fulfilled in order for an individually negotiated term to be deemed unfair. The Commission proposed that such terms would only be considered unfair if they had been imposed on the consumer "as a result of the economic power of the seller or supplier and/or the consumer's economic and/or intellectual

³⁰⁶ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 115.

³⁰⁷ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 287.

³⁰⁸ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 118.

³⁰⁹ Laurence Koffman and Elizabeth Macdonald: *The Law of Contract*, p. 265

³¹⁰ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 118.

³¹¹ *Ibid.*

weakness”. In spite of this proposal, the Commission was unable to convince the Council to subject individually negotiated terms to the control of fairness and the article was lost in the final formulation of the text.³¹²

Thus, Article 3(1) of the Directive 93/13/EEC establishes that only those terms which have not been individually negotiated may be subjected to the Directive’s control of fairness. As a result of this restriction, the protection bestowed on consumers against unfair terms has essentially been confined to situations in which consumers require assistance due to the manner in which the relevant contract is concluded. Most terms of that nature are contained in standard form contracts which consumers generally do not comprehend sufficiently and, as Laurence Koffman and Elizabeth Macdonald note, even if consumers are able understand the terms of a contract, they still remain unable to effectively negotiate such terms due to their lack of bargaining power.³¹³

Before we continue to explore the concept of ‘individually negotiated terms’ in the sense of Article 3 of the Directive, it seems appropriate to display just how problematic it can be to make a distinction between pre-formulated terms, on the one hand, and individually negotiated terms, on the other. These difficulties are illustrated particularly well in the German judgment of the *Bundesverfassungsgericht* of 3 December 1991.³¹⁴ In this case, the defendant, an agricultural credit bank, used credit agreement forms for a period of three years from 1977-1980. These credit agreement forms had blank columns in the section at the top for entering the conditions agreed upon when concluding an individual contract. These conditions included, among others, the type and amount of credit, rate of interest and payment and final payment. The column labeled ‘Repayment’ was divided into ‘amount/start/deadline’ and the following footnote referred to the details given on the repayment deadline: ‘m = monthly, q = quarterly, b = biannually, y = yearly.’ Situated at the center of the form was the following term with blank spaces to be filled out in each individual contract: “The interest accrued on the loan is calculated from the day the loan is received, and subsequently ... yearly, calculated each time on the balance of debt to the ... of the month/quarter/half-year/year.”³¹⁵

The defendant unsuccessfully held that on the basis of typewritten additions, this constituted an individually negotiated agreement which was, as such, not subject to review

³¹² Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 118.

³¹³ Laurence Koffman and Elizabeth Macdonald: *The Law of Contract*, p. 265

³¹⁴ BGH judgment of 3 December 1991, NJW (1992) 503.

³¹⁵ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 287-288.

according to the German Standard Terms Act (AGBG).³¹⁶ The *Bundesverfassungsgericht* ruled that a term constitutes a standard term if the customer has only been given a choice between particular alternatives offered by the counterparty. It stated that in this respect, it cannot be a decisive factor whether the business party has used a separate form for each of the alternatives, has printed all of the alternatives onto a single form and then had the customer mark the ones he chooses, or if the customer has been provided with a choice between several given alternatives (such as was the case here) to be filled out by hand or typed in the blank spaces which have been left for that purpose on the form.³¹⁷ According to this judgment, a term will not be considered to be an individually negotiated term in the context of German law if the customer has only been given a choice between specific alternatives which have been pre-determined by the counterparty. It must be kept in mind, however, that the CJEU has not confirmed this interpretation although, as we will see in Chapter 7.3.1, provisions reflecting this interpretation have found their way into the DCFR, the Feasibility study and ultimately the PCESL.³¹⁸

An explanation of the concept ‘individually negotiated terms’ is provided in the Article 3(2) of the Directive. As we will see below, this article has given rise to a great level of confusion and criticism amongst academics. The Article provides that “a term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.” Accordingly, the concept of ‘terms which have not been individually negotiated’ encompasses not only standard terms but all terms which have not been subjected to a preliminary negotiation between the contractual parties.³¹⁹ As Nebbia notes, the rules of the Directive are, as a result, triggered every time a contract, whether in its entirety or only partially, has been unilaterally composed by one party, irrespective of whether the contract or terms in question have been drafted specifically for the purposes of one particular transaction or to be used more generally for a greater number of contracts.³²⁰ The Directive responds to the risks inherently associated with standard contracts by introducing a shift in the burden of proof in Article 3(2) which provides that: “Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him”. Moreover, Member States are, according to Article 7(2)

³¹⁶ *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (AGBG).

³¹⁷ Hans-W. Micklitz, Jules Stuyck and Evelyne Terry: *Cases, Materials and Text on Consumer Law*, p. 287-288.

³¹⁸ See Article II – 1:110(2) of the DCFR, Article 5(2) of the FS and Article 7(2) of PCESL.

³¹⁹ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 118.

³²⁰ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 118.

of the Directive, required to introduce special procedures with respect to standard contract terms so that contractual terms “drawn up for general use” can be removed from contracts.³²¹

That said, the restriction of the scope of the Directive’s fairness control to terms which have not been individually negotiated is one of the most heavily criticized components of the Directive, for its formulation and substance alike. These criticisms will be considered below, but for explanatory purposes it must be made clear that Article 3(1) originates from German law.³²² As Nebbia informs us, § 1 AGBG, now § 305 of *Bürgerliches Gesetzbuch* (BGB), originally limited the scope of protection to standard business terms that were pre-established for a large quantity of contracts which one party to the contract (the ‘user’ of the contract) presented to the other party upon the conclusion of a contract. In the meaning of this German provision, contractual terms did not constitute standard business terms if they had been individually negotiated between the parties. At the time, German law required (although it no longer does so) the standard terms to be used for the plurality of contracts, although German courts have held that an intention to use standard terms for a plurality of contracts was sufficient.³²³

As we have seen, the Directive’s notion of a ‘non-negotiated term’ is broader than the concept of ‘standard business terms’ from which it sprung in German law. It differs from ‘standard business terms’ firstly, in that a term which is presented by the business party but which has been drafted by a third party, even for *ad hoc* purposes rather than to be used more generally, nevertheless constitutes a ‘standard term’ under Directive 93/13/EEC.³²⁴ Such terms have sometimes been referred to as (individually) ‘pre-formulated terms’ and essentially comprise a special category between genuine individual contracts or terms on the one hand and standard business terms on the other. Hence, these pre-formulated terms may be formulated in advance by sellers or suppliers as well as by third parties, for instance by means of handbooks, computer programs or by advising professions such as notaries or lawyers, associations etc. The bottom line is that the manner by which the pre-formulation occurs is irrelevant to the scope of the Directive’s fairness control.³²⁵ Secondly, the scope of the fairness control under Directive 93/13/EEC extends to pre-formulated terms of contract even if they have been drafted for *ad hoc* single use only.³²⁶

³²¹ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 128.

³²² Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 119.

³²³ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 119.

³²⁴ *Ibid.*

³²⁵ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 129.

³²⁶ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 119.

Article 3(2) has been made the target of criticism due, in particular, to the confusion it has provoked amongst commentators with regard to its restriction of the fairness control to terms which have not been individually negotiated. This can best be illustrated with reference to the perspectives of Nebbia and Micklitz discussed below. First of all, it must be observed that the second paragraph of Article 3(2) declares that “the fact that certain aspects of a term or one specific term have been individually negotiated” shall not preclude the application of the Directive’s fairness control “to the rest of the contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated contract.” In the opinion of Nebbia, this provision would have made sense in the context of the AGBG explained above, since its scope is restricted to standard business contracts, and, as a result, there would have been a risk that a contract would no longer have been regarded as a standard business contract if several terms of the standard contract have been individually negotiated, rendering the contract outside the scope of application of the fairness control.³²⁷

Subsequently, Nebbia observes that the scope of Directive 93/13/EEC is not restricted to standard contracts, but to consumer contracts regardless of whether or not they can be categorized as being ‘standard’. Nebbia then states that “the only limitation is that the Directive will not apply to the ‘individually negotiated terms’.” From her perspective, Article 3(2)(2) gives off another impression, since it “would imply *a contrario* that in some cases the Directive would not be applicable to terms in consumer contracts.” Nebbia maintains that this obviously was not the intention of the legislator and that this provision must therefore be interpreted taking into account the other provisions and the rationale of the Directive.³²⁸

A brief comment should be made with regard to this perspective. First of all, one can certainly agree with Nebbia that the Directive only precludes those terms that have been individually negotiated from the scope of the Directive’s fairness control. It follows, as the disputed provision affirms, that the mere fact that a certain aspect of a term or one specific term has been individually negotiated accordingly has no bearing on the application of the Directive’s fairness control to other terms, within the same consumer contract, which have not been individually negotiated. However, it is difficult to see why the Article 3(2)(2) should be seen to imply ‘*a contrario*’ that the Directive would “in some cases not be applicable to terms in consumer contracts”, as Nebbia puts it. This paragraph merely seems to have been intended to function as an explanatory provision, serving to eliminate any doubts in this respect, particularly in light of the origins of Article 3, and to affirm that the fairness control is applied

³²⁷ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 119.

³²⁸ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 119-120.

autonomously in the context of individual terms (a term by term approach) rather than to contracts in their entirety.

Another contested issue regarding Article 3(2) concerns the meaning of the concept of a term which has not been “individually negotiated”. As we have seen, Article 3(2) defines this concept as meaning that it has been “drafted in advance and the consumer has therefore not been able to influence the substance of the term [...]”. The question therefore arises whether Article 3(2) should be seen to present an ‘impossibility’ requirement in addition to the condition that the term has been pre-formulated, in order for it to fall under the Directive’s fairness control. In the opinion of Micklitz, it does, in fact, seem that the drafters of the Directive have envisioned that this additional element be required in order to make the Directive applicable. However, Micklitz states that the connection of this element with the scope of application is unclear, since it would be difficult to prove such a nexus. He concludes that accordingly, it would seem correct to consider “pre-formulation as a presumption that under normal circumstances the consumer had no opportunity to have an impact on their contents.” From his perspective, that does, in fact, reflect the typical negotiation situation between the consumer and his counterparty in which the terms and conditions of a contract are not negotiated specifically but, instead, the parties rely on pre-drafted contracts for rationalization purposes and to minimize transaction costs.³²⁹

It is interesting to note in this context that Article 30(2) of the *Proposal for a Consumer Rights Directive*³³⁰ specifically addressed this issue, although the provision ultimately did not find its way into the final text of the Consumer Rights Directive 2011/83/EU since, as it will be recalled, the last-minute decision was made to preclude the rules of Directive 93/13/EEC from the maximum harmonization approach of the CRD. Article 30(2) of this Proposal expressly states that “the fact that the consumer had the *possibility of influencing* the content of certain aspects of a contract term or one specific term, shall not exclude the application of this Chapter to other contract terms which form part of the contract”. This provision certainly implies that the Commission is of the position that the concept of non-individually negotiated terms entails an ‘impossibility’ requirement. This is further supported by the wording of Article 7(1) of the proposal for a CESL which states that a “contract term is not individually negotiated if it has been supplied by one party *and the other party has not*

³²⁹ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 129.

³³⁰ *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*. 2008/0196 (COD). Brussels 8 October 2008. COM (2008) 614 final.

been able to influence its content.” It remains to be seen whether this requirement will find its way into the final text of the CESL.

Yet another question arises from the provision of Article 3(2)(3) which states that a seller or supplier who claims that a standard term has been individually negotiated and should, as such, be excluded from the scope of the Directive’s fairness control, has the burden of proving that preliminary negotiation has taken place before the contract or individual terms were concluded between the parties. Nebbia observes that this rule has also been borrowed from German law, although it was controversial in German legal doctrine whether a standard term that had been negotiated but had been left unchanged should be regarded as having been ‘negotiated’. Nebbia observes that *prima facie*, the answer to that question in the context of the Directive would seem to be that if the seller or supplier is able to prove preliminary negotiation, an unchanged standard term should be considered as negotiated. However, she notes, that this conclusion conflicts with the wording of Article 3(2)(1) which clearly states that “a term shall *always* be regarded as not individually negotiated where it has been drafted in advance.” This leads Nebbia to the conclusion that Article 3(2)(3) must therefore be understood as to refer solely to standard terms that have been modified.³³¹ In light of the decisive wording of Article 3(2)(1), it would admittedly be difficult to disagree with Nebbia’s finding in this respect.

On a final note, it must be observed that Article 3(2) has been criticized for a certain ‘underlying hypocrisy’, as Nebbia puts it, which is reflected in the restricting the protection offered to consumers through the Directive’s fairness control to those terms which have not been individually negotiated while simultaneously claiming that the Directive’s purpose is to protect consumers since they are the weaker party to a transaction.³³² As Weatherill puts it:

Where the consumer has actually engaged in negotiation with the trader, it seems to be assumed that the process of negotiation acts as adequate protection from the risk of the imposition of unfair terms; or at least that the justification for legal intervention is lost. Only where negotiation is absent is intervention in the substance of the deal admitted. This is by no means uncontroversial. One might go so far as to adopt precisely the opposite perspective and argue that face-to-face discussion deepens the risk that the economically powerful trader will exploit the consumer..³³³

Nebbia is clearly of the same opinion as Weatherill. She notes that it is not uncommon for the trader to explain the contract terms to the consumer and even to reassure him that it is very unlikely that the event visualized by the terms will occur in his case or that such terms are

³³¹ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 120.

³³² *Ibid*, 122.

³³³ Stephen Weatherill: *EU Consumer Law and Policy*, p. 118.

always used in the relevant trade, thus convincing the consumer to agree to not have them changed in the course of the negotiation or to change them, although they end up more or less having the same effect. As Nebbia explains, the sole fact that a trader and a consumer negotiate a particular term does not, in itself, prevent the negotiated terms from being unfair.³³⁴

It cannot be ruled out that the scope of Directive 93/13/EEC will be expanded in a future review of the Directive to include individually negotiated terms. In the Green Paper on the Review of the Consumer Acquis, the Commission noted that: “A number of issues refer to the Unfair Contract Terms Directive, which is the only directive applying to all types of consumer contracts, covering both goods and services. The practical importance of these issues is demonstrated by the noticeable proportion of complaints received by the European Consumer Centres concerning contract terms. In this context, the Commission wishes, amongst others, to raise the question whether the protection afforded by the directive should be extended to cover individually negotiated terms.”³³⁵ Moreover, Micklitz notes with respect to the distinction between individually and non-individually negotiated terms that “there are more and more cases which make clear that the demarcation line between what is ‘in’ and what is ‘out’ becomes ever more difficult to define. A prominent field of conflict concerns price clauses, in particular in the banking sector.”³³⁶

In light of the above, it may be concluded that there is a real need to expand the scope of the control of fairness to include terms which have been individually negotiated as it would not only eradicate the problems related to the formulation of Article 3, but also provide consumers with a much higher level of consumer protection, as ‘individually negotiated terms’ would not be excluded from the Directive’s control of fairness. Nevertheless, the Proposal for a CRD³³⁷ as well as the Proposal for a CESL³³⁸ both restricted the application of the control of unfair terms to include only those terms which have been individually negotiated. This certainly does not indicate a change of heart in the Commission although it remains to be seen whether this restriction will be included in the final text of the CESL.

³³⁴ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 123.

³³⁵ Commission of the European Communities: *Green Paper on the Review of the Consumer Acquis*. Brussels 2007. COM (2006) 744 final, p. 11-12.

³³⁶ Hans-W. Micklitz: “The Proposal on Consumer Rights and an Opportunity for a Reform of European Unfair Terms Legislation in Consumer Contracts”, p. 26.

³³⁷ See Article 30(1) of the PCRD as well as Recital 45.

³³⁸ See Article 83(1) and Article 7 of the PCESL.

6.4.3 'Core' Exclusions – Subject Matter and Price

It will be recalled that Directive 93/13/EEC specifically excludes two categories of terms from the scope of the Directive, even if they are found to be non-individually negotiated in the meaning of Article 3. The former of the two exceptions is established in Article 4(2) of the Directive. It states that terms relating to the definition of the main subject matter of the contract or the adequacy of the price or remuneration as against the goods or services supplied fall outside the scope of the fairness control of the Directive, provided that they are expressed in plain, intelligible language. This rather unclear restriction was first introduced at the end of the preparatory phase in the discussions of the Council.³³⁹ In these discussions, it was found to be necessary to preclude from the Directive's scope of application "*tout ce qui résulte directement de la liberté contractuelle des parties*",³⁴⁰ or in other words, those terms which constitute a direct product of the contractual freedom of the parties.³⁴¹ Therefore, as long as the 'core' terms of a contract are expressed in a clear and understandable way, they will be excluded from the control of fairness. The result is, as Advocate General Trstenjak observed in *Caja de Ahorros*,³⁴² that "Article 4(2) reflects the tension between the parties' freedom to arrange their own affairs and the need for statutory intervention in favour of consumer protection."³⁴³

The rule stipulated by Article 4(2) originates from German law.³⁴⁴ § 8 of the AGBG, which has now been replaced by § 307(3) of the BGB, provides that the content of the main obligations under a contract is not subject to judicial control.³⁴⁵ Nebbia explains that German courts have interpreted this exception rather strictly. For instance, so-called 'secondary terms' relating to price concerning, for example, such matters as the method of calculation or adjustment of the price, are considered to fall under the fairness control and so do terms regarding the price of ancillary obligations.³⁴⁶ The same principle has been held to apply to Directive 93/13/EEC. The exclusion of terms provided in Article 4(2) is therefore only directed towards terms which concern the adequacy of the price and remuneration as against

³³⁹ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 131.

³⁴⁰ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 124.

³⁴¹ Paolisa Nebbia: "Unfair contract terms", p. 219.

³⁴² Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I – 0475.

³⁴³ Opinion of Advocate General Trstenjak, delivered on 29 October 2009 in Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I – 0475, para 64.

³⁴⁴ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 287-292.

³⁴⁵ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 124.

³⁴⁶ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 124.

the services or goods supplied in exchange. Terms addressing price in another context are therefore not excluded from the scope of the fairness control.³⁴⁷

This principle is reflected in Recital 19³⁴⁸ to the Directive which, as Nebbia points out, implies that Article 4(2) should be interpreted restrictively. This Recital illustrates that the exclusion of the price/quality ratio from the fairness control is confined to the ratio itself. Consequently, other terms concerning the price of goods or services, i.e. terms stipulating the method to be used to calculate the price or determining how the price can be altered are not excluded from the scope of the control of fairness. Moreover, Recital 19 specifically provides an example of the narrow interpretation that should be conveyed to Article 4(2) by revealing that, in insurance contracts, not all terms that define the insured risk should be perceived to relate to the main subject matter. Terms are only excluded from the fairness control if they delimit or define clearly the insured risk and the restriction of the insurance liability is taken into account in calculating the premium paid by the consumer.³⁴⁹

On the subject of the restrictive interpretation of Article 4(2) it is interesting to note that in a British case before the House of Lords concerning price escalation clauses, Lord Steyn noted that the corresponding provision of the 1994 Unfair Terms in Consumer Contracts Regulations³⁵⁰ “must be given a restrictive interpretation. [...] After all, in a broad sense all terms of the contract are in some way related to the price or remuneration. That is not what is intended.” and concluded that the term in question consequently did not fall outside the scope of the Regulations.³⁵¹ In light of the above, as well as the objectives of the Directive, it may be concluded that a restrictive interpretation should be applied to Article 4(2). Interestingly enough, it is not unlikely that a comment on this subject will be provided by the ECJ before long, since a reference³⁵² has now been made to the ECJ for a preliminary ruling in a Romanian case in which the Court is asked to address questions regarding the interpretation of the concepts of the ‘price’ and ‘subject matter’ within the meaning of Article 4(2).

³⁴⁷ Commission of the European Communities: *Report from the Commission on the Implementation of Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, 15.

³⁴⁸ Recital 19 states that for the purposes of the Directive: “assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer”.

³⁴⁹ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 124-125.

³⁵⁰ Regulation 3(2) states that: “In so far as it is in plain, intelligible language, no assessment shall be made of the fairness of any term which (a) defines the main subject matter of the contract, or (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied.”

³⁵¹ *Director General of Fair Trading v. First National Bank plc* [2002] 1 AC 481, para 45.

³⁵² Case C-571/11 SC *Volksbank Romania SA v. Andreia Câmpan and Iohan Dan Câmpan*. Reference published in the *Official Journal* C 25 on 28 January 2012, p. 35-36.

Another important rule is found in Recital 19. In addition to the aforesaid, it states that the main subject matter of the contract and the price/quality ratio may be taken into account in the assessment of the fairness of other terms. In this context, Nebbia provides the example, with regard to price, that although a term which defines the price of goods or services could accordingly not be held unfair for the reason alone that the price is too high, it could not, however, be ruled out that a contract term that leads to a significant imbalance could be determined to be fair if the contract affords the consumer with a notably advantageous price.³⁵³

The determination of the scope of the ‘subject matter’ exclusion of Article 4(2) poses greater difficulties than the ‘price’ exclusion for the simple reason that, as Nebbia observes, it requires that it be determined what exactly constitutes the ‘main subject matter of the contract’. In *Cofidis*,³⁵⁴ a case concerning the payment of sums due under a credit contract, Advocate General Tizzano held that certain financial terms regarding “rates of contractual interest and of interest on late payment and a penalty for failure to repay the sums due” were “the ‘main subject-matter’ of a credit contract and that in such a case, under Article 4(2) of the Directive, assessment of their unfairness is precluded if they ‘are in plain intelligible language’”.³⁵⁵ According to Micklitz, this assessment of Advocate General Tizzano, which, as he notes, is not explained any further, may be justified by the interest rate and the amount, although it is, in his opinion, hardly applicable to contractual penalties. The ECJ, however, ultimately circumvented the issue, merely stating that: “it is not obvious that the terms in question are outside the scope of the Directive, as defined by Articles 1(2) and 4(2)”.³⁵⁶ Hence, this case provides little guidance regarding the interpretation of the concept of ‘the main subject matter’ of a concept.

According to Nebbia, the question of what constitutes the ‘main subject matter’ of a contract brings up the everlasting legal dilemma of distinguishing between contractual obligations and terms which exclude or restrict liability for breach of obligations.³⁵⁷ In light of the above comment made by Micklitz on the subject of *Cofidis*, he seems to make a corresponding distinction between provisions that fall under the main subject matter of a contract and those who do not. Nebbia explains that the question normally arises, most commonly in cases regarding the alleged unfair nature of an exemption clause, whether such

³⁵³ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 124-125.

³⁵⁴ Case C-473/00 *Cofidis SA v. Jean-Louis Fredout* [2002] ECR I – 10875.

³⁵⁵ Opinion of Advocate General Tizzano delivered on 18 April 2002 in Case C-473/00 *Cofidis SA v. Jean-Louis Fredout* [2002] ECR I – 10875, para 40.

³⁵⁶ *Cofidis*, para 22.

³⁵⁷ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 125.

terms act as a defence to breaches of the contractual obligations (which she calls ‘exclusionary terms’) or whether they, in fact, have a function in defining those obligations (‘definitional terms’). According to Nebbia, only such definitional terms can possibly constitute a term reflecting the main subject matter of a contract. She points out that an exclusionary term does not define the subject matter of a contract. It only functions to restrict liability for a pre-existing contractual obligation.³⁵⁸ In this context, a reference may be made to a German case³⁵⁹ concerning an exemption clause in an insurance contract, in which the *Bundesverfassungsgericht* held that a term in an insurance contract constitutes a ‘core term’, i.e. a term reflecting the main subject matter, if the contractual promise cannot be determined without the clause in question. Otherwise it merely modifies the contractual promise and falls, as such, under the fairness control.³⁶⁰ This is in line with the distinction made between exclusionary terms and definitional terms as described above.

In this context it must be observed that Advocate General Trstenjak made a parallel distinction in her Opinion in *Caja de Ahorros*³⁶¹ by stating that “as a basic rule, it may be inferred from Article 4(2) that terms in plain, intelligible language laying down the price or the scope of the *main contractual obligations* are exempt from assessment as to unfairness under Article 3 of Directive 93/13”.³⁶² The ECJ, however, did not address the question in this case of what exactly constitutes a term ‘core term’ and it therefore remains to be established whether it will take the same view as Advocate General Trstenjak, i.e. that only terms which determine the main contractual obligations constitute the ‘main subject matter’ of a contract in the sense of Article 4(2). As has already been noted, the answer to this question may be provided by the ECJ shortly as a response to the questions posed by a Romanian court in *Volksbank Romania*³⁶³ in a reference to the ECJ for a preliminary regarding the interpretation of the concepts of ‘subject matter’ and ‘price’ within the meaning of Article 4(2).

Finally, the judgment of the ECJ in the aforementioned *Caja de Ahorros*³⁶⁴ must be accounted for before we part with the subject of the provision of Article 4(2), since this

³⁵⁸ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 125.

³⁵⁹ BGH, 21 April 1993, NJW-RR 1993, 1049.

³⁶⁰ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 296.

³⁶¹ Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I – 0475.

³⁶² Opinion of Advocate General Trstenjak, delivered on 29 October 2009 in Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I – 0475, para 66.

³⁶³ Case C-571/11 *SC Volksbank Romania SA v. Andreia Câmpan and Iohan Dan Câmpan*. Reference published in the *Official Journal* C 25 on 28 January 2012, p. 35-36.

³⁶⁴ Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I – 0475.

judgment provides an important contribution concerning to the interpretation of Article 4(2). This case concerned the fairness of a so-called ‘rounding up term’ contained in variable-rate loan agreements for the purchase of residential property concluded between a Spanish lending institution, Caja de Ahorros y Monte de Piedad de Madrid (Caja de Madrid), and its clients. According to this ‘rounding up term’, the nominal interest rate laid down in the contract, which was variable from time to time in accordance with an agreed reference index, was to be rounded up, with effect from the first revision, to the next quarter of a percentage point.³⁶⁵

The Spanish association banking service users, ‘Ausbanc’, brought an action against Caja de Madrid seeking to have the rounding-up term annulled and its future use prohibited. The *Juzgado de Primera Instancia de Madrid* (Madrid Court of First Instance) took the view that the term was unfair, and as such, invalid, in accordance with the Spanish legislation which had transposed Directive 93/13/EEC. The decision was appealed to the *Audiencia Provincial de Madrid* (Madrid Provincial Court) which confirmed the decision. The case was finally brought before the *Tribunal Supremo* (Spanish Supreme Court) which considered, first of all, that the rounding-up term was liable to constitute an essential element of a bank loan contract and, as such, could not in principle be subjected to the fairness assessment of the Directive, as it constituted a term relating to the subject matter of the contract in the sense of Article 4(2). Secondly, however, it observed that the Kingdom of Spain had not transposed Article 4(2) into its legal system and resultantly, the Spanish legislation subjects the entire content of a contract to the control of fairness. In these circumstances, the *Tribunal Supremo* decided to suspend the proceedings and to seek a preliminary ruling of the ECJ³⁶⁶ with regard to three questions.

In short, the Spanish Supreme Court requested an answer from the ECJ to the question of whether Articles 4(2) and 8 of the Directive prevent a Member State from providing an assessment of the unfairness of contract terms relating to the main subject matter of a contract (or to the adequacy of the price and remuneration against the services or goods to be supplied in exchange) at national level, to the benefit of consumers, even in cases in which the terms are drafted in plain, intelligible language.³⁶⁷ The ECJ noted that according to settled case-law, “the protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or

³⁶⁵ *Caja de Ahorros*, para 10.

³⁶⁶ *Ibid*, para 11-16.

³⁶⁷ *Ibid*, para 24.

supplier without being able to influence the content of those terms.”³⁶⁸ It subsequently observed that Directive 93/13/EEC is based on the minimum harmonization approach as can be seen from Article 8 and concluded that Member States may, in fact, retain or adopt throughout the area which is covered by the Directive, stricter rules than those provided for by the Directive itself on the condition that they are designed to afford consumers a higher level of protection.³⁶⁹

6.4.4 Mandatory Statutory or Regulatory Provisions and the Provisions or Principles of International Conventions

Article 1(2) of Directive 93/13/EEC, which was briefly introduced in Chapter 6.2.4 on public service undertakings, specifically excludes two kinds of terms from the fairness control, regardless of whether or not they have been individually negotiated. Article 1(2) states that contractual terms that reflect on the one hand, ‘mandatory statutory or regulatory provisions’, and on the other, ‘the provisions or principles of international conventions to which Member States or the Community are a party, particularly in the transport area’ are excluded from the Directive’s scope of application. According to Nebbia, this exclusion can have a significant impact in civil law countries since codes in those countries often provide complete frameworks of default rules that present in detail the rights and obligations of contractual parties.³⁷⁰

The exclusion of contractual terms which embody statutory or regulatory provisions from the control of fairness is based on the rationale that such provisions are presumed to be fair and can for that reason be excluded from the scope of the Directive,³⁷¹ provided, of course, as Recital 14 explains, that Member States ensure that they do not include unfair terms.³⁷² to the Directive.³⁷³ However, as Chris Willett observes, it is not entirely clear whether the ‘presumed fairness’ of such provisions should be seen as being indisputable or if the actual

³⁶⁸ Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I – 0475, para 27.

³⁶⁹ *Ibid.*, para 44.

³⁷⁰ Paolisa Nebbia: “Unfair contract terms”, p. 220.

³⁷¹ See *Recital 13* which provides that: “Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are a party [...]”.

³⁷² *Recital 14* provides that: “Member States must however ensure that unfair terms are not included, particularly because this Directive also applies to trades, business or professions of a public nature.”

³⁷³ Commission of the European Communities: *Report from the Commission on the Implementation of Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, 14-15.

intention was that the fairness of such terms could be refuted.³⁷⁴ As will be seen below, *Cofidis* can rather be seen to indicate that the ECJ is of the latter view than the former. Likewise, Micklitz seems to believe that the fairness of such terms can be refuted, as he states that discriminatory contractual provisions of the Member States would, for instance, irrespective of Article 1(2), not be excluded from the fairness control.³⁷⁵ As Micklitz points out, the EU legislator has in short, by means of Article 1(2), specifically recognized the authority of the contract laws of the individual Member States in this regard, instead of giving EU law priority as is usually the case. Nonetheless, the bottom line is, as always, that the contract laws of the Member States must be in conformity with primary EU law.³⁷⁶

The most problematic aspect of Article 1(2) is the ambivalent meaning of ‘mandatory statutory or regulatory provisions’. Some clarification can be found in the wording of Recital 13 which states that this concept “also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established.” Accordingly, it has been held that the word ‘mandatory’ is meant to imply that ‘default rules’ fall under the concept,³⁷⁷ irrespective of whether such default rules, on the one hand, always apply to the type of contract in question because the exclusion of such rules is strictly prohibited or, on the other, that such default rules can be precluded from a contract by specifying that other rules are to apply in their stead.³⁷⁸ Therefore, as the Commission specifically notes in its report on the implementation of the Directive, the use of the word ‘mandatory’ evidently does not reflect the usual distinction made in civil law between binding provisions and supplementary provisions.³⁷⁹ As Micklitz observes, it must nevertheless be borne in mind that the Recital does not constitute an official definition of this concept. For that reason, it clearly does not bind the ECJ, although the Recital’s explanation can be of use with respect to the interpretation of the Directive.³⁸⁰

Despite the fact that the ECJ was presented with the opportunity in *Cofidis*³⁸¹ to reflect the interpretation of Article 1(2), the meaning of the concept ‘mandatory statutory or regulatory terms’ remains to be determined by the Court. This case concerned the payment of sums

³⁷⁴ Chris Willett: “General Clauses on Fairness and the Promotion of Values Important in Services of General Interest”, p. 72.

³⁷⁵ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 130-131.

³⁷⁶ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 130.

³⁷⁷ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 96.

³⁷⁸ Chris Willett: “General Clauses on Fairness and the Promotion of Values Important in Services of General Interest”, p. 72.

³⁷⁹ Commission of the European Communities: *Report from the Commission on the Implementation of Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, 14.

³⁸⁰ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 130.

³⁸¹ Case C-473/00 *Cofidis SA v. Jean-Louis Fredout* [2002] ECR I – 10875.

which were due under a credit contract concluded between the French company Cofidis and an individual. The *Tribunal d'instance de Vienne* found that the disputed financial clauses of the offer of credit lacked legibility and, as such, were likely to mislead the consumer.³⁸² It concluded that the 'financial clauses may be regarded as unfair'. However, Articles 311-337 of the French *Code de la Consommation* provided that claims stemming from a consumer credit contract must taken to court within two years of the event which instigates the dispute in question. From the perspective of the *Tribunal d'instance de Vienne*, this reservation precluded it from annulling the terms it had found to be unfair. It therefore decided to suspend the proceedings and refer to the ECJ via the preliminary reference procedure the question of whether the protection conferred on consumers by Directive 93/13/EEC precluded the national provisions of Articles 311-337 of the *Code de la Consommation* "from finding, of its own motion or following a plea raised by the consumer, that a term of the contract is unfair."³⁸³

It should be noted the company Cofidis had, in response to the claim that the financial clauses were unfair due their misleading and unclear nature, held that the terms could not "be accused of lack of clarity, since they merely [reproduced] a model contract drawn up by the national legislature, which under Article 1(2) of the Directive is not subject to its provisions."³⁸⁴ As we have already seen, Advocate General Tizzano similarly came to the conclusion that the Directive was not applicable to the case in question, firstly, because the relevant terms, in his opinion, fell under the scope of Article 4(2), and secondly, because he considered the terms to reflect 'mandatory statutory or regulatory provisions' in the sense of Article 1(2).³⁸⁵ The ECJ, however, evaded the issue, simply stating that it "should be observed that, in that they do not merely reflect mandatory statutory or regulatory provisions and are criticized as being ambiguous, it is not obvious that the terms in question are outside the scope of the Directive, as defined by Articles 1(2) and 4(2)". As Micklitz points out, *Cofidis* may for that reason be read so as to include mandatory provisions within the fairness

³⁸² In short, the offer of credit took the shape of a leaflet. On the front side of this leaflet were printed the following words in large letters: 'Free application for money reserve' in large letters. References to the contractual interest rate and a penalty clause were, on the other hand, printed in small print on the reverse side. This was considered to be misleading since it gave consumers the impression that the transaction was actually free of charge. See *Cofidis*, para 13 and 21.

³⁸³ *Cofidis*, para 13-16.

³⁸⁴ *Ibid*, para 18.

³⁸⁵ Opinion of Advocate General Tizzano delivered on 18 April 2002 in Case C-473/00 *Cofidis SA v. Jean-Louis Fredout* [2002] ECR I – 10875, para 31.

control, although he stresses that the ECJ did not actually address the issue of how Article 1(2) is to be interpreted.³⁸⁶

It may be argued, albeit with the same reservation as Micklitz notes above, that *Cofidis* implies that the ECJ is, in an effort to uphold and ensure the consumer protection objectives of Directive 93/13/EEC, reluctant to exclude those terms which only *partially* reflect ‘mandatory statutory or regulatory provisions’ of Member States from the scope of the Directive’s fairness control, perhaps especially so when there are *prima facie* indications of unfairness. This is supported by the fact that in judgments concerning the interpretation of the Directive, the Court typically makes reference to the protective purpose of the Directive, see for instance paragraph 27 of *Caja de Ahorros*, and, correspondingly, the manner in which Advocate General Trstenjak placed special emphasis on historical and purposive interpretation in her Opinion in *Caja de Ahorros*.³⁸⁷ The wording in paragraph 18 of the judgment, in particular the Court’s use of the word ‘merely’, thereby indicates that the ECJ will in future cases provide a certain threshold that must be overcome with respect to the degree to which a particular term reflects ‘mandatory statutory or regulatory provisions’. The judgment gives no indication, however, of just how closely a term would have to reflect the ‘mandatory or regulatory provisions’ of a Member State to escape the fairness control of the Directive. Although the interpretation of Article 1(2) remains to be decided by the ECJ and it has yet to be seen to what extent this provision will restrict the Directive’s scope of application, it can furthermore be argued that *Cofidis* implies that the mere fact that a contractual term stems from ‘mandatory statutory or regulatory provisions’, or (at the very least) that a term partially reflects such provisions, does not for that reason in and of itself exclude such terms from the Directive’s scope of application. This would consequently seem to indicate that the presumed fairness of such terms can, in fact, be rebutted.

6.5 The Control of Fairness

6.5.1 The Role of the ECJ in the Assessment of the Substantive Fairness of a Term

Before we turn our focus to the substantive control of fairness, it is important to understand what role the ECJ has to play via the preliminary reference procedure of Article 267 TFEU with regard to the fairness assessment of a term as compared to the national court making the

³⁸⁶ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 130-131.

³⁸⁷ Opinion of Advocate General Trstenjak, delivered on 29 October 2009 in Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I – 0475, para 60.

reference. The answer is simple: its role in the assessment of the fairness of a term is limited to the interpretation of EU law. Consequently, the jurisdiction of the ECJ does not extend to interpret the national law of Member States which has implemented the provisions of the Directive. As a result, it cannot determine by means of the preliminary reference procedure whether a particular term is unfair³⁸⁸ despite being requested to do so by a referring national court, as the ECJ has made clear in a number of judgments.³⁸⁹ In a very recent judgment of the Court from 26 April 2012 in the case *Invitel*³⁹⁰ the Hungarian *Pest Megyei Bíróság* (Pest County Court) asked the Court of Justice to determine whether a term regarding special ‘money order fees’ in the general business conditions of the fixed-line telephone company *Invitel Távközlési Zrt* (Invitel) was unfair in light of the general clause of Article 3(1), Article 3(3) and points 1(j)³⁹¹ and 2(d)³⁹² of the so-called indicative list annexed to the Directive. The term in question stipulated that ‘if the subscriber pays the amount of the invoice by means of a money order, the supplier of services shall have the right to invoice the additional fees which result (such as postal fees)’.³⁹³

In short, the *Pest Megyei Bíróság* asked the ECJ whether the stated provisions should be “interpreted as meaning that, where a seller or supplier provides, in a term appearing in the [general business conditions] of a consumer contract, for a unilateral amendment of the fees connected with the service to be provided, without setting out clearly the method of fixing those fees or specifying a valid reason for this amendment, that term is unfair”.³⁹⁴ The ECJ responded, just as it had done in *Pénzügyi Lízing*,³⁹⁵ by pointing out, firstly, that its jurisdiction extends to the interpretation of the concept ‘unfair term’ used in Article 3(1) of the Directive and in the indicative list of the Annex, as well as the criteria which the national court may or must apply in the assessment of the fairness of a term under the provisions of the

³⁸⁸ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 142-143.

³⁸⁹ See Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Cp. KG v. Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I – 03403, para 22; Case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I – 10421, para 23-24; Case C-137/08 *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider* [2010] ECR n.y.r., para 44; Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r., para 22.

³⁹⁰ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r.

³⁹¹ Article 3(3) of Directive 93/13/EEC provides that “The Annex shall contain an indicative and non-exhaustive list which may be regarded as unfair”. Point 1(j) of this indicative list reads: “Terms which have the object or effect of (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract”.

³⁹² Article 2 of the indicative list concerns the scope of subparagraphs (g), (j) and (l). Article 2(d) reads: “Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which the prices vary is explicitly described”.

³⁹³ *Invitel*, para 18.

³⁹⁴ *Invitel*, para 21.

³⁹⁵ Case C-137/08 *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider* [2010] n.y.r., para 44.

Directive and, secondly, that it is for the national court to determine, in light of those criteria, whether the term in question should be deemed unfair in the circumstances of the case.³⁹⁶

6.5.2 Substantive Control of Fairness – The Indicative List of the Annex

As we will see in this chapter and the next the Directive offers two approaches for the assessment of whether or not a contractual term is unfair. The main approach is contained in the general clause of Article 3(1) which defines the substantive criteria of the fairness control and may accordingly be regarded as forming the heart of Directive 93/13/EEC. This general clause is complemented by the provision of Article 4(1) which describes three issues that must be taken into account in the fairness assessment of a term. Moreover, Article 3(3) provides that “the Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as fair.” It is this so-called ‘indicative list’ which forms the second approach, which is merely ancillary to that of Article 3(1).³⁹⁷ Since it is difficult to understand how the aforesaid approaches engage with one another without understanding first the nature of the indicative list in the Annex, this chapter will be dedicated to the subject of the said list. In the subsequent chapter, we will turn our focus to the general clause of Article 3(1) and the instructions provided with regard to the assessment of fairness in Article 4(1) of the Directive.

A distinction has traditionally been made between different types of lists of unfair terms intended to be used as an interpretative aid for traders, consumers, courts and authorities alike in the determination of the fairness of terms.³⁹⁸ While so-called ‘black lists’ describe terms which are always considered unlawful and the terms provided by ‘grey lists’ are presumed to be unfair (i.e. they are considered unfair unless proven otherwise³⁹⁹), the terms outlined in ‘indicative lists’ are simply regarded as having the possibility of being unfair.⁴⁰⁰ At one point during the preparatory stages of the drafting of Directive 93/13/EEC, the list provided in the Annex to Directive 93/13/EEC was actually intended to be a black list.⁴⁰¹ However, the Council ultimately decided in its Common Position of 22 September 1992 that the list should only be indicative.⁴⁰²

³⁹⁶ *Invitel*, para 22.

³⁹⁷ Commission of the European Communities: *Report from the Commission on the Implementation of Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, 16.

³⁹⁸ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 291.

³⁹⁹ Opinion of Advocate General Geelhoed delivered on 31 January 2002 in Case C-478/99 *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I – 04147, para 26.

⁴⁰⁰ Hans-W. Micklitz, Jules Stuyck and Evelyne Terryn: *Cases, Materials and Text on Consumer Law*, p. 291.

⁴⁰¹ Stephan Weatherill: *EU Consumer Law and Policy*, p. 118.

⁴⁰² Commission of the European Communities: *Report from the Commission on the Implementation of Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, 17.

As the CJEU has explained on many occasions such as in *Freiburger Kommunalbauten*⁴⁰³ as well as in *Commission v. Sweden*,⁴⁰⁴ the indicative nature of the non-exhaustive list provided in the Annex to Directive 93/13/EEC entails that a contractual term which coincides with one of the examples given list is not for that reason alone considered to be unfair.⁴⁰⁵ For example, such a term may ultimately be regarded as being fair due to the fact that it is essentially compensated for by other terms which are very advantageous for the consumer party to the contract.⁴⁰⁶ Similarly, a term that does not correspond to one of the points of the list may nonetheless be deemed unfair.⁴⁰⁷

The bottom line is that a thorough assessment must be carried to determine whether the contractual term in question really is unfair in the meaning of Article 3(1) of Directive 93/13/EEC.⁴⁰⁸ As we have already seen in the previous chapter, this is a task for the relevant court or administrative authority at national level, not the CJEU, which must assess the fairness of a term by taking into account all the relevant factors in the case in accordance with Article 4(1), together with the criteria of the general clause of Article 3(1).⁴⁰⁹ Accordingly, the role of the indicative list of the Annex in the Directive's substantive control of fairness is essentially to provide national courts, administrative authorities, the parties to a contract and other affected parties such as consumer organizations with an instrument to assist them in the interpretation of the concept of an 'unfair term' under Directive 93/13/EEC.⁴¹⁰ It must be stressed that although it is ultimately for the national court to determine whether a particular term is unfair, the case-law of the CJEU has nevertheless made it clear on numerous occasions that its interpretative jurisdiction extends to the terms that are laid out by the indicative list.⁴¹¹

⁴⁰³ Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Cp. KG v. Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I – 03403.

⁴⁰⁴ Case C-478/99 *Commission of the European Communities v. the Kingdom of Sweden* [2002] ECR I – 04147.

⁴⁰⁵ See *Freiburger Kommunalbauten*, para 20 and *Commission v. Sweden* para 20.

⁴⁰⁶ Opinion of Advocate General Geelhoed delivered on 31 January 2002 in Case C-478/99 *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I – 04147, para 28.

⁴⁰⁷ See *Freiburger Kommunalbauten*, para 20 and *Commission v. Sweden* para 20.

⁴⁰⁸ Opinion of Advocate General Trstenjak, delivered on 26 April 2012 in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r., para 81.

⁴⁰⁹ Opinion of Advocate General Geelhoed, delivered on 31 January 2002 in Case C-478/99 *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I – 04147, para 28.

⁴¹⁰ Opinion of Advocate General Geelhoed delivered on 31 January 2002 in Case C-478/99 *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I – 04147, para 28.

⁴¹¹ See, most recently, in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r., para 22.

6.5.3 Substantive Control of Fairness – Fairness Test of Article 3(1)

The fairness assessment of Article 3(1) provides that a contractual term is considered unfair if “contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations”. This provision is complemented by Article 4(1) of the Directive which makes clear that the assessment of the unfairness of a term should be conducted “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 and to all the other terms of the contract or of another contract on which it is dependent”. Accordingly, Article 3(1) must always be read in light of Article 4(1) of the Directive. This is reflected in the case-law of the CJEU which has in the past emphasized that Articles 3(1) and 4(1), as a whole, define the general criteria of the fairness test of Directive 93/13/EEC.⁴¹² Be that as it may, the fact remains that nature of the criteria of the general clause of Article 3(1), has yet to be clarified, despite the fact that almost two decades have passed since the Directive came into existence.

The case-law of the ECJ in *Freiburger Kommunalbauten*⁴¹³ and *Pannon GSM*⁴¹⁴ makes clear 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”.⁴¹⁵ As we saw in the previous chapter, the ‘indicative list’ in the Annex may provide assistance in this context, although it only contains an indicative and non-exhaustive list of terms which may be regarded as fair⁴¹⁶ and as a result, a term which appears on the list does not necessarily have to be unfair and vice versa.⁴¹⁷

Consequently, a detailed and independent assessment must be carried out by the national court to determine whether an individual contract term is, in fact, unfair.⁴¹⁸ Such an assessment must be made under Article 4(1) which specifies three factors that must be taken

⁴¹² Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I – 0475, para 33; Case C-478/99 *Commission of the European Communities v. the Kingdom of Sweden* [2002] ECR I – 04147, para 11 and 17; Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Cp. KG v. Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I – 03403, para 18-19, 21.

⁴¹³ Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Cp. KG v. Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR I – 03403.

⁴¹⁴ Case C- 243/08 *Pannon GSM Zrt. v. Erzsébet Sustikné Györfi* [2009] ECR I – 04713.

⁴¹⁵ See *Freiburger Kommunalbauten*, para 19 and *Pannon GSM*, para 37.

⁴¹⁶ See *Freiburger Kommunalbauten*, para 20 and *Pannon GSM*, para 38.

⁴¹⁷ See *Commission v. Sweden* para 20 and *Freiburger Kommunalbauten*, para 20.

⁴¹⁸ Opinion of Advocate General Trstenjak, delivered on 26 April 2012 in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r., para 81.

into consideration in this context.⁴¹⁹ As we saw in Chapter 6.5.2, it has been firmly established by the case-law of the CJEU that it is not the role of the CJEU to make that assessment and, subsequently, to come to a decision as to whether or not the term in question is unfair. Nevertheless, the CJEU has also consistently ruled that its jurisdiction extends to the interpretation of the general criteria of Article 3(1), in order to define the concept of unfair terms, as well as to the terms provided in the ‘indicative list’ of the Annex⁴²⁰ and to the “criteria which the national court may or must apply when examining a contractual term

Despite this last point, i.e. that the CJEU has time and again declared itself competent to interpret the general criteria of Article 3(1), a survey of its case-law reveals that the Court has yet to provide any tangible general interpretations that shed light on the core of the ‘good faith’ and ‘significant imbalance’ criteria. Instead, the Court of Justice has concentrated on addressing the factors which it deems to be of importance in each relevant case for the assessment of unfairness. This can best be illustrated though an example from the Court’s case-law. It will be recalled from Chapter 6.5.2 that the Court’s most recent judgment, *Invitel*,⁴²¹ concerned the alleged unfairness of a term in the general business conditions of the fixed-line telephone company Invitel which stated that ‘if the subscriber pays the amount of the invoice by means of a money order, the supplier of services shall have the right to invoice the additional fees which result (such as postal fees)’.⁴²² As the referring court (the *Pest Megyei Bíróság*) noted, the insertion of this term into the general business conditions constituted a “unilateral amendment of the fees connected with the service provided, without setting out clearly the method of fixing those fees or specifying a valid reason for the amendment”.⁴²³ In response to the court’s question of whether such a term should be considered unfair in the meaning of Article 3(1) and in light of points 1(j)⁴²⁴ and 2(d)⁴²⁵ of the indicative list, the CJEU provided the *Pest Megyei Bíróság* with the following instructions:

⁴¹⁹ Opinion of Advocate General Trstenjak, delivered on 26 April 2012 in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r., para 81.

⁴²⁰ See, for example, Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r., para 22 and Case C-137/08 *VB Pénzügyi Lízing Zrt. v. Ferenc Schneider* [2010] ECR n.y.r., para 44.

⁴²¹ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r.

⁴²² *Invitel*, para 18.

⁴²³ *Invitel*, para 21.

⁴²⁴ Article 3(3) of Directive 93/13/EEC provides that “The Annex shall contain an indicative and non-exhaustive list which may be regarded as unfair”. Point 1(j) of this indicative list reads: “Terms which have the object or effect of (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract”.

[...] to determine, inter alia, whether, in light of all the terms appearing in the [general business conditions] of the consumer contracts which include the contested term, and the national legislation setting out the rights and obligations which could supplement those provided by the [general business conditions] at issue, the reasons for, or the method of, the amendment of fees connected with the service to be provided are set out in plain, intelligible language and, as the case may be, whether consumers have a right to terminate the contract.⁴²⁶

Accordingly, the meaning of the ‘significant imbalance’ and ‘good faith’ criteria remains obscure. With regard to the ‘significant imbalance’ criteria, Article 3(1) provides that a term shall be regarded as unfair if it “causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.” The Directive itself gives little indication as to the substance of this test, although, as we have seen, this requirement should not be understood to refer to the main contractual obligations since Article 4(2) of the Directive specifically excludes such obligations from the Directive’s fairness control of the Directive. Moreover, as the authors of the *EC Consumer Law Compendium* note, the imbalance in question must be significant in accordance with the so-called *minima non curat praetor* principle.⁴²⁷ Finally, as will be described in greater detail below, Article 4(1) stipulates that certain factors must be taken into account in the assessment of whether the imbalance criterion is met. Apart from these three points, the provisions of the Directive itself give little instruction as to how it should be determined whether the ‘significant imbalance’ criterion is fulfilled in a particular case. However, some assistance may be sought from the list of terms provided in the Annex,⁴²⁸ since the terms contained therein primarily represent typical manifestations of the kind of contract drafting which leads to an inequality in the contractual rights and obligations arising from the contract concerned, to the detriment of the consumer.

As Advocate General Geelhoed noted in his opinion in *Commission v. Sweden*,⁴²⁹ the ECJ has had recourse to the list in the Annex for this exact purpose.⁴³⁰ In *Océano*,⁴³¹ the ECJ found that, in so far as it caused, contrary to the requirement of good faith, a significant imbalance in

⁴²⁵ Article 2 of the indicative list concerns the scope of subparagraphs (g), (j) and (l). Article 2(d) reads: “Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which the prices vary is explicitly described”.

⁴²⁶ *Invitel*, para 31.

⁴²⁷ *EC Consumer Law Compendium: Comparative Analysis*, p. 385.

⁴²⁸ As the ECJ noted in *Invitel*, even if the indicative list does not suffice in itself to establish that the term in question is unfair, it nevertheless constitutes “an essential element of which the competent court may base its assessment as to the unfair nature of that term”. See Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r., para 26.

⁴²⁹ Case C-478/99 *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I – 04147.

⁴³⁰ Advocate General Geelhoed delivered on 31 January 2002 in Case C-478/99 *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I – 04147, para 30.

⁴³¹ Cases C-240-244/98 *Océano Grupo SA v. Quintero* [2000] ECR I-494.

the parties' rights and obligations arising under the contract, to the detriment of the consumer, a term which had the purpose of conferring jurisdiction on the court in the territorial jurisdiction of the seller or supplier with regard to all disputes arising from the contract in question, was to be regarded as unfair.⁴³² It observed that such a term leaves the consumer no alternative but to submit to the exclusive jurisdiction of a court which may be far away from his place of residence which, as a result, may make it difficult for him to make an appearance.⁴³³

The ECJ subsequently observed that "in the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. *Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive*".⁴³⁴ Apart from those scenarios where the list of terms in the Annex may provide some *prima facie* indication of imbalance, it remains unclear how it is to be determined, outside of the factors stipulated in Article 4(1), whether this 'imbalance' criterion is fulfilled in a particular case. According to the authors of the *EC Consumer Law Compendium* the determination of whether the 'imbalance' criterion is met can be settled by taking into consideration the surrounding legal context. In their view, the position of the consumer resulting from the contested term should be compared to the position in which he would have been if it had not been for the term. They state that accordingly, "the term must be judged in its regulatory context, arising by virtue of the respective Member State law. An imbalance then only exists 'to the detriment of the consumer', if the dispositive statutory law is more advantageous to the consumer than the clause in question".⁴³⁵ This solution, however, seems to be based more generally on recognition of the factors contained in Article 4(1) of the Directive.

The same problem arises with regard to the 'good faith' criterion. As we have seen, Article 3(1) stipulates that a term shall be regarded as unfair if, contrary to good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Most legal systems distinguish between subjective good faith and objective good faith.⁴³⁶ The former concept refers to the subjective mentality (*bona*

⁴³² *Océano*, para 24.

⁴³³ *Ibid*, para 22.

⁴³⁴ *Ibid*, para 22. (Italics reflect the author's emphasis).

⁴³⁵ *EC Consumer Law Compendium: Comparative Analysis*, p. 385.

⁴³⁶ Martijn W. Hesselink: "The Concept of Good Faith", p. 193.

fide state of mind), i.e. that an individual did not or should not have known about a certain fact or incident while the latter, sometimes also referred to as procedural good faith, refers to a standard of conduct between the contractual parties.⁴³⁷ In B2C contracts, for instance, it concerns the question of whether the consumer has been given a chance “to influence the terms, to choose between alternatives and to understand them”⁴³⁸ A further explanation is provided by Recital 16 to the Directive which states that “in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account.”

Such a definition of substantive or procedural good faith, i.e. that it relates to the disproportionate advantage of the business party, has raised the question of whether the ‘good faith’ criterion actually differs from the criterion of ‘significant imbalance’.⁴³⁹ Hence, it remains unclear how these two criteria relate to one another. The wording of Article 3(1) has been seen to imply that a term is only unfair if both criteria are fulfilled.⁴⁴⁰ It follows from such an interpretation that a term should hypothetically be able to cause a significant imbalance without being ‘contrary to good faith’ at the same time.⁴⁴¹ The opposite perspective would obviously be that a term which causes a significant imbalance to the detriment of the consumer is always contrary to the good faith criterion. A third point of view provides that only one of these two criteria of Article 3(1) need to be met in order for a term to be deemed unfair.⁴⁴² An examination of the case-law of the CJEU does not provide an answer to this question. In this context, it is interesting to note that the ‘good faith’ criterion is only mentioned expressly in 15 of the 27 Member States.⁴⁴³

Be that as it may, the case-law of the CJEU indicates that the determination of whether a term should be regarded as unfair in the meaning of Article 3(1) ultimately comes down to the outcome of a comprehensive assessment (at national level) of the factors specified by Article (4)1 of Directive 93/13/EEC. It therefore seems appropriate to conclude the discussion of the substantive control of fairness with a brief deliberation on this subject. As we have already

⁴³⁷ Martijn W. Hesselink: “The Concept of Good Faith”, p. 123.

⁴³⁸ Jules Stuyck: “Unfair Terms”, p. 124.

⁴³⁹ Jules Stuyck: “Unfair Terms”, p. 124.

⁴⁴⁰ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 150.

⁴⁴¹ *EC Consumer Law Compendium: Comparative Analysis*, p. 385.

⁴⁴² *EC Consumer Law Compendium: Comparative Analysis*, p. 386.

⁴⁴³ *EC Consumer Law Compendium: Comparative Analysis*, p. 393.

seen, Article 4(1) provides that the fairness test based on the aforementioned criteria be conducted by taking into account, firstly, the nature of the goods or services obtained via the consumer contract in question, secondly, all the circumstances at the time of conclusion of the contract which relate to the conclusion of the contract and thirdly, all the other terms of the contract or of another contract upon which the relevant consumer contract is dependent.

As the ECJ observed in *Caja de Ahorros*⁴⁴⁴ and, more recently, in a judgment from 15 March 2012 in *SOS*,⁴⁴⁵ the effect of Article 4(1) is that the criteria for assessing the fairness of a term is given a very wide definition, since this provision expressly states that such an assessment should take into account ‘all the circumstances’ attending the conclusion of the contract in question. In *SOS*, the CJEU was faced with the task of determining the significance of one such factor stemming from ‘all the circumstances’ attending the conclusion of a credit agreement: more specifically of whether a finding that a commercial practice connected to the consumer contract in question constituted an unfair commercial practice within the meaning of the Unfair Commercial Practices Directive 2005/29/EC⁴⁴⁶ should have an impact on the fairness assessment under Article 3(1) of terms provided in that same contract.

This case concerned a credit agreement which two individuals concluded with SOS, a non-bank establishment which granted loans to consumers on the basis of standard contracts. The annual percentage rate (APR) was fixed at 48.63% in the agreement, although it was in fact 58.76% according to the calculation of the referring court, *Okresný súd Prešov* (District Court Prešov). This discrepancy resulted from the fact that SOS had excluded some charges relating to the loan in its calculation of the APR.⁴⁴⁷ In the opinion of Advocate General Trstenjak in this case, it was concluded that the unfairness of a commercial practice did not automatically result in the unfairness of a contractual term. The Advocate General emphasized that the assessment of the unfair nature of a term must primarily be made on the basis of the provisions of Directive 93/13/EEC and, accordingly, that the fact that an unfair commercial practice has led to the conclusion of the credit agreement in question could only be regarded as being one of several factors to be taken into account within the meaning of

⁴⁴⁴ Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I – 0475, para 42.

⁴⁴⁵ Case C-453/10 *Jana Pereničová and Vladislav Perenič v. SOS financ spol. s.r.o.* [2012] ECR n.y.r., para 42.

⁴⁴⁶ Council Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

⁴⁴⁷ *SOS*, para 20-25.

Article 4(1) of the Directive.⁴⁴⁸ The CJEU came to the same conclusion and affirmed that such a factor could not be seen to establish automatically and on its own that the terms concerned were unfair.

6.5.4 Formal Control of Fairness – The Transparency Principle

The importance of information as a means of providing consumer protection has been a recurring theme throughout the years in the EU's consumer protection policy. Resultantly, the transparency principle has become firmly established in secondary legislation as well as the case-law of the ECJ.⁴⁴⁹ As a matter of fact, almost every consumer directive encompasses some provisions on the duty to provide information. Such requirements are aimed at providing the consumers with the tools necessary to make informed choices between competing products or services in full awareness of their rights and responsibilities.⁴⁵⁰ Against this background, Directive 93/13/EEC establishes a transparency principle in Article 5 by stipulating that: "in the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language". Recital 20 to the Directive furthermore contains a declaration which is relevant for the transparency principle. It specifies that the consumer should be given an opportunity to examine all the terms of a contract.⁴⁵¹

Through the principle of legitimate expectations, the transparency principle of Article 5 of Directive 93/13/EEC has been said to form a sub-category of the principle of good faith.⁴⁵² The significance of this principle for the implementation of the Directive is so great that it has

⁴⁴⁸ Opinion of Advocate General Trstenjak, delivered on 29 November 2011 in Case C-453/10 *Jana Pereničová and Vladislav Perenič v. SOS financ spol. s r.o.* [2012] ECR n.y.r., para 125.

⁴⁴⁹ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 137.

⁴⁵⁰ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 137.

⁴⁵¹ It is interesting to note in this context that the contents of Recital 20 actually reflect a provision which was originally found in Article 5(3) the 1992 proposal of the Directive but disappeared later on in the legislative process. It stipulated that irrespective of whether or not a non-individually negotiated term could be considered unfair, such a term should only be regarded as having been accepted by the consumer if the consumer had been provided with a genuine opportunity to examine the contractual terms before the contract was concluded. The provision was excluded from the final text of the Directive since the Council ultimately felt its subject matter to fall outside the legal framework of Directive 93/13/EEC and should rather be dealt with at national level with relation to rules on the formation of contracts. Nonetheless, reference remains to this provision in Recital 20 which, according to the Commission, is capable of having an impact, albeit an indirect one via the principle of transparency, on terms which have been inserted into a contract at the time of its conclusion. In this context it should furthermore be noted that point (i) of the Annex to the Directive specifies that a term may be deemed unfair if it irrevocably binds the consumer "to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract". See Commission of the European Communities: *Report from the Commission on the Implementation of Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, p. 17-18.

⁴⁵² Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 136.

been established by ECJ that Member States are specifically required to incorporate the principle in full in their national legislation.⁴⁵³ Thus, in *Commission v. the Netherlands*,⁴⁵⁴ the Court made it clear that to satisfy the requirements of legal certainty, it did not suffice that the provisions of national law had in the settled case-law of a Member State been interpreted in such a way as to fulfill the requirements of the Directive. Instead, Member States are required to implement the principle of transparency comprehensively into domestic law so that the legal position of consumers is made clear and precise enough that individuals will be able to become fully aware of the rights afforded to them.⁴⁵⁵

With this in mind, the question arises what role this principle actually has to play in connection to the rules of Directive 93/13/EEC. According to the Commission, the principle of transparency has a variety of functions in the context of the Directive which differ with regard to the manner in which the principle interacts with individual provisions in the Directive. The principle of transparency is essentially meant to ensure that consumers will be able to obtain the information necessary in order to understand the relevant facts and conditions before they choose to conclude a contract.⁴⁵⁶ Accordingly, the terms of a contract must be drafted in such a way that the consumer will be able to comprehend the rights and duties for which it provides⁴⁵⁷ as well as the consequences of entering into a contract.⁴⁵⁸ The Commission states that if the principle is examined in light of the substantive control of Article 3, the principle acts to scrutinize the substance of contractual term in question. When it is read in the light of the aforementioned Recital 20, however, it can be seen as posing a hindrance to the insertion of new contracts terms at the contract's time of conclusion.⁴⁵⁹

The wording of Article 5 makes it clear that the requirements of the transparency principle are intended to be applied to written terms. According to Tenreiro and Karsten, the manner in which the terms are written has no significance in this respect, so they can for instance have been printed, handwritten or even be displayed on a screen through the use of computer

⁴⁵³ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 135-136.

⁴⁵⁴ Case C-144/99 *Commission of the European Communities v. Kingdom of the Netherlands* [2001] ECR I – 03541.

⁴⁵⁵ *EC Consumer Law Compendium: Comparative Analysis*, p. 413.

⁴⁵⁶ Commission of the European Communities: *Report from the Commission on the Implementation of Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, 17.

⁴⁵⁷ *EC Consumer Law Compendium: Comparative Analysis*, p. 412.

⁴⁵⁸ Mário Tenreiro and Jens Karsten: “Unfair Terms in Consumer Contracts: Uncertainties, contradictions and novelties of a Directive”, p. 242.

⁴⁵⁹ Commission of the European Communities: *Report from the Commission on the Implementation of Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, 17.

technology.⁴⁶⁰ It is interesting to note that the fact that the transparency principle only applies to written contract terms according to sentence 1 of Article 5 is actually inconsistent with the spirit of the Directive's recitals.⁴⁶¹ They do not acknowledge that the requirement of transparency should only apply to written terms and, in fact, Recital 11 specifically declares that "consumers must receive equal protection under contracts concluded by word of mouth and written contracts."⁴⁶² It must be kept in mind, however, that in contrast to the provisions of Article 5, the contents of recitals are not legally binding in the formal sense. They are primarily intended to assist in the interpretation of the provisions of the Directive's articles.⁴⁶³

As Article 5 explains, it encompasses two independent standards that form the core of the transparency principle of Directive 93/13/EEC, i.e. the requirements of plainness and intelligibility.⁴⁶⁴ According to the authors of the *EC Consumer Law Compendium*, these criteria are intrinsically conjoined – for that reason it can be difficult to differentiate between them. In their view, terms fulfill the plainness criteria if no doubts, misunderstanding or ambiguities exist with regard to the content of the terms.⁴⁶⁵ Another way to put this, as Micklitz does, is that the 'plainness' concept refers to the clarity of the legal effect of a term, including its consequences. The consumer has to know, in other words, on the basis of the wording of the terms, what to expect. It follows that obscurely worded terms should not enable a seller or supplier to improve his legal position to the detriment of the consumer.⁴⁶⁶ The 'intelligibility' standard, on the other hand, pertains to the actual legibility of the term in question⁴⁶⁷ and thus relates to the style adopted as well as the manner in which the term is printed onto paper.⁴⁶⁸ The 'intelligibility' standard is inter alia intended to eradicate intangible 'small print' provisions from consumer contracts.⁴⁶⁹

Pursuant to the above, a distinction can be made between the formal and substantive aspects of the transparency principle's 'plainness' and 'intelligibility' criteria. From the formal perspective, Article 5 requires the terms to be drafted in such a way that the consumer will be able to understand the rights and duties of each contractual party as stipulated by the contract. As the authors of the *EC Consumer Law Compendium* note, this entails that the font

⁴⁶⁰ Mário Tenreiro and Jens Karsten: "Unfair Terms in Consumer Contracts: Uncertainties, contradictions and novelties of a Directive", p. 242.

⁴⁶¹ *EC Consumer Law Compendium: Comparative Analysis*, p. 413-414.

⁴⁶² *EC Consumer Law Compendium: Comparative Analysis*, p. 413-414.

⁴⁶³ Michael Keadig: "Active Transposition of EU legislation", p. 29.

⁴⁶⁴ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 136.

⁴⁶⁵ *EC Consumer Law Compendium: Comparative Analysis*, p. 412.

⁴⁶⁶ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 136.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 136.

⁴⁶⁹ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 136.

used be easy to read and that the length of the terms be compatible and proportionate to the purpose of the contractual undertaking. Furthermore, the contract's external appearance and organization should enable to consumer to gain an overview of the structure of the contractual terms without too much difficulty. Accordingly, frequent cross-referencing between terms should be avoided.⁴⁷⁰

The substantive aspect of the transparency principle, on the other hand, requires drafters of contract terms to ensure that the consumer will be able to understand the contents of the terms. According to the authors of the *EC Consumer Law Compendium*, some common pitfalls in this respect include the use of inaccurate or fragmentary statements, technical jargon and long and complex sentences. Furthermore, some academics are of the opinion that Article 5 should be read to provide the substantive requirement that contractual terms be formulated in a language which the consumer understands.⁴⁷¹ In the view of Tenreiro and Karsten, the terms would not necessarily have to be in the native language of the consumer. Rather, it may suffice in this regard for the language in question to be widespread in the consumer's place of residence and that the consumer is therefore likely to be able to read and comprehend the contents of the terms.⁴⁷²

On a closely related subject, it must be observed that an assessment of whether or not a term satisfies the 'plain and intelligible language' criteria of Article 5 clearly reflects the manner in which the term in question is understood. Despite this fact, Directive 93/13/EEC fails to provide any instructions regarding the manner in which such an assessment is to be conducted.⁴⁷³ As Nebbia points out, the nature of the consumer concerned, i.e. his educational background and level of knowledge, has an obvious impact on whether or not a contractual term will seem 'plain' and 'intelligible' from that consumer's point of view. Accordingly, it must be determined which standard of consumer should be employed in the assessment of a term's transparency. In this context, Nebbia explains that a prominent question before the ECJ has, as a matter of fact, been which standard of consumer should be applied with regard to the definition of EU consumer protection. This question has resulted in the emergence of the concepts of an 'average consumer' or an 'informed consumer' from the case-law of the Court.⁴⁷⁴

⁴⁷⁰ *EC Consumer Law Compendium: Comparative Analysis*, p. 412.

⁴⁷¹ *Ibid*, p. 412-413.

⁴⁷² Mário Tenreiro and Jens Karsten: "Unfair Terms in Consumer Contracts: Uncertainties, contradictions and novelties of a Directive", p. 242-243.

⁴⁷³ *Ibid*, p. 414.

⁴⁷⁴ Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 136.

According to Tenreiro and Karsten, it is this notion of an ‘average consumer’ that should be applied as the basis of the transparency assessment of a term. They hold that the assessment should be based on the question whether, taking into account the type of contract concerned, the average consumer is capable of understanding the term without the assistance of a third person.⁴⁷⁵ However, as the authors of the *EC Consumer Law Compendium* note, it must be kept in mind that it remains to be settled whether this concept, which refers to a reasonably well informed, observant and circumspect individual, can apply in the context of the fairness control of Directive 93/13/EEC.⁴⁷⁶ This question thus far remains unanswered by the ECJ. It should therefore not come as any surprise that the consumer standard currently being applied at national level in relation to the assessment of unfair terms varies considerably between individual Member States.⁴⁷⁷

Another question which remains to be answered relates to the legal consequences of a breach of the transparency principle of Directive 93/13/EEC. The Directive itself does not provide any answers to this question. It only makes it clear via the second sentence of Article 5 that violations of the transparency principle result in the application of the rule of interpretation which will be discussed in the following chapter. As the authors of the *EC Consumer Law Compendium* point out, however, the rule of interpretation can only be applied to terms which fail to satisfy the ‘plainness’ aspect of the transparency principle but are capable of being interpreted. Consequently, the Directive does not explicitly provide for any legal consequences in the case of plain but unintelligible terms.⁴⁷⁸

As a consequence, three different hypotheses have emerged with regard to the legal consequences of a term’s failure to meet the requirements of the transparency principle of Directive 93/13/EEC. The first is that it should simply be left to the discretion of the individual Member States to decide what the legal consequences should be in such cases. Secondly, the view could be taken that the satisfaction of the qualifications of Article 5 constitutes a prerequisite for the application of the term in question – in other words: a term which fails to conform to the transparency principle amounts to an unfair term. This perspective is supported by the subject-matter of Recital 20. Finally, there is the hypothesis that a term’s lack of transparency does not in and of itself result in the determination that the

⁴⁷⁵ Mário Tenreiro and Jens Karsten: “Unfair Terms in Consumer Contracts: Uncertainties, contradictions and novelties of a Directive”, p. 243.

⁴⁷⁶ *EC Consumer Law Compendium: Comparative Analysis*, p. 414.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ The authors of the *EC Consumer Law Compendium* provide the following example: “where, due to legal terminology or insufficient command of the language in which the terms are drafted, the clause is unintelligible to the consumer.” *Ibid.*, p. 415.

term in question is unfair. It follows from this train of thought that an obscure term will only be deemed non-binding in accordance with Article 6(1) of the Directive if the substantive ‘unfairness’ criteria of Article 3(1) are fulfilled.⁴⁷⁹

The ECJ has yet to establish its position on the legal consequences of a violation of the transparency principle of Article 5. Nevertheless, it can be argued that some indications in this regard may be found in the Court’s judgments in *Cofidis*⁴⁸⁰ as well as a recent judgment in the case *Invitel*.⁴⁸¹ It will be recalled from previous chapters that *Cofidis* concerned the alleged unfairness of terms in an offer of credit which took the form of a leaflet printed on both sides with the words “Free application for money reserve” in large letters across the front of the leaflet, while information regarding a penalty clause and the contractual interest rate were printed in small print on the reverse side. The *Tribunal d’instance de Vienne* concluded on the basis of these facts “that ‘the financial clauses ... lack legibility’ and that ‘the lack of legibility’ is to be contrasted with the word “free” ... in a particularly obvious form’, which was likely to mislead the consumer. Its conclusion was that the ‘financial clauses may be regarded as unfair’.”⁴⁸² In other words, the *Tribunal d’instance de Vienne* seems to take the view that the lack of transparency *per se*, reflected in the misleading use of small print, renders the terms on the contractual interest rate and penalty clause unfair. This position seems to be in sync with the second hypothesis described above. The ECJ begins by noting the position of the national court and then proceeds to explain that:

To fall within the scope of the Directive, however, those terms must satisfy the conditions set out in Article 3(1) of the Directive, that is, they must not have been individually negotiated and must, contrary to the requirement of good faith, cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. Although the national court has not provided any information on the latter point, it cannot be excluded that that condition is satisfied.⁴⁸³

The Court subsequently affirms the admissibility of the reference for a preliminary ruling “on the basis that the terms which the national court regards as unfair satisfy the criteria defined in Articles 1(2), 3(1) and 4(2) of the Directive”.⁴⁸⁴

The fact that the ECJ mentions the substantive control of Article 3(1) in this context is interesting when it is taken into account that this part of Article 3(1) has no significance for the Directive’s scope of application, as the provisions of Articles 1(2) and 4(2), in addition

⁴⁷⁹ *EC Consumer Law Compendium: Comparative Analysis*, p. 415 - 416.

⁴⁸⁰ Case C-473/00 *Cofidis SA v. Jean-Louis Fredout* [2002] ECR I – 10875.

⁴⁸¹ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r.

⁴⁸² *Cofidis*, para. 13.

⁴⁸³ *Cofidis*, para. 23.

⁴⁸⁴ *Cofidis*, para. 26.

with the question of whether or not the terms have been individually negotiated, obviously do. The significance of the question presented in paragraph 23 of the judgment, i.e. whether the term in question is contrary to the requirement of good faith and causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer in the meaning of Article 3(1), may therefore perhaps be seen to reflect the Court's contemplation of whether there is a *prima facie* indication that the terms in question can be considered unfair.⁴⁸⁵ If this is correct, paragraph 23 in *Cofidis* could perhaps be seen to imply that an independent assessment must be made of whether or not the term in question causes a significant imbalance in the parties' rights and obligations arising under the contract, contrary to the requirement of good faith, to the detriment of the consumer in the meaning of the substantive control of Article 3. This would seem to indicate that a lack of transparency does not *per se* suffice to render a term unfair in the meaning of Directive 93/13/EEC.

The recent judgment of the Court in *Invitel*⁴⁸⁶ similarly indicates that a breach of the transparency principle *per se* does not suffice to render the term in question unfair in the meaning of Article 3(1). In this case, the Hungarian national consumer protection authority Nemzeti Fogyasztóvédelmi Hatóság (NFH) brought public-interest proceedings against the fixed-line telephone company network operator company Invitel Távközlési Zrt (Invitel) regarding Invitel's use of allegedly unfair terms in the latter's contracts which the concluded with consumers.⁴⁸⁷ Invitel introduced into its general business conditions ('GBC') a term which provided for special 'money order fees, i.e. fees charged in relation to the payment of invoices by money order. The term stipulated that 'if the subscriber pays the amount of the invoice by means of a money order, the supplier of services shall have the right to invoice the additional fees which result (such as postal fees)'. The GBC did not contain any provisions describing the method of calculation of the said money order fees.⁴⁸⁸

The judgment of the Court in this case makes it clear that a violation of the transparency principle "is of fundamental importance" in the assessment of the term's fairness.⁴⁸⁹ It stated that "as is clear from the 20th recital in the preamble to the Directive, the consumer should

⁴⁸⁵ As the ECJ explains in paragraph 20 of the judgment, a national court's request for a preliminary ruling under Article 267 TFEU should only be dismissed "where it is obvious that the interpretation of Community law or the consideration of the validity of a Community rule requested by that court has no bearing on the real situation or on the subject-matter of the case". It could, of course, be argued that an the interpretation of EU law has no significance in a case which concerns the alleged unfairness of terms if there is not even a *prima facie* indication that the terms in question are unfair in the meaning of Directive 93/13/EEC.

⁴⁸⁶ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt*. Judgment of the Court of 26 April 2012 [2012] ECR n.y.r.

⁴⁸⁷ *Invitel*, para. 2.

⁴⁸⁸ *Ibid.*, para. 18.

⁴⁸⁹ *Ibid.*, para 28.

actually be given an opportunity to examine all the terms appearing in the GBC and the consequences of those terms. Further, the obligation to draft terms in clear, intelligible language is laid down in Article 5 of the Directive. Consequently, 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 with regard to the fees connected to the service to be provided is of fundamental importance”.⁴⁹⁰

These factors relating to the transparency principle were not, however, the only factors which the CJEU considered necessary to take into account in the assessment of fairness. It explicitly made clear that “As part of the assessment, the national court must determine, *inter alia*, whether, in light of all the terms appearing in the GBC of consumer contracts which include the contested term, and in the light of the national legislation setting out rights and obligations which could supplement those provided by the GBC at issue, *the reasons for, or the method of, the amendment of the fees connected with the service to be provided are set out in plain, intelligible language* and, as the case may be, whether consumers have a right to terminate the contract.” Here, the CJEU seems to regard the possibility of a violation of the transparency principle as one of a number of factors which must be taken into account in the fairness assessment according to Article 4(1) of the Directive, which clearly seems to indicate that a violation of the transparency principle *per se* does not suffice to render a term unfair.

6.5.5 Formal Control of Fairness – *Interpretatio Contra Proferentem*

As we have seen in the previous chapter, sentence 2 of Article 5 provides a rule of interpretation which complements the transparency principle. It states that “where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail”. This rule provides a variant to the rule commonly referred to as the *contra proferentem*⁴⁹¹ rule in that the party to whose advantage an unclear term is interpreted will, in the case of sentence 2 of Article 5, always be a consumer.⁴⁹² Another important facet of the *contra proferentem* rule of Article 5 is that does not simply provide that terms which fail to comply with the transparency principle should be interpreted in favor of the consumer. It

⁴⁹⁰ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r., para 27-28.

⁴⁹¹ The traditional *contra proferentem* rule provides that unclear terms shall be interpreted to the detriment of the party which drafted them. See Ewoud Hondius: “EC Directive on Unfair Terms in Consumer Contracts: Towards a European Law of Contract”, p. 41.

⁴⁹² *Nebbia: Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 142.

stretches even further and demands that an interpretation ‘most’ favorable for the consumer shall prevail in such cases.⁴⁹³

Obviously, there is a certain conflict between the application the *contra proferentem* rule to force an advantageous interpretation for the consumer, on the one hand, and finding a term to be unfair and resultantly non-binding, on the other. As Karsten and Tenreiro point out, a seller or supplier should not simply be able to intentionally disregard the transparency requirement of Article 5 with the knowledge that in the worst case scenario, the *contra proferentem* rule will ensure a satisfactory outcome for the consumer. After all, an interpretation in favor of the consumer is not always the most advantageous option. It may very well prove to be more beneficial for a consumer to have the term in question deemed unfair and resultantly non-binding in accordance with Article 6(1) of the Directive.⁴⁹⁴ It is for that very reason that the third sentence of Article 5 explicitly states that the rule of interpretation does “not apply in the context of the procedures laid down in Article 7(2)”, i.e. in collective actions for the prevention of the continued use of unfair terms that have been drawn up for general use.

As Advocate General Geelhoed explains in his opinion in *Commission v. Spain*,⁴⁹⁵ there is a fundamental difference between a collective action for cessation brought by, for instance, a consumer-protection organization on the one hand, and proceedings brought by an individual consumer against a seller or supplier, on the other. The former of these is inherently a preventative measure which is designed to be employed for the general protection of consumers against the application of unfair terms in general conditions and the unequal nature of the position of the consumer, on the one hand, and the seller or supplier, on the other, is rescinded by the intervention of an external party which does not have any material or personal interests in the outcome of the action.⁴⁹⁶ The rule stipulated in sentence 3 of Article 5 prevents the application of the *contra proferentem* rule in such cases, since its employment would simply result in their consumer-friendly interpretation and, resultantly, in their continued existence and involvement in the contract in question, despite the purpose of such

⁴⁹³ *EC Consumer Law Compendium: Comparative Analysis*, p. 417.

⁴⁹⁴ Mário Tenreiro and Jens Karsten: “Unfair Terms in Consumer Contracts: Uncertainties, contradictions and novelties of a Directive”, p. 243-244.

⁴⁹⁵ Case C-70/03 *Commission of the European Communities v. Kingdom of Spain* [2004] ECR I – 07999.

⁴⁹⁶ Opinion of Advocate General Geelhoed, delivered on 29 April 2004 in Case C-70/03 *Commission of the European Communities v. Kingdom of Spain* [2004] ECR I – 07999, para 12.

collective actions which, by the express wording of Article 7(2), is to prevent the continued use of such terms.⁴⁹⁷

To conclude, the *contra proferentem* rule can therefore prove to be an effective instrument for consumers in individual cases where it is actually in the interest of the consumer for the term to continue to form a part of the relevant contract, albeit in a more advantageous guise. In collective actions, however, the application of such a rule would ultimately have the paradoxical effect of promoting the continued use of terms which, under the normal interpretation under national law, would be deemed unfair, since the drafter of such a term could simply argue that the relevant term could not be considered unfair (and resultantly be rendered unfair) when interpreted in favor of the consumer.⁴⁹⁸

6.6 The Legal Consequences of Unfairness

Article 6(1) of Directive 93/13/EEC establishes the legal consequences of finding a term to be unfair in the meaning of Article 3(1). It provides that Member States “shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms”. Accordingly, Member States are required to ensure through transposition of this provision into national law firstly, that the unfairness of a term shall render it non-binding on the consumer and secondly, that the remaining provisions of the contract shall continue to bind the parties to the consumer contract, as long as the contract is capable of ‘continuing in existence’ without the unfair terms. This second consequence is often referred to as ‘partial nullity’.⁴⁹⁹

The manner in which the Member States ensure these consequences of unfairness is left to their discretion.⁵⁰⁰ The Directive does not specify whether the unfair term is to be declared invalid or void.⁵⁰¹ As a matter of fact, the diverse legal traditions of the Member States have resulted in a range of different transposition variations such as nullity, non-existence,

⁴⁹⁷ Ewoud Hondius: “EC Directive on Unfair Terms in Consumer Contracts: Towards a European Law of Contract”, p. 42.

⁴⁹⁸ Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 142.

⁴⁹⁹ Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 144.

⁵⁰⁰ Mário Tenreiro and Jens Karsten: “Unfair Terms in Consumer Contracts: Uncertainties, contradictions and novelties of a Directive”, p. 244.

⁵⁰¹ Opinion of Advocate General Trstenjak, delivered on 26 April 2012 in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r., para 89.-

unenforceability, revocability and voidability.⁵⁰² In this context, an important observation was raised by Advocate General Trstenjak in her opinion in *SOS*. She noted that the very wording of Article 6(1) makes it clear that the legal consequence of an unfair term are to be “to the advantage of the consumer only, whereas the contractual term classified as unfair does not cease to be binding on the seller or supplier”.⁵⁰³

In the recent judgment of the CJEU from 15 March 2012 in *SOS*,⁵⁰⁴ which was accounted for in Chapter 6.5.3 above, a Slovakian court (*Okresný súd Prešov*) made a reference to the Court for a preliminary ruling with regard to the question whether Article 6(1) could be interpreted in such a way as to allow national courts to decide that a contract which has been found to include an unfair term in the meaning of Article 3(1) of Directive 93/13/EEC shall, in its entirety, not be binding for the consumer, if such an outcome is more favorable to the consumer.⁵⁰⁵ In response to this question, the CJEU observed, that national courts which find a term of a consumer contract to be unfair are required by Article 6(1), first, to “draw all the consequences that follow under national law, so that the consumer is not bound by those terms”⁵⁰⁶ and, secondly, to determine whether the contract concerned can continue in existence without those unfair terms.⁵⁰⁷

Subsequently, the CJEU noted as it had done on many occasions before that the core idea upon which the Directive’s system of consumer protection is based, is that the consumer is in a “weak position vis-à-vis the trader as regards both his bargaining power and his level of knowledge, which leads the consumer to agreeing to terms drawn up in advance by the trader without being able to influence the content of those terms”.⁵⁰⁸ In this context, the CJEU stated that the objective of the Directive is to restore the balance between the parties, while, as a

⁵⁰² Commission of the European Communities: *Report from the Commission on the Implementation of Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, 19.

⁵⁰³ Opinion of Advocate General Trstenjak, delivered on 29 November 2011 in Case C-453/10 *Jana Pereničová and Vladislav Perenič v. SOS financ spol. s.r.o.* [2012] ECR n.y.r.

⁵⁰⁴ Case C-453/10 *Jana Pereničová and Vladislav Perenič v. SOS financ spol. s.r.o.* [2012] ECR n.y.r., para 42.

⁵⁰⁵ The *Okresný súd Prešov* had observed that the determination that the short-term loan agreement which was contested in this case be invalid in its entirety would be more advantageous for the consumers in this case than maintaining the binding nature of the non-unfair terms – if the contract were deemed invalid in its entirety, the consumers would only be obligated to pay interest for late payment (at a 9% rate) instead of having to pay all the charges arising from the granting of the loan, which would amount to a much higher sum. See *SOS*, para 24.

⁵⁰⁶ *SOS*, para 30. See also Case C- 40/08 *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [2009] ECR I – 09579, para 58-59 and order in Case C- 76/10 *Pohotovost’ s.r.o. v. Iveta Korčkovská* [2010] ECR n.y.r., para 62.

⁵⁰⁷ *SOS*, para 30. See also order in Case C- 76/10 *Pohotovost’ s.r.o. v. Iveta Korčkovská* [2010] ECR n.y.r., para 61.

⁵⁰⁸ *SOS*, para 27. See also Case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I – 10421, para 25; Case C- 243/08 *Pannon GSM Zrt. v. Erzsébet Sustikné Györfi* [2009] ECR I – 04713, para 22 and Case C- 40/08 *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [2009] ECR I – 09579, para 29.

rule, preserving the validity of the contract as a whole rather than to negate all contracts which contain unfair terms in their entirety.⁵⁰⁹ It observed that the wording of Article 6(1) of the Directive as well as the requirements of legal certainty of economic activities both imply that the circumstances of the consumer should not be seen as a decisive factor in the determination of whether the contract as a whole should be rendered unbinding.⁵¹⁰

The Court consequently came to the conclusion that Article 6(1) of Directive 93/13/EEC cannot be interpreted in such a manner as to allow a national court to base its decision as to whether a contract containing an unfair term should continue to exist without the unfair term “solely on a possible advantage for the consumer of the annulment of the contract as a whole.”⁵¹¹ In line with the rule provided by Article 8 on minimum harmonization, however, the Directive does not preclude Member States from providing that a ‘consumer contract’ in the sense of Directive 93/13/EEC which contains one or more unfair terms is to be void in its entirety in cases where such an outcome will ensure better protection of the consumer.⁵¹²

Another recent judgment of the CJEU has shed light on an important issue concerning Article 6(1) of the Directive, namely, how it should be interpreted with regard to public interest actions (*actio popularis*) brought by a body appointed by law and competent to bring such an action on behalf of consumers. It will be recalled from previous chapters that the case *Invitel*⁵¹³ concerned public-interest proceedings brought by the Hungarian national consumer authority *Nemzeti Fogyasztóvédelmi Hatóság* (NFH) against the fixed-line telephone company network operator Invitel with regard to the alleged unfair nature of certain terms on ‘money order fees’ in the latter’s general business conditions. In this case, the referring court (the Pest Megyei Bíróság) asked the CJEU whether Article 6(1) read in light of Article 7(1) and 7(2) should, firstly, be interpreted in such a way that it does not, in declaring the terms in question unfair and therefore invalid, preclude a national court from “producing legal effects with regard to all consumers who have concluded a contract to which the same general business conditions apply, including those who were not party to the proceedings for an injunction, and secondly, whether the national courts are required to apply all the legal consequences under national law, also with regard to the future”.⁵¹⁴

⁵⁰⁹ *SOS*, para 31.

⁵¹⁰ *SOS*, para 32.

⁵¹¹ *SOS*, para 33.

⁵¹² *SOS*, para 36.

⁵¹³ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r.

⁵¹⁴ *Invitel*, para 32.

The CJEU once again referred to the protective purpose of the Directive with regard to the consumer who is in a weak position vis-à-vis the trader and subsequently noted that Article 6(1) has the objective of re-establishing equality between the parties. It observed that, despite the fact that the Directive itself does not “seek to harmonise the penalties applicable in the event of a term being found to be unfair” during public-interest actions, Article 7(1) nevertheless requires Member states to ensure that ‘adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumer’ and that one of those means is the possibility for persons or organizations which fulfill the criteria of Article 7(2) to take action to obtain a judicial decision declaring the such terms to be unfair and to have them prohibited.⁵¹⁵

The CJEU concluded that in such a situation, Article 6(1) of Directive 93/13/EEC, read in conjunction with the provisions of Article 7(2) and 7(3), should be interpreted in such a way that a declaration of the invalidity of an unfair term included in the standard terms of consumer contracts in an action for an injunction, brought by an organization satisfying the requirements of Article 7, in the public interest on behalf of consumers, should have an effect for all consumers who concluded a contract with that seller or supplier to which the same standard terms apply, including those consumers who were not a party to the injunction proceedings.⁵¹⁶ Moreover, with regard to the second part of the question, the national court should in such proceedings where the unfair nature of a term has been acknowledged, apply all the legal consequences of unfairness provided by national law, not only *ex officio* but also as regards the future.⁵¹⁷

On a final note, Article 6(2) of Directive 93/13/EEC must be mentioned briefly as it contains an important rule of private international law⁵¹⁸ which is intended to ensure that traders outside the EU cannot bypass the legal consequences of unfairness through the insertion of a simple clause on the laws applicable to the contract in question. As Recital 22 to the Directive explains, that there is a risk that a consumer may lose the protection which the Directive offers him if he concludes a contract which designates the law of a non-Member State as the applicable law to the contract. Article 6(2) aims to circumvent the adverse effect of such choice of laws clauses by providing that “Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract

⁵¹⁵ *Invitel*, para 33-36. See also Case C-372/99 *Commission v. Italy* [2002] ECR I – 00819, para 14.

⁵¹⁶ *Invitel*, para 38.

⁵¹⁷ *Invitel*, para 43.

⁵¹⁸ Jules Stuyck: “Unfair terms”, p. 117.

if the latter has a close connection with the territory of the Member States”. However, it is not clear what exactly is required so that a party will be considered to have a ‘close connection with the territory of the Member States’.

6.7 Enforcement

6.7.1 *Actio Popularis*

Although we have already caught a glimpse of the provisions of Article 7 through an examination of the case-law of the CJEU in previous chapters, it would seem improper to conclude our analysis of the provisions of Directive 93/13/EEC without an express, albeit brief, comment on the contents of this Article. Recital 23 to the Directive is of relevance in this context. It explains that persons or organizations that are regarded, under the law of the relevant Member State, as having a legitimate interest in the matter must be provided with the facilities to initiate proceedings regarding contract terms that have been drafted for general use in consumer contracts, particularly in the case of unfair terms, either before a court or before an administrative body which is competent to decide upon complaints or initiate legal proceedings. A further explanation provides that such facilities are not, however, expected to include prior inspection or verification of general conditions in individual economic sectors.

Article 7(1) accordingly requires Member States to “ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers”. In an attempt to adapt to the measures which had already come into existence in individual Member States by the time that Directive 93/13/EEC adopted, the Directive more or less leaves the choice of ‘adequate and effective’ means to the discretion of the Member States.⁵¹⁹ This provision is based on the view that an attempt should be made to eradicate unfair terms before a conflict arises from them⁵²⁰ by bringing the use of such terms to a halt.⁵²¹ As Karsten and Tenreiro note, the ‘adequate and effective’ means which are to be provided by Member States in accordance with Article 7(1) are to benefit both consumers and competitors, indicating that

⁵¹⁹ *EC Consumer Law Compendium: Comparative Analysis*, p. 422.

⁵²⁰ Ewoud Hondius: “EC Directive on Unfair Terms in Consumer Contracts: Towards a European Law of Contract”, p. 42.

⁵²¹ Mário Tenreiro and Jens Karsten: “Unfair Terms in Consumer Contracts: Uncertainties, contradictions and novelties of a Directive”, p. 254.

the underlying purpose of this provision is to stimulate competition and the improvement of transaction practices within the internal market.⁵²²

Article 7(2) defines more specifically the manner in which contractual terms ‘drawn up for general use’ are to be controlled. According to Karsten and Tenreiro, the scope of application of Article 7(2) is narrower than that of Article 7(1) since the latter concerns unfair terms in all ‘consumer contracts’ whereas the former only pertains to ‘standard contract terms’. Article 7(2) dictates that ‘persons or organizations’ which have a legitimate interest in consumer protection under national law (such as consumer organizations) must be equipped with the tools necessary to bring an action for injunction against unfair terms before courts or administrative bodies. It must be mentioned that this rule of Article 7(2) is complemented by the provisions of the Injunctions Directive 2009/22/EC.⁵²³ The Directive leaves it to the national legislators to define when a person or organization is considered to have a legitimate interest in consumer protection under national law.⁵²⁴ This idea of the collective control of unfair terms originates from the ombudsman systems established by the Scandinavian countries.⁵²⁵ On a final note, it should be observed that Article 7(3) provides that the legal remedies stipulated by Article 7(2) may be directed wither separately or jointly against a more than one ‘seller or supplier’ from the same economic sector or their associations which user or recommend the use of the same general contractual terms or similar terms.

6.7.2 Control of Fairness Ex Officio

Lastly, before we turn our focus to the rules relating to unfair terms in the proposal for a Common European Sales Law, it must be observed that the national courts of the Member States are obligated to subject terms which are unfair to the fairness control of the Directive *ex officio*, as the ECJ explicitly stated in *Claro*.⁵²⁶ Prior to this judgment, the ECJ had established the possibility of an *ex officio* review of terms in *Océano*⁵²⁷ that the underlying objective of Article 6(1) “would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms” and that effective consumer protection could only be obtained

⁵²² Mário Tenreiro and Jens Karsten: “Unfair Terms in Consumer Contracts: Uncertainties, contradictions and novelties of a Directive”, p. 254.

⁵²³ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests.

⁵²⁴ Mário Tenreiro and Jens Karsten: “Unfair Terms in Consumer Contracts: Uncertainties, contradictions and novelties of a Directive”, p. 256.

⁵²⁵ Mário Tenreiro and Jens Karsten: “Unfair Terms in Consumer Contracts: Uncertainties, contradictions and novelties of a Directive”, p. 254.

⁵²⁶ Case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I – 10421.

⁵²⁷ Case C-240-244/98 *Océano Grupo SA v. Quintero* [2000] ECR I-494.

if “the national court acknowledges that it has power to evaluate terms of this kind of its own motion”.⁵²⁸ Accordingly, it concluded that the protection afforded to consumers by the Directive extends to allow national courts to determine *ex officio* whether a contractual term is unfair.⁵²⁹ The ECJ did not, however, establish a duty of a national court to review the fairness of a term *ex officio* in *Océano*. In *Pannon GSM*,⁵³⁰ the ECJ affirmed the authority of national courts to review contractual terms of their own motion, but did not go so far as to establish a duty to that effect.⁵³¹

Such an obligation was established in *Claro*.⁵³² This case concerned a mobile telephone contract concluded between Ms. Claro and the company Móvil which contained an arbitration clause stipulating that any disputes arising from the said contract were to be referred for arbitration to the *Asociación Europea de Arbitraje de Derecho y Equidad*⁵³³ (AEADE). In short, Ms. Claro did not comply with the minimum subscription period of the contract and as a result, arbitration proceedings were initiated against her before the AEADE. The arbitrator ultimately ruled in favor of Móvil and Ms. Claro subsequently brought action for annulment of the arbitration decision before the *Audiencia Provincial de Madrid* (Provincial Court). In the view of the latter court, there was no doubt that the arbitration clause was unfair. However, the court observed that Ms. Claro had not pleaded that the arbitration clause was unfair during the arbitration proceedings. It therefore referred the question to the ECJ whether the court was obliged, in order to enforce the protection awarded to consumers under Directive 93/13/EEC, to determine the unfairness of such a term *ex officio*, despite the fact that the consumer had not raised the issue of unfairness during the arbitration proceedings.⁵³⁴ Having taken into account the purpose of Article 6 of the Directive and the underlying purpose and regime of consumer protection of Directive 93/13/EEC, the ECJ answered in the affirmative.⁵³⁵ As we saw in Chapter 6.6 on the legal consequences of unfairness, the CJEU has confirmed this obligation in *Invitel*⁵³⁶ in relation to public-interest actions. A preliminary

⁵²⁸ *Océano*, para 26.

⁵²⁹ *Océano*, para 29.

⁵³⁰ Case C- 243/08 *Pannon GSM Zrt. v. Erzsébet Sustikné Györfi* [2009] ECR I – 04713.

⁵³¹ *Pannon GSM*, para 24.

⁵³² Case C-168/05 *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I – 10421.

⁵³³ (e. European Association of Arbitration in Law and Equity).

⁵³⁴ *Claro*, para 16-20.

⁵³⁵ *Claro*, para 24-39, (see para 39 in particular).

⁵³⁶ Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.* Judgment of the Court of 26 April 2012 [2012] ECR n.y.r., para 43.

ruling concerning the duty to review the fairness of contract terms *ex officio* is now pending before the CJEU in *Banco Español de Crédito*.⁵³⁷

7. Unfair Terms in the Proposal for a Common European Sales Law

7.1 Introduction

As we have seen in Chapter 5.5, the European Commission introduced an ‘optional instrument’ on 11 October 2011 in the form of a *Proposal for a Regulation on a Common European Sales Law* (PCESL). This proposal consists of three main parts: a Regulation, Annex I to the regulation containing the contract law rules, i.e. the Common European Sales Law, and Annex II containing a Standard Information notice. Chapter 8 of the PCESL contains rules on unfair terms in B2C as well as B2B contracts. In the following chapters, we will explore the provisions of this chapter and compare them with the corresponding rules of Directive 93/13/EEC.

The proposal currently awaits first reading at the European Parliament. However, the Commission has explained that European Parliament and the European Council have both made it clear that they will only support this proposal if it provides a high level of consumer protection. If adopted, parties to a cross-border contract will be able to come to an agreement to conclude their contract under the rules of the CESL, rather than under the contract laws of the relevant Member States. In B2C contracts, this means that consumers will be able to choose to conclude a contract with a business party under the rules and corresponding consumer protection of the CESL, rather than the rules and consumer protection of their national consumer contract law. In Chapter 5.5, we discussed the private international law rules of the Rome I Regulation⁵³⁸ which provides a restriction to the choice of law in B2C transactions.⁵³⁹ If the parties to such a contract choose to conclude the contract under the law of another Member State than that of the consumer’s, Article 6(1) of Rome I Regulation

⁵³⁷ Case C- 618/10 *Banco Español Crédito, SA v. Joaquín Calderón Camino* [2012] n.y.r. The referring court asks whether “it is contrary to Community law, in particular the law on consumers and users, for a national court to avoid giving a ruling of its own motion and in limine litis or at any stage during the proceedings on whether or not a term concerning interest on late payments (in this case 29 %) in a consumer credit agreement is void and on whether or not that term should be modified. May the court, without prejudicing the rights of the consumer under Community law, decide to leave any evaluation of such a term to the initiative of the debtor (by means of the appropriate procedural objection)?”, see question 1.

⁵³⁸ *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*. Official Journal 4 July 2008. L 177/6.

⁵³⁹ European Commission: *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*. 2011/0284 (COD). Brussels 10 November 2011. COM (2011) 635 final.

stipulates that such a choice may not deprive the consumer of the protection of the mandatory provisions of the law of his habitual residence (see Article 6(2) of the Rome I Regulation).

The Common European Sales law provides a clever way of circumventing this provision. The rules of Article 6 of the Rome I Regulation will not apply since the provisions of the Common European Sales Law – provided in the form of a Regulation which is to be transposed into the national contract law of each and every Member State – will accordingly be identical to the CESL provisions of national law. These provisions essentially constitute a second contract law regime within the national contract law of each Member State,⁵⁴⁰ i.e. parallel to the traditional law of contract. As the document accompanying the PCESL states, “therefore the level of the mandatory consumer protection laws of the consumer’s country is not higher and the *consumer is not deprived of the protection of the law of his habitual residence*”.⁵⁴¹ However, it will be argued in the subsequent chapters that by choosing to conclude a B2C contract under the rules of the PCESL rather than under the protection provided by national consumer contract law, consumers will, as a matter of fact, in many cases be subjecting themselves to a lower level of consumer protection against unfair terms.

The reason can, *inter alia*, be traced to the fact that the national consumer contract laws are raised on the rules of Directive 93/13/EEC. Since the Directive is a minimum harmonization directive, Member States have under Article 8⁵⁴² of this Directive been allowed to provide higher levels of consumer protection in their national laws than the standard level of protection stipulated by the Directive. As we will see, the Member States have, in many cases, chosen to do just that. Due to the fact that the unfair terms rules of Chapter 8 of the PCESL largely replicate the (minimum level) provisions of the Directive, it follows that consumers in those Member States that have chosen to provide their consumers with a higher level of protection than is provided for by the Directive, will consequently lose that added level of protection.

⁵⁴⁰ European Commission: *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*. 2011/0284 (COD). Brussels 10 November 2011. COM (2011) 635 final, p. 6.

⁵⁴¹ European Commission: *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*. 2011/0284 (COD). Brussels 10 November 2011. COM (2011) 635 final, p. 6. (Italics reflect the author’s emphasis).

⁵⁴² Article 8 of Directive 93/13/EEC provides that “Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer”.

7.2 Scope of Application *Ratione Personae*

7.2.1 Introduction

Article 7 of PCEsL contains provisions pertaining to scope of application *ratione personae* of the CEsL. Article 7(1) explains that the CEsL may only be applied if the seller of the goods or supplier of the digital content obtained by means of the relevant contract is a trader. Furthermore, it explains that where all the parties to a contract are traders, the CEsL may only be used if at least one of the contractual parties is a small or medium-sized enterprise ('SME'). According to this provision, The PCEsL can be applied to B2B and B2C contracts alike. In the ensuing chapters our focus will solely be directed at the provisions pertaining to unfair terms in B2C contracts. Thus, we will not cover issues relating solely to B2B contracts.

As will be recalled, CEsL constitutes an 'optional instrument'. Accordingly, its rules only govern those contracts in which both parties have specifically agreed to its use. It is interesting to note that according to Article 8(2) of PCEsL, the use of CEsL is only valid in B2C contracts if the consumer gives his consent by an explicit statement. It furthermore requires that such a statement be given separately from the statement which indicates the consumer's agreement to conclude the particular contract in question. Moreover, this Article stipulates that the trader is required to provide the consumer with a confirmation of that agreement on a 'durable' medium. Another important provision is found in Article 8(3). It explains that if parties to a B2C agree to apply the rules of CEsL to the contract between them, the rules of CEsL may only be applied in their entirety. In other words, parties to a B2C contract are prohibited from negotiating between themselves that the provisions of CEsL will only apply partially to the contract.

Moreover, in B2C contracts concluded under the rules of CEsL, the trader must not only provide the consumer with certain pre-contractual information which is specified in the CEsL, the trader is also required to draw the consumer's attention to the intended application of CEsL before the agreement is made by providing the consumer with the 'Standard Information Notice' which is provided in Annex II to the PCEsL. It explains to the consumer that the contract he is about to conclude "will be governed by the Common European Sales Law, which is an alternative system of national contract law available to consumers in cross-border situations. These common rules are identical throughout the European Union, and have been designed to provide consumers with a high level of protection." It then goes on to explain that the rules of the CEsL only apply if the consumer specifically marks his agreement that the contract be governed by the rules of CEsL, as stipulated by Article 8(2).

Finally, it summarizes very briefly the key rights of the consumer before and after signing the contract. On the subject of unfair terms, it informs the prospective consumer that: “Trader’s standard contract terms which are unfair are not legally binding for you.”

If an agreement is reached to apply the CESL to a contract by telephone or by other means that make it impossible to provide the consumer with the aforesaid information notice and in situations where the trader has failed to provide the information notice, the consumer is not bound by such an agreement until he has received confirmation of his agreement that the contract will be governed by the rules of the CESL, accompanied by the standard information notice, and has explicitly given his consent to the use of CESL subsequent to receiving the said confirmation and information notice. Article 10 requires Member States to lay down penalties for violations of the obligations of traders described above.

7.2.2 The ‘Consumer’ Concept

The ‘consumer’ concept of CESL is defined in Article 2(f) of the PCESL Regulation. It provides that “‘consumer’ means any natural person who is acting for purposes which are outside that person’s trade, business, craft or profession.” This definition is clearly very similar to the typical ‘transaction’ definitions discussed in Chapter 6.2.2 found in the consumer contract directives, including that of Directive 93/13/EEC.⁵⁴³ The only difference between the ‘consumer’ concepts of Directive 93/13/EEC and PCESL is that the latter inserts the word ‘craft’ into the “for the purposes which are outside that person’s trade, business or profession” formula. This addition is obviously simply intended to exclude all transactions concluded between a *prima facie* consumer and a trader where the former acts for purposes other than those of the consumer’s family or for his own personal needs. We can therefore conclude that the differences between the ‘consumer’ concepts of Directive 93/13/EEC and of PCESL are very remote.

It should be noted in this context that a number of Member States have derogated from the ‘consumer’ concept of Directive 93/13/EEC by offering the Directive’s protection against unfair terms to contractual parties which would otherwise have fallen outside the scope of the Directive’s ‘consumer’ concept. To name a few examples, Greece, Hungary and Spain protect all ‘final addressees’ as consumers.⁵⁴⁴ Furthermore, business parties concluding contracts

⁵⁴³ Article 2(b) of the Unfair Terms Directive 93/13/EEC defines the ‘consumer’ concept as: “‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”.

⁵⁴⁴ *EC Consumer Law Compendium: Comparative Analysis*, p. 378.

which are not directly linked to their profession enjoy protection as ‘consumers’ or ‘*non-professionnels*’ in France, Latvia and Poland.⁵⁴⁵ Moreover, in Member States such as Austria, Belgium, the Czech Republic, Denmark, France, Greece, and Slovakia, legal persons can enjoy the status of consumers as long as the purchase in question is made for personal purposes, or, for example in Greece and Spain, if the legal person is the final addressee. Moreover, Romanian law protects groups of natural persons, organized in associations.⁵⁴⁶

It must nevertheless be stressed that such deviations from the ‘consumer’ concept of the Directive and of the ECJ’s case-law relating thereto does not stem from the provisions of Article 8 of the Directive. This provision does not prevent Member States from adopting or maintaining more favorable provisions to protect consumers in the field which it covers. However, as Nebbia observes, the object of Article 8 is to determine the freedom left to Member States in the area covered by the directive, namely that of consumer protection. As she notes, it does not concern a Member State’s right to adopt measures outside the area with which it is concerned, such as the protection bestowed on businesses and traders.”⁵⁴⁷ This prerogative therefore simply stems from the legislative power of the individual Member States.⁵⁴⁸ The fact remains that contractual parties which fall outside of the ‘consumer’ concept of Directive 93/13/EEC but nevertheless enjoy the same protection against unfair terms as consumers do, due to the aforesaid derogations in their Member States, might, depending on the circumstances, be provided with a lower level of protection against unfair terms under PCESL than they would under the laws of their Member States. Such contractual parties would obviously fall outside the scope of the PCESL’s ‘consumer’ concept. Accordingly, they would simply be regarded as ‘traders’ within the meaning of Article 2(e) of the PCESL Regulation and would consequently only be receive the protection of PCESL’s Chapter 8, Section 3 on ‘Unfair Contract Terms in Contract Terms Between Traders’.

7.2.3 The ‘Trader’ Concept – The Business Party

Article 2(3) of the proposed Regulation describes the counter part to the consumer, i.e. business party, in a B2C contract falling under the scope of the PCESL. This is the ‘trader’ concept, defined as meaning “any natural or legal person who is acting for purposes relating to that person’s trade, business, craft or profession”. When compared to the parallel concept

⁵⁴⁵ *Compendium: Comparative Analysis*, p. 378-379.

⁵⁴⁵ *EC Consumer Law Compendium: Comparative Analysis*, p. 378.

⁵⁴⁶ *EC Consumer Law Compendium: Comparative Analysis*, p. 378-379.

⁵⁴⁷ *Di Pinto*, para 21-22.

⁵⁴⁸ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 88-90.

of Directive 93/13/EEC⁵⁴⁹ it becomes apparent that the business party concepts are in many ways similar. In both cases, the business party can be either a natural person or a legal person and, moreover, the core element of the definition is whether this contractual party concludes the contract in question for professional purposes, rather than to meet its personal need or the need of its family. As we have seen in Chapter 6.2.3, this corresponds to the typical definitions of the business party, as provided by consumer contract directives.

However, three main differences can be identified. First of all, the business party is referred to differently in the PCESL than in Directive 93/13/EEC. In the former, it is called a ‘trader’ and in the latter, a ‘seller or supplier’. It could perhaps be argued that these titles reflect different meanings. Nevertheless, as we saw in Chapter 6.2.3, it has been argued by Nebbia that the personal scope of Directive 93/13/EEC should not be restricted to the provision of goods or services since the definition of the ‘seller or supplier’ does not itself make any reference to the sale of goods or supply of services.⁵⁵⁰ It remains to be seen, of course, whether the ECJ will take the same view as Nebbia in these matters.

Secondly, the word ‘craft’ has once again been inserted into the “trade, business or profession” formula. This addition probably does not result in a substantive difference between the definitions of PCESL and Directive 93/13/EEC, since, as we saw in Chapter 6.2.3, the notion of the business party in Article 2(c) of Directive 93/13/EEC is interpreted very widely and therefore covers all natural and legal persons acting in relation to their business or profession.⁵⁵¹ There is no reason why natural or legal persons acting in relation to their craft should be excluded from the scope of Article 2(c) of the Directive. In this context, one might wonder whether the business party in a B2C contract falling under the scope of PCESL must belong to the category of SME’s as that concept is defined Article 7(2) of the PCESL Regulation. This question can be answered in the negative, since Article 7(1) stipulates that the requirement stating that a business party to a contract concluded under CESL must be a SME only applies to B2B contracts. In such cases, at least one of the business parties to the contract must be an SME.

Thirdly, the definition of the business party as provided by PCESL excludes the last part of the corresponding definition of Directive 93/13/EEC, i.e. the words “whether publicly owned or privately owned” are not included. This gives rise to the question whether the rules

⁵⁴⁹ Article 2(c) of Directive 93/13/EEC defines the counterpart to the consumer in a ‘consumer contract’ within the meaning of the Directive as “any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned”. In Directive 93/13/EEC, this party is referred to as the ‘seller or supplier’.

⁵⁵⁰ Paolisa Nebbia: *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, p. 92.

⁵⁵¹ *EC Consumer Law Compendium: Comparative Analysis*, p. 379.

of CESL can be applied to contracts concluded between consumers and publicly owned companies and, moreover, whether the CESL requires the business to be profit-motivated. An attempt will be made to answer these questions in the following chapter.

7.3 The Scope of Application *Ratione Materiae* – Which Contracts?

According to Article 4 of the PCEsL Regulation, the provisions of CESL may only be used for cross-border contracts.⁵⁵² A contract is considered a cross-border contract within the meaning of CESL if the parties to the contract have their habitual residence in different countries of which at least one is a Member State.⁵⁵³ Thus, as Recital 14 to PCEsL explains, the use of CESL is not intended to be limited to cross-border situations between Member States, but rather to be made available for use in contracts between Member States and third countries for the purposes of facilitating trade between such countries. In this context it should be noted that, the document attached to the proposal states that since the PCEsL concerns an EEA matter, that the CESL should extend to the EEA.⁵⁵⁴ If the PCEsL is adopted, it therefore seems that this ‘second’ regime of contract law will find its way into the national contract laws of the EFTA/EEA states Iceland, Liechtenstein and Norway.⁵⁵⁵

Article 5 of the Regulation contains an important rule for the determination of the PCEsL’s scope of application *ratione materiae* since it explains for which contracts the CESL can be used. These contracts can be divided into three categories. The first is ‘sales contracts’,⁵⁵⁶ the second, which we can refer to as ‘digital contracts’ covers contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and reused by the user, irrespective of whether the digital content is

⁵⁵² For the purposes of CESL, a contract between a trader and a consumer is a cross-border contract if, firstly, either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader’s habitual residence and, secondly, if at least one of those countries is a Member State. See Article 4(3). As Article 4(6) explains, the determination of whether a particular contract is considered a cross-border contract is based on the point in time in which the parties come to an agreement to use the CESL.

⁵⁵³ See Article 4(2) of PCEsL.

⁵⁵⁴ European Commission: *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*. Brussels 2011. COM (2011) 635 final, p. 11

⁵⁵⁵ The EFTA Working Group on Consumer Affairs met on 5 and 6 of December 2011 to discuss, among other topics, the PCEsL. See, for more information, *Exchanging views on Common European Sales Law* on the EFTA website.

⁵⁵⁶ See Article 5(a) of PCEsL. This concept is defined in Article 2(k) which states that a ‘sales contract’ means any contract under which the trader (‘the seller’) transfers or undertakes to transfer the ownership of the goods to another person (‘the buyer’), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority.

supplied in exchange for the payment of a price⁵⁵⁷, and the third extends to ‘related services contracts’, irrespective of whether a separate price was agreed for the related service.⁵⁵⁸ Article 6(1) of the Regulation, moreover, stipulates that the CESL may not be used for so-called ‘mixed-purpose’ contracts, i.e. contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services. The same applies to contracts which are linked to a consumer credit.⁵⁵⁹

In the previous chapter, the question was raised whether the rules of CESL can be applied to contracts concluded between consumers and publicly owned companies (‘traders’). This question is not addressed by Article 7 of the proposed Regulation on the ‘Parties to the Contract’ nor any other part of the PCESL or the document which accompanies it. Taking into account the nature of the aforesaid of contracts for which the CESL may be used, it would seem more likely that those kinds of goods and services would be provided by privately owned companies rather than publicly owned companies, although the latter cannot be excluded. In that context, however, it must be taken into account that according to Article 2(k), contracts for sale on execution or otherwise involving the exercise of public authority are excluded from the concept of a ‘sales contract’ and, moreover, the concept of ‘goods’ falling under the scope of ‘sale contracts’ only includes tangible movable items⁵⁶⁰ and more, importantly, it excludes electricity and natural gas, as well as water and other types of gas unless they are put up for sale in a limited volume or set quantity.⁵⁶¹

With regard to the subsequent question of whether there is an ‘animo lucri’ requirement, i.e. whether the rules of CESL can only be applied to contracts in which the ‘trader’ has the intention to make a profit. The answer depends on the type of contract concluded. As we have already seen, Article 5 of the proposed Regulation declares that the rules of CESL may only be applied to three categories of contracts, i.e. sales contracts, digital contracts and related

⁵⁵⁷ See Article 5(b) of PCESL. The concept ‘digital content’ is defined in Article 2(j) of PCESL as meaning “data which are produced and supplied in digital form, whether or not according to the buyer’s specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalize existing hardware or software.” It excludes: “(i) financial services, including online banking services; (iii) legal or financial advice provided in electronic form; (iii) electronic healthcare services; (iv) electronic communications services and networks, and associated facilities and services; (V) gambling and (vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users.

⁵⁵⁸ See Article 5(c) of PCESL. ‘Related services’ are defined in Article 2(m) as meaning any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes (i) transport services, (ii) training services, (iii) telecommunications support services, and (iv) financial services.

⁵⁵⁹ See Article 6(2).

⁵⁶⁰ Accordingly, it can be concluded that the rules of CESL cannot be used with regard to real property contracts.

⁵⁶¹ See Article 2(h)(i) and 2(h)(ii).

services contracts. Article 5 explicitly states that the rules of CESL may be applied to the latter two categories of contracts “irrespective of whether the digital content is supplied in exchange for the payment of a price”⁵⁶² and “irrespective of whether a separate price was agreed for the related service”. With regard to the first category, Article 2(k) of PCESL makes clear that the concept of a ‘sale contract’ only applies to contracts in which the buyer pays or undertakes to pay the price⁵⁶³ thereof.

7.3 The Scope of Application *Ratione Materiae* – Which Terms?

7.3.1 Individually negotiated terms

It will be recalled from Chapter 6.4.2 that the application of the Directive’s control of fairness is confined to terms which have not been individually negotiated between the consumer and the seller or supplier. As we have seen, the Commission raised the question in the *Green Paper on the Review of the Consumer Acquis*⁵⁶⁴ of whether the protection provided by Directive 93/13/EEC against unfair terms should be extended to cover individually negotiated terms. Nevertheless, Articles 79, 82 and 83 of the PCESL make it clear that the protection afforded to consumers against unfair terms only extends to terms that have not been individually negotiated.

Article 7 of PCESL contains five provisions defining terms which are not ‘individually negotiated’ within the meaning of Chapter 8 of PCESL on Unfair Terms. Article 7(1) states that a contract term has not been individually negotiated “if it has been supplied by one party and the other party has not been able to influence its content.” This provision clearly reflects the controversial ‘impossibility requirement’ discussed in Chapter 6.4.2. If this provision finds its way into the final text of the CESL it will be interesting to see how this provision will be interpreted in the case-law of the CJEU and national courts, particularly whether this criteria will be presumed to be fulfilled in the case of pre-formulated terms, unless proven

⁵⁶² In this context it should be noted that Recital 18 to PCESL states that “Digital content is often supplied not in exchange for a price but in combination with separate paid goods or services, involving a non-monetary consideration such as giving access to personal data or free of charge in the context of a marketing strategy based on the expectation that the consumer will purchase additional or more sophisticated digital content products at a later stage. *In view of this specific market structure and of the fact that defects of the digital content provided may harm the economic interests of consumers irrespective of the conditions under which it has been provided, the availability of the Common European Sales Law should not depend on whether a price is paid for the specific digital content in question.*” (Italics reflect the author’s emphasis).

⁵⁶³ Article 2(i) provides that ‘price’ means money that is due in exchange for goods sold, digital content supplied or a related service provided.

⁵⁶⁴ Commission of the European Communities: *Green Paper on the Review of the Consumer Acquis*. Brussels 2007. COM (2006) 744 final, p. 11-12.

otherwise as Micklitz suggests.⁵⁶⁵ Secondly, Article 7(2) states that “where one party supplies a selection of contract terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection”. This term stems from Article II – 1:110(2) of the DCFR and the subsequent Article 5(2) of the Expert Group’s Feasibility Study (FS). A corresponding provision was not included in Directive 93/13/EEC. As will be recalled from Chapter 6.4.2, however, such an interpretation was reflected in the judgment of the German *Bundesverfassungsgericht* of 3 December 1991.⁵⁶⁶

The following three provisions of Article 7 of PCESL concern the burden of proof. Article 7(3) states that “a party who claims that a contract term supplied as a part of standard contract terms has since been individually negotiated bears the burden of proving that it has been.” Article 7(4) subsequently explains that in a B2C contract “the trader bears the burden of proving that a contract term supplied by the trader has been individually negotiated”. This rule corresponds to the ‘burden of proof’ rule found in Article 3(2)(3) of Directive 93/13/EEC.⁵⁶⁷ Finally, Article 7(5) stipulates that in a B2C contract, “contract terms drafted by a third party are considered to have been supplied by the trader, unless the consumer introduced them to the contract”. The content of these three provisions reflects Articles 1:110(3)-1:110(5) DCFR and Article 5(3)-5(5) FS.

The first ‘burden of proof’ rule, found Article 7(3), evidently provides a general principle to be applied in B2B and B2C situations alike in which standard contract terms are applied. The subsequent rule of Article 7(4) simply reflects how the general principle would manifest itself in a B2C setting, since it would obviously never be in the interest of a consumer to argue that standard contract terms have been negotiated as this would render him without protection against the unfairness of such terms. However, the rule of Article 7(4) is broader than the general principle of Article 7(3) since it extends to contract terms irrespective of whether they should be categorized as ‘standard contract terms’ or terms which have been drafted for *ad hoc* single use only. Lastly, Article 7(5) provides a special rule of interpretation with regard to terms which have been drafted by a third party. Here, the weaker contractual position of consumers as compared to traders results in a shift in the burden of proof.

It is clear from the provisions of Article 7 that the PCESL’s notion of a non-individually negotiated term is broader than the concept of ‘standard business terms’ in the same manner

⁵⁶⁵ See Chapter 6.4.2 above. Hans-W. Micklitz, Norbert Reich and Peter Rott: *Understanding EU Consumer Law*, p. 129.

⁵⁶⁶ BGH judgment of 3 December 1991, NJW (1992) 503.

⁵⁶⁷ Article 3(2)(3) of Directive 93/13/EEC provides that “Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him”.

as the parallel concept of Directive 93/13/EEC. This is made apparent firstly, by the fact that terms which are presented by trader but have been drafted by a third party are regarded as not having been individually negotiated. This is confirmed by the aforesaid Article 7(5) of PCESL as well as the use of the word ‘supplied’ rather than ‘drafted’ in Article 7(1). Secondly, Article 2(d) of PCESL specifically defines ‘standard contract terms’ as meaning “contract terms which have been drafted in advance for several transactions involving different parties, and which have not been individually negotiated by the parties within the meaning of Article 7 of the Common European Sales Law”, which implies *a contrario* that individually negotiated terms may be drafted for either *ad hoc* single use or for several transactions involving different parties.

The PCESL provides a very important novelty for consumer protection in Article 70. It establishes a duty to raise awareness of non-individually negotiated terms. According to Article 70(1), non-individually negotiated terms in the meaning of Article 7, as described above, may only be invoked against the other party “if the other party was 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 is obviously very intimately related to the transparency principle. It is therefore interesting to note, in relation to the question raised in Chapter 6.5.4 regarding the legal consequences of a breach of the transparency principle of Directive 93/13/EEC, that the PCESL does establish, via Article 70, that the legal consequences of a term which lacks transparency can be the same as if the term were deemed unfair: it renders the term non-binding for the consumer.

Nonetheless, this provision gives rise to the difficult question of when a trader will be considered to have fulfilled his duty of awareness. Some clarifications can be found in Article 70(2) which states that in B2C contracts, contract terms are not considered to be “sufficiently brought to the consumer’s attention by a mere reference to them in a contract document, even if the consumer signs the document”. Article 70(3) subsequently states that contractual parties are prohibited from excluding the application of Article 70 as well as from derogating from it or varying its effects in any way. It remains to be established, however, how far a trader has to go to be considered to have taken ‘reasonable steps’ to draw the other party’s attention to the terms. As the British and Scottish Law Commissions have observed with regard to internet sales, the provisions of Article 70(2) establish that:

it would not be enough to refer to terms and conditions which no-one actually reads, even if the consumer is required to tick a box agreeing to them before submitting an order. Some more prominent warning would be needed. [...] Would a warning in English be taking reasonable steps to bring the term to the notice of a

Spanish consumer? Again, a judge who does not read English and cannot understand the warning may be unsympathetic to the argument that the warning constituted reasonable steps.⁵⁶⁸

To conclude, it must be observed that despite fact that Article 70 certainly does offer a certain increase in consumer protection, the fact remains that the protection offered to consumers against unfair terms in the PCESL is restricted to non-individually negotiated terms. In this context, it cannot be overlooked that 11 of the 27 EU Member States have chosen not to restrict their control of unfair terms to terms which have not been individually negotiated.⁵⁶⁹ These are Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Latvia, Luxembourg, Malta, Sweden and Slovenia.⁵⁷⁰ It should be emphasized that this is not a small number – these Member States make up over 40 percent of the European Union. This is a consequence of the minimum harmonization nature of Directive 93/13/EEC; as we have seen time and again, Article 8 of the Directive allows Member States to adopt or retain more stringent provisions in the area covered by the Directive to provide consumers with an even higher level of protection than they are presented with by Directive 93/13/EEC. The significance of this reality is the fact that by choosing to conclude a contract under the provisions of the Common European Sales law, as presented by the current proposal, consumers in 40 percent of the EU will be subjecting themselves to a lower level of consumer protection than they would enjoy under the contract laws of their Member States, owing to the fact that they would resultantly expose themselves to the possibility of being bound by individually negotiated contractual terms of an unfair nature. The gravity of this fact must not be ignored.

7.3.2 Main subject-matter and price

Article 80 of PCESL contains three provisions relating to exclusions from the control of fairness, although only the first two are of relevance for B2C contracts. Article 80(2) provides that the rules on unfair contract terms in B2C contracts do not apply to “the definition of the main subject matter of the contract, or to 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”. Although the wording of this provision is different from that of Article 4(2) of Directive 93/13/EEC, Article 80(2) of the PCESL makes it clear that the ‘core’ terms of a contract governed by the CESL will be excluded from its fairness control “in so far as the trader has complied with the duty of

⁵⁶⁸ Law Commission and Scottish Law Commission: *An Optional Common European Sales Law: Advantages and Problems. Advice to the UK Government*, p. 57.

⁵⁶⁹ *EC Consumer Law Compendium: Comparative Analysis*, p. 383.

⁵⁷⁰ *Ibid.*

transparency”. At first glance, one might assume that this provision affords a novelty associated with the transparency requirement as Article 70 PCEsL does. Upon a closer look, however, it becomes apparent that Article 80(2) only confirms what the Directive had already established.⁵⁷¹

Not all Member States have transposed Article 4(2) of the Directive.⁵⁷² As a matter of fact, a total of nine Member States - 1/3 of the EU - have refrained from implementing Article 4(2) into their domestic legislation, i.e. Austria, Denmark, Greece, Latvia, Luxembourg, Romania, Slovenia, Spain and Sweden.⁵⁷³ Accordingly, the ‘core’ terms of a contract defining the main subject-matter and adequacy of the price are not specifically excluded from the review of fairness in these Member States.⁵⁷⁴ By choosing to conclude a contract under rules of the CEsL, consumers in the aforesaid Member States would, as a consequence, essentially be subjecting themselves to a lower level of consumer protection as well as risking exposure to unfair ‘core’ terms.

7.3.3 *Terms reflecting CEsL terms which would otherwise apply*

Article 80(1) of PCEsL provides that the rules on unfair contract terms in B2C contracts “do not apply to contract terms which reflect rules of the Common European Sales Law which would apply if the terms did not regulated the matter.” This provision is presumably based on the same ideology as Article 1(2) of Directive 93/13/EEC (on the exclusion of provisions which reflect mandatory statutory or regulatory provisions and the provisions of international conventions from the scope of the fairness control), i.e. that term “reflecting the rules of the CEsL which would apply if the terms had not regulated the matter” are presumed to be fair.

Article 80(1) must be read in light of the provisions of Article 1(1) of the PCEsL on the freedom of contract. According to Article 1, parties to a contract which is governed by the rules of CEsL are free to “determine the contents of such a contract, subject to any applicable

⁵⁷¹ Article 4(2) of Directive 93/13/EEC states that: “Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, *in so far as these terms are in plain intelligible language.*” (Italics reflect the author’s emphasis).

⁵⁷² It will be recalled from Chapter 6.4.3 that in *Caja de Ahorros*,⁵⁷² the ECJ specifically established that Article 4(2) does not preclude Member States from extending the review of fairness to the ‘core terms’ of a contract. See Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2010] ECR I – 0475, para 44.

⁵⁷³ *EC Consumer Law Compendium: Comparative Analysis*, p. 393.

⁵⁷⁴ The authors of the *EC Consumer Law Compendium* note that in some Member States (for example, Greece and Spain), this silence has produced uncertainty interpreting national law with the result that academia and case law use different approaches to solve the problem with contradictory solutions.” See *EC Consumer Law Compendium*, p. 393-394.

mandatory rules.” Moreover, Article 1(2) provides that parties may exclude from application, derogate from or vary the effects of any of the CESL provisions unless those provisions specifically state otherwise. Recital 30 to the PCESL furthermore states that “Freedom of contract should be the guiding principle underlying the Common European Sales Law. Party autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection. Where such a necessity exists, the mandatory nature of the rules in question should be clearly indicated.” An example of such a ‘mandatory’ provision is Article 81 PCESL which provides that parties to a contract that is concluded under the rules of CESL may not exclude Chapter 8 on unfair contract terms from application, nor may they derogate from or vary its effects.

7.4 The Control of Fairness

7.4.1 The Introduction of a Black and a Grey List

The greatest difference between Directive 93/13/EEC and the rules on unfair terms of the PCESL is that the latter introduces a black list and a grey list. It will be recalled from Chapter 6.5.2 that the concept of a ‘black list’ refers to a list of terms which are always regarded as being unfair whereas a ‘grey list’ provides a list of terms which are presumed to be unfair, meaning that the trader has to prove that they are, in fact, not unfair. The black and grey lists only apply to Section 2 of PCESL on unfair terms in B2C contracts, not to Section 3 which relates to B2B contracts. Nonetheless, the emergence of these lists, in particular the black one, is intriguing – particularly in light of the fact that the DCFR only provided for a grey list.

The black list of Article 84 PCESL contains 11 unfair terms which are always prohibited while the grey list of Article 85 entails a list of 23 terms which are ‘presumed to be unfair’, thus placing the burden of proof on the trader to prove that they are, in fact, fair. To name a few examples from the black list, a contract term is always considered unfair for the purposes of Section 2 if its object or effect is to: (b) exclude or limit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence; (e) to confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the trader is domiciled unless the chosen court is also the court for the place where the consumer is domiciled; (g) provide that the consumer is bound by the contract when the trader is not and (k) determine that non-individually negotiated contract terms within the meaning of Article 7 prevail or have preference over contract terms which have been individually negotiated.

Some of the terms of the PCESL's black can actually be traced back to the terms of the indicative list of Directive 93/13/EEC⁵⁷⁵ and the same applies to some of the terms of the grey list.⁵⁷⁶ It follows that a term, reflecting simultaneously a 'black listed' term of PCESL on the one hand, and a term of the Directive's 'indicative list', on the other, would automatically be deemed unfair and non-binding if the relevant contract has been concluded under the provisions of the PCESL, whereas under Directive 93/13/EEC a special assessment would have to be conducted in accordance with the provisions of Article 3(1) and 4(1) before the term could be declared unfair and non-binding upon the consumer. The same applies *mutatis mutandis* for terms which correspond simultaneously to a 'grey' term of the PCESL and a merely 'indicative' term of the Annex to Directive 93/13/EEC. We can, as a result, conclude that this aspect of the rules on unfair terms of PCESL undoubtedly provides consumers with a higher level of protection than Directive 93/13/EEC.

Nevertheless, it should not be overlooked that a number of Member States have already taken the 'indicative list' of Directive 93/13/EEC to the 'black list' level, at least to the extent that the terms of the 'indicative list' have been transposed in those states.⁵⁷⁷ In Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Greece, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovenia and Spain – a total of 14 countries amounting to over half of the Member States of the EU - the terms of the 'indicative list', in so far as they have been transposed, are always considered unfair. Moreover, an additional five Member States have provided a higher level of consumer protection than the mandatory (minimum) protection of Directive 93/13/EEC by choosing to provide both black and grey lists.⁵⁷⁸ With this in mind, it seems that the 'extended protection' gained by consumers by choosing to conclude a contract under the rules of the CESL rather than under the consumer contract rules of their national law is perhaps, after all, not as great as it may have seemed at first glance.

⁵⁷⁵ See Article 84(a) PCESL which actually stems from point 1(j) of the indicative list of Directive 93/13/EEC; Article 84(c) PCESL which corresponds to Article point 1(n) of the indicative list; Article 84(d) PCESL which corresponds to point 1(q) of the indicative list; Article 84(f) PCESL which corresponds to point 1(m) of the indicative list and Article 84(g) which corresponds to point 1(c) of the indicative list.

⁵⁷⁶ See, for example. Article 85(d) PCESL which corresponds to point 1(d) of the indicative list of Directive 93/13/EEC; Article 85(e) PCESL which corresponds to point 1(e) of the indicative list; Article 85(g) PCESL which corresponds to point 1(g) of the indicative list and Article 85(a) PCESL which corresponds to point 1(q) of the indicative list.

⁵⁷⁷ *EC Consumer Law Compendium*, p. 395.

⁵⁷⁸ *EC Consumer Law Compendium*, p. 395. These Member States are Germany, Hungary, Italy, the Netherlands and Portugal.

7.4.2 Fairness Test of Article 83(1)

Article 83(1) of PCEsL contains a fairness test analogous to that of Article 3(1) of Directive 93/13/EEC. It stipulates that a contract term in a contract concluded between a trader and a consumer, “a contract term supplied by the trader which has not been individually negotiated within the meaning of Article 7 is unfair for the purposes of this Section 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”. With regard to substance, this formulation is almost identical to the fairness test of Article 3(1) of the Directive. We have already observed in Chapter 7.3.1 that only non-individually negotiated terms the meaning of Article 7 of PCEsL are subjected to the CEsL’s control of fairness.

The fairness test of PCEsL contains three elements or criteria, two of which are the exact same as in the fairness test of Directive 93/13/EEC: a term is considered 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*. As we can see, a new element of ‘fair dealing’ has been added to the formulation. Interestingly, the wording of Article 83(1) poses the same problem as Article 3(1) of the Directive in that it is not clear whether all three elements need to be established before a term can be declared unfair nor is it apparent how these criteria should be delimited from one another. As we remember from Chapter 6.5.3, it is difficult to say how the criterion of ‘significant imbalance’ differs from the criterion that a term has to be ‘contrary to (procedural or objective) good faith’. Suffice it to say that it is no less difficult to differentiate between the ‘good faith’ and ‘fair dealing’ criteria since it follows from the very presumption that the ‘good faith’ and ‘fair dealing’ elements of the fairness test constitute two independent and divergent criteria, that a term could hypothetically be contrary to good faith without simultaneously being contrary to fair dealing and vice versa. Moreover, if we were ultimately to assume that the ‘fair dealing’ criterion poses an independent and additional element to the fairness test, the consequence would incontestably be that an extra criterion would have to be met in order that a term could be declared unfair. Such an outcome would hardly result in a higher level of consumer protection.

Finally, a brief comment must be made on the contents of Article 83(2) which stipulates that five distinct factors, described in Article 83(2) (a)-(e), should be taken into account in the assessment of the fairness of a term. Four of these factors, i.e. Article 83(2) (b)-(e), are simply

replicated from the contents of Article 4(1) of Directive 93/13/EEC.⁵⁷⁹ This leaves the factor provided by Article 83(2)(a). It states that regard must be had to “whether the trader complied with the duty of transparency set out in Article 82” when the unfairness of a term is assessed. This is interesting, firstly, because as we have seen in Chapter 7.3.1, a certain form of a violation of the transparency principle, i.e. a failure to draw a consumer’s attention to a non-individually negotiated term, can *per se* render such a term non-binding upon the consumer. This provision of Article 83(2)(a) must, accordingly, be understood to refer to other manifestations of transparency violations than that of Article 70 PCESL. Secondly, this is an interesting provision when it is put into context with the discussion on the current hypotheses regarding the legal consequences of violations of the Directive’s transparency principle which we explored in Chapter 6.5.5. There, it was argued that the case-law of the CJEU may be seen to imply that a lack of transparency does not *per se* suffice to render a term unfair in the meaning of Directive 93/13/EEC and that it such a violation should rather be taken into account in the fairness test of Article 3(1) as a factor under Article 4(1) the Directive. Article 83(2)(a) makes it clear that such an approach will be followed in the CESL if the proposal is adopted, i.e. a violation of the transparency principle is to be taken into account as one of a number of factors when the fairness of a contract term is assessed under Article 83(1).

7.4.3 The Transparency Principle

As we have already seen, Article 70 PCESL provides a special rule regarding the transparency principle, stipulating that a failure on behalf of a trader to raise awareness of non-individually negotiated terms will render such terms non-binding upon the consumer. Moreover, we saw in the previous chapter that violations of the transparency principle of PCESL are to be taken into account, together with a number of other factors, when the fairness of a particular term is assessed under the rule of Article 83(1). Apart from the two aforesaid rules, Article 82 PCESL contains a provision on the ‘duty of transparency in contract terms not individually negotiated’. It states that “where a trader supplies contract terms which have not been individually negotiated with the consumer within the meaning of Article 7, it has a duty to

⁵⁷⁹ Article 4(1) of Directive 93/13/EEC provides that the unfairness of a term shall be assessed “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 and to all the other terms of the contract or of another contract on which it is dependent”. Article 83(2) of PCESL, by contrast, provides that “when assessing the unfairness of a contract term for the purposes of this Section, regard has to be had to”: (b) the nature of what is to be provided under the contract; (c) the circumstances prevailing during the conclusion of the contract; (d) to the other contract terms; and (e) to the terms of any other contract on which the contract depends.

ensure that they are drafted and communicated in plain, intelligible language”. This rule simply replicates the contents of the first sentence of Article 5 of Directive 93/13/EEC, reiterating the same requirements of ‘plainness’ and ‘intelligibility’.

Article 82 of PCESL does not, however, contain a rule of interpretation corresponding to the *interpretatio contra proferentem* rule of Article 5 of Directive 93/13/EEC, nor does any other Article of the PCESL’s Chapter 8 on Unfair Contract Terms. The reason is simple: the PCESL devotes an entire chapter to rules on interpretation. Article 64(1) of Chapter 6 of PCESL states that “where there is doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer”. Article 64(2) moreover makes it clear that the parties to a contract concluded under the rules of the PCESL “may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects”.

The rule of interpretation provided by Article 64(1) replicates the substance of the second sentence of Article 5 of the Directive by requiring an interpretation *most favorable* to the consumer in cases where there is doubt about the meaning of a contract term. In contrast to the rule of the Directive, however, it stipulates that such a rule shall not apply if the consumer supplied the term in question. This addition makes sense, since the rule is intended to counteract a failure on behalf of the business party to meet the requirements of transparency. However, it is worth mentioning that since Article 5 of the Directive does not provide such a disclaimer, one might argue that this addition could result in a restriction of consumer rights in this context. Nevertheless, it remains to be seen whether the CJEU would actually allow an unclear term that had been provided by a consumer to be interpreted in a manner most favorable to him. It should be noted in this respect that Article 5 does not explicitly state that its application should be restricted to terms that have not been individually negotiated.

7.5 The Legal Consequences of Unfairness

Article 79 of the PCESL contains provisions on the legal consequences of the unfairness of a term. Article 79(1) provides that “a contract term which is not supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party”. The PCESL therefore provides the same non-binding legal effect as Article 6(1) of the Directive does. Article 79(2) furthermore stipulates that “where the contract can be maintained without the unfair contract term, the other contract terms remain binding”. By contrast, Article 6(1) of

the Directive states that “[...] the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms”. The substance of the two provisions is the same.

It is with regard to Article 79(2) that it becomes overtly clear that by choosing to conclude a contract under the rules of the PCEsL, consumers will without a doubt be subjecting themselves to a lower level of consumer protection than they would have a chance of enjoying if they were to choose to apply their national consumer contract law instead. As the CJEU’s judgment in *SOS*⁵⁸⁰ (see Chapter 6.6) made clear, Article 6(1) of the Directive – and consequently Article 79(1) as well – cannot be interpreted in such a way as to allow a national court to base its decision as to whether a contract containing an unfair term should continue to exist without the unfair term “solely on a possible advantage for the consumer of the annulment of the contract as a whole.”⁵⁸¹ Accordingly, a national court would not be allowed to annul a contract in its entirety for the reason alone that such an outcome would be more favorable to the consumer than allowing the remaining terms of the contract to continue to bind the parties, if the contract in question has been concluded under the rules of CEsL. By comparison, a national court would be allowed to do just that if the contract had been concluded under the rules of national consumer contract law, since the CJEU stated clearly in *SOS* that the Directive, due to the rule on minimum harmonization provided by Article 8, “does not, however, preclude a Member State from providing, in compliance with European Union law, that a contract concluded with a consumer by a trader which contains one or more unfair terms is to be void as a whole where that will ensure better protection of the consumer”.⁵⁸²

8. Conclusions

As we have seen, a multitude of questions pertaining to the rules of Directive 93/13/EEC on unfair terms in consumer contracts remain to be settled, despite the fact that almost two decades have passed since this Directive was adopted in the spring of 1993. To make matters even more complex, a proposal for a Common European Sales Law now waits to be adopted and subsequently transposed as an optional second regime of contract law comfortably residing under the covers of national law, out of reach of the provisions of Article 6(1) of the Rome I Regulation.

⁵⁸⁰ Case C-453/10 *Jana Pereničová and Vladislav Perenič v. SOS financ spol. s.r.o.* [2012] ECR n.y.r., para 42.

⁵⁸¹ *SOS*, para 33.

⁵⁸² *SOS*, para 36.

The Commission claims that this optional Common European Sales Law will provide such a high level of consumer protection that EU consumers will be able to regard its application as a 'mark of quality'. However, at least with regard to protection against unfair terms in consumer contracts, we have seen that, in fact, the opposite is true. This conclusion should not come as much of a surprise considering the inherent dilemma connected with the Common European Sales Law: it has to find a 'golden mean' between the interests of consumers, on the one hand, and businesses, on the other. Too little consumer protection will result in consumers avoiding its application and, correspondingly, too much consumer protection will lead to its rejection by businesses.

The Common European Sales Law does offer some improvements, primarily with regard to the introduction of a black and grey list which clearly expand consumer protection beyond the protection which was provided by the merely indicative list of Directive 93/13/EEC. As the Commission points out in the proposal, the Common European Sales Law does not provide lesser protection than is already provided by EU legislative measures such as Directive 93/13/EEC and thus implies that consumers need not worry about losing protection by the mere choice of agreeing to conclude a contract under the rules of the Common European Sales Law.

Be that as it may, such a statement completely disregards the fact that Member States have widely chosen to provide an even higher standard of consumer protection in their national consumer contract law than the minimum standard which is provided by minimum harmonization measures like Directive 93/13/EEC. It fails to bring to the attention of EU consumers the risks inherently associated with the choice to conclude a contract under the Common European Sales Law, at least in relation to unfair terms: if they are residents of a Member State which offers a high level of consumer protection – higher than that which is provided by minimum harmonization legislation such as Directive 93/13/EEC – they will without a doubt be subjecting themselves to a lower level of protection against unfair terms. This presents the danger of businesses using the Common European Sales Law to their advantage in such Member States, to the detriment of the unknowing consumer.

This danger should not be ignored by other EU institutions in the legislative process that lies ahead. The question that must be asked by all parties involved is whether we are willing to sacrifice the best consumer protection for the greater good of the internal market. The fact of the matter is that if the rules of the Common European Sales Law on unfair terms in consumer contracts are allowed to slip through the legislative process in their current form, the ultimate outcome will be just the same as if the rules of Directive 93/13/EEC had been

included in the Consumer Rights Directive, subjected to the maximum harmonization approach, since the end result of both scenarios is the same: an eradication of the greater consumer protection that many Member States have endowed on their consumers on the basis of Article 8 of Directive 93/13/EEC. The EU legislator should not be allowed to justify such a consequence with reference to the voluntary nature of this optional instrument. If that is to be the case, consumers will at the very least have to be fully aware of the sacrifices they might be making by choosing this ‘mark of quality’ over their national consumer contract law.

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