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THE PROPOSAL ON CONSUMER RIGHTS AND THE
OPPORTUNITY FOR A REFORM OF EUROPEAN
UNFAIR TERMS LEGISLATION IN CONSUMER CONTRACTS

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DEPARTMENT OF LAW

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Unfair Terms Legislation in Consumer Contracts*

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Abstract

Unfair contract terms legislation is more than forty years old. Member States started regulating unfair contract terms from the 1970s onwards with a growing intensity. In 1993 the European Community adopted, after a lengthy discussion, Directive 93/13/EEC on unfair contract terms in consumer contracts. At least since 1993 unfair terms legislation in Europe provides for a rather unique combination on substantive rules on fairness and procedural rules on eliminating unfair terms from the market either via the judiciary and or via competent administrative authorities. The current debate on a possible reform of the Directive 93/13/EC provides the opportunity to draw the attention to four underresearched issues (I) the need to link collective and individual enforcement – where there is no room for full harmonisation; (II) the strive for widening the scope *ratio materiae* of the Directive/Proposal; (III) the search for a realisable and manageable combination of black and grey lists with a general clause and (IV) the inclusion of a skimming off procedure into the action for injunction.

Keywords

Unfair terms – consumer protection – Directive 93/13 – maximum and minimum harmonisation - individual and collective enforcement – action for injunction - individually negotiated terms – burden of proof – core terms – contracts of services – black and grey lists – skimming-off procedure.

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Table of Contents

I.	A Plea for Reform and a Plan for Action	1
1.	There Is More than the Minimax Debate	1
2.	No Full Harmonisation outside a Couple of Blacklisted Terms but a Strong Need for Introducing Additional Reform Elements.....	3
II.	The Link between Collective and Individual Enforcement – Setting the Scene	4
1.	The Distinction between Individual/Collective Enforcement and its Consequences for the Shaping of the Control System.....	4
a)	Standardised and or individual contract terms	5
b)	The legal concept of control abstract-general vs. concrete individual.....	5
c)	Ex-ante or ex-post control.....	6
d)	Ex post control via the public authority or the judiciary.....	6
e)	What kind of remedy to invalidate unfair terms in collective litigation	7
2.	The Impact of the Action of Injunction on Individual Litigation.....	8
a)	Extension of legal effects in Germany and Poland.....	9
b)	The technical side – how to link collective administrative respectively judicial enforcement via injunction to individual litigation.....	11
c)	The substantial side – what are the differences and similarities between collective and individual litigation in unfair terms outside and beyond the fact that the parties to the conflict are different.....	12
d)	Does the <i>acquis</i> prevent Member States from introducing a procedural link between individual and collective litigation?.....	13
3.	Three Proposals on How to Link the Two Procedures in the Current Proposal on Consumer Rights	14
a)	Where is the way out – approximation of the yardstick of control as a precondition for interconnecting collective and individual litigation.....	14
b)	Revitalising CLABUS – a European wide data file on judgments taken under the general clause	14
c)	Obliging Member States to interconnect the legal effects of collective and individual litigation	15
III.	The Gaps in the Scope of the Current and the Envisaged Scope of Application.....	16
1.	Standard Terms and Individually Negotiated Terms.....	17
2.	Standard Terms and Collectively Negotiated Terms.....	18
a)	Standard terms negotiated <i>outside</i> a statutory regulatory frame	18
b)	Standard terms negotiated <i>within</i> a statutory regulatory frame.....	19
3.	Core Terms „Price“ and „Quality“	20
a)	The case of bank charges – different judgments from Member States’ Courts	21

b)	Common standards on the control of core terms or different standards on the control of core terms.....	22
c)	Price clauses and ancillary price clauses.....	23
d)	Transparency requirement and price control	23
e)	The solution: A new structure for core terms, ancillary terms and price transparency.....	25
4.	The Applicability of the Unfair Terms Rules to Services in Regulated Markets.....	25
a)	The „without prejudice“ approach	25
b)	Are Directives to be regarded as „mandatory or statutory regulatory provisions“ in the meaning of Art. 1 (2) of Directive 93/13 and/or Art. 30 (3) of the Proposal on Consumer Rights.....	27
c)	Proposal for clarifying the relationship between mandatory and statutory rules and unfair terms legislation.....	28
IV.	Black, Grey Lists and General Clauses – What Approach for a European Yardstick?.....	29
1.	The Control Structure in Directive 93/13, in the Proposal on Consumer Rights and Benchmarks... ..	30
2.	A Differentiated Model: Exhaustive Fully Harmonised Black List, Non-Exhaustive (Minimum Harmonised) Grey List and a (Minimum Harmonized) General Clause on Unfairness	31
a)	Fully harmonised blacklist.....	31
b)	Minimally harmonised non-exhaustive grey list.....	32
c)	The minimally harmonised general clause.....	33
d)	Safeguard measures	33
3.	Examples on Clauses Qualifying as „Black“ Throughout the EU	34
V.	Skimming off Benefits Resulting from the Use of Unfair Contract Terms?.....	36
1.	State of Affairs of EU Initiatives on Collective Actions in Antitrust and Consumer Law.....	37
2.	A Separate Initiative in the Proposal on Consumer Rights on Skimming-Off Procedures? Yes!.....	38
a)	The first step: reinstall the wording of Art. 7 Directive 93/13 to guarantee an action of injunction as the minimum standard of protection.....	39
b)	The second step: extending Art. 7 Directive 93/13 and Art. 41 Proposal so as to cover ill-gotten gains	39
VI.	Conclusions and Recommendations.....	40
	Bibliography.....	41

I. A Plea for Reform and a Plan for Action

Unfair contract terms legislation is more than forty years old.¹ Member States started regulating unfair contract terms from the 1970s onwards with a growing intensity. In 1993 the European Community adopted, after a lengthy discussion, Directive 93/13/EEC on unfair contract terms in consumer contracts. At least since 1993 unfair terms legislation in Europe provides for a rather unique combination on substantive rules on fairness and procedural rules on eliminating unfair terms from the market either via the judiciary and or via competent administrative authorities.

1. There Is More than the Minimax Debate

The widely discussed Proposal on Consumer Rights² pursues one major objective – to transform the 1993 minimum into 2010 maximum standards. The few proposed amendments remain very much in the ambit of a decade long discussion.³ The European Commission did not evaluate the decade long experience in the Member States in order to get a clearer picture of the effects and the effectiveness of the current legal setting. The consultative process initiated before the publication of the Proposal served legitimacy purposes, but it did not launch into a deeper debate on how a modern 21st century European law on unfair terms should and must look like. The European Commission did not even refer back to prior efforts which attempted at investigating deeply the strengths and weaknesses of unfair terms legislation. In 1999 the European Commission organised an important conference with a wide participation base, including academics, politicians and NGO's, entitled „The Unfair Terms Directive“: 5 years on – held on 1-3 July 1999, the result of which were published⁴ and widely distributed. The then adopted „Report on the Implementation of Directive 93/13/EEC“⁵ pointed to eventual conceptual shortcomings.

The year 2000 marked the beginning of a new area. For a period of about five years the European Commission focused its energies on the European codification project.⁶ There was, however, one remarkable initiative in the field of unfair terms, the idea to initiate the elaboration of standard terms by trade and consumer organisations.⁷ In 2005, when it became clear that there was no strong support for a European Civil Code and that collective negotiation of unfair terms did not produce promising results, the European Commission changed its policy. The European Commission left the codification

¹ See from the more recent literature, H. Collins (ed.), *Standard Contract Terms in Europe, A Basis for and a Challenge to European Contract Law*, 2008.

² COM (2008) 614 final.

³ S. Whittaker, *Unfair Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of 'Full Harmonisation'*, *ERCL* 2009, 223; K. Tonner/M. Tamm, *Der Vorschlag einer Richtlinie über Rechte der Verbraucher und seine Auswirkungen auf das nationale Recht*, *JZ* 2009, 277; P. Rott/E. Terry, *The Proposal for a Directive on Consumer Rights*, *ZEuP* 2009, 456; H.-W. Micklitz/ N. Reich, *Crónica de una muerte anunciada: The Commission Proposal for a 'Directive on Consumer Rights'*, *Common Market Law Review*, 47 (2009) 471.

⁴ European Commission, *The 'Unfair Terms' Directive, Five Years On, Evaluation and Future Perspectives*, Brussels Conference, 1.-3.7.1999.

⁵ COM (2000) 248 final, 27.4.2000.

⁶ http://ec.europa.eu/consumers/rights/contract_law_en.htm

⁷ See H. Collins, *The Freedom to Circulate Documents: Regulating Contracts in Europe* (2004) 10 *European Law Journal*, 787.

project largely in the hands of the Study and Acquis Groups, and directed its energies to what became the „Revision of the Consumer Acquis“. ⁸ This bifurcation heavily affected the way in which unfair terms legislation was dealt with.

The Acquis and the Study Groups concentrated on the substantive side and did not devote attention to the procedural effects of unfair terms legislation. This is very much in line with continental legal thinking. ⁹ Acquis Principles and the CFR were largely aiming at the establishing of a consistent and coherent code in a traditional perspective where the collective side and in particular collective enforcement remained excluded. Unfair terms regulation was just one topic amidst a broad array of others. The debate within the two groups was determined by the „eternal“ issues of the distinction between individually negotiated and standard terms, between contract terms and so-called core terms, on the interplay between good faith and fair dealing in the shaping of the general clause and the pros and cons of complementing the general clause via a black and/or even a grey list. ¹⁰ The guiding idea was very much the transformation of existing contract law (law of obligations) into a coherent and consistent concept under due consideration of the *acquis communautaire*.

The European Commission instead focused and focuses on the revision of eight consumer law directives, four of them are supposed to be merged in the Proposal on Consumer Rights. In light of the consumer strategy 2002-2006 ¹¹ the European Commission argued strongly against minimum harmonisation which is blamed for leading to fragmentation of consumer law and for endangering the creation of an Internal Market to the benefit of suppliers and consumers. The European Commission relied on the Consumer Law Compendium ¹² which provides ample evidence on the still very different standards of consumer protection beyond the European minimum level. The lack of legal certainty should be overcome and a more coherent approach adopted, which means to turn minimum into maximum standards. In such a perspective, the findings of the Acquis and the Study Groups could indeed be no more than a tool box, one which did not provide much input beyond the said eternal issues and in particular its silence with regard to the interplay between substantive and procedural law. In theory, the bifurcation would have allowed the European Commission to develop its own perspective on the future of unfair terms legislation. Indirectly, the narrow approach of the Acquis and Study Groups might have impacted the rather low profile the European Commission takes in unfair terms legislation.

⁸ COM (2006) 744 final, in more detail M. B. M. Loos, *Review of the European Consumer Acquis*, 2008, at 40.

⁹ R. Michaels/N. Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, *AJCL* 2007, 843, 853.

¹⁰ See N. Reich/H.-W. Micklitz, *Unfair Terms in the Draft Common Frame of Reference Comments on the Occasion of the Tartu Conference on Recent Development in European Private Law*, *Juridica International*, Law Review University of Tartu, 2008, 58.

¹¹ OJ C 137, 8.6.2002, 2.

¹² H. Schulte-Nölke/Ch. Twigg-Flesner/M. Ebers (eds.), *EC Consumer Law Compendium*, 2008.

2. *No Full Harmonisation outside a Couple of Blacklisted Terms but a Strong Need for Introducing Additional Reform Elements*

I will argue that unfair terms legislation is not a matter conducive to full harmonisation. The major reason is the deep intrusion of fully harmonised rules into the national legal system.¹³ There is ample evidence that the European Commission has not thoroughly investigated the possible impact of fully harmonised standard terms legislation on national civil orders. But even if the European Commission would have made a serious effort, it could only be of limited importance. Unfair terms legislation cuts across the law of obligations, not only contract law. It is difficult if not impossible to overlook the possible impact of each and every rule of the Proposal on 27 different private legal orders. There is one notable exception where full harmonisation in unfair terms legislation might make sense, this is the black list of incriminated practices. It will have to be demonstrated, however, that clear cut and outspoken verdicts set the ceiling and the floor, what level of harmonisation is chosen.

In my analysis, I will draw attention to a set of legal issues in the field of unfair terms law which are under-discussed, often under-researched and definitely under-represented in the current debate. The minimax debate is of limited relevance to them. Out of the collection of possible issues, I have chosen four. The criteria for selection were very much determined by the window which is currently open for reform – that is the chance to strive for amendments to the Proposal on Consumer Rights. I will mainly refer to the 2008 version,¹⁴ but where necessary refer to the revised proposal presented in December 2009 under the Swedish presidency.¹⁵ The four issues are (II) the need to link collective and individual enforcement – where there is no room for full harmonisation; (III) the strive for widening the scope ratio materiae of the Directive/Proposal – where there is again no room for full harmonisation; (IV) the search for a realisable and manageable combination of black and grey lists with a general clause – which might pave the way for introducing a limited set of fully harmonised black listed terms; (V) and last but not least the inclusion of a skimming off procedure into the action for injunction – again here there is no room for full harmonisation.

¹³ See H. Schulte-Nölke, *The Potential Impact of the Consumer Rights Directive on the Member States Contract Law, side effects on the Member States general contract laws or general sales laws*, European Parliament, Director General of Internal Policies, 2009; S. Whittaker, *Unfair Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of 'Full Harmonisation'*, ERCL 2009, 223, 244.

¹⁴ COM (2008) 614 final.

¹⁵ Council of Europe, 10 December 2009, 17397/09 CONSOM 238, JUSTCIV 254 CODEC 1441.

II. The Link between Collective and Individual Enforcement – Setting the Scene

The distinction between collective and individual control of unfair contract terms belongs to the consumer *acquis*. What is much less known are the difficulties which arose due to this distinction and which downgrade the level of protection consumers might benefit from. This deserves an explanation.

I. *The Distinction between Individual/Collective Enforcement and its Consequences for the Shaping of the Control System*

Over the last century, Member States' courts used general clauses in the national civil legal orders or the common law system as a tool to control, and if necessary set aside, blatantly unfair contract terms. Member States' laws certainly differed considerably, mainly due to substantial differences in the role and function attributed to judges. Continental judges are principally more easily prepared to take an active stand, whereas common law judges tend to be more reluctant.¹⁶

The situation changed in the early 1970's when Member States started to adopt particular legislation to enhance the control of unfair terms, mainly but not exclusively in b-2-c contracts. However, this series of legislative activities did not automatically lead to the introduction of collective actions against unfair terms. Germany set the tone in Europe with the adoption of the 1976 Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen.¹⁷ Here, one might find for the first time a clear cut distinction between the control of unfair terms in individual litigation and the control of unfair terms in collective litigation.

Once an *individual* consumer goes to court or is sued by the trader, the outcome of the legal conflict might depend on the validity of a particular contract term which, for example, excludes the liability of the trader. A decision on the validity of the contract has affect only *inter partes* – between the two parties. In b-2-c contracts it is highly debated, whether and to what extent the national court is obliged to investigate the validity of the term *ex officio* or whether consumers have to raise the question themselves before the court. In a whole series of judgments, *Océano*,¹⁸ *Costanza Claro*,¹⁹ *Asturcom*,²⁰ *Martin*,²¹ evidence emanates that the ECJ is currently developing standards of what national courts are legally obliged to do in individual litigation under Directive 93/13.²²

In 1976 Germany introduced a new regulatory mechanism meant to control the recommendation and/or the use of standard contract terms by way of *collective* actions, somewhat but not fully independent of whether they have been applied in individual contracts. The organisations which were

¹⁶ D. Kennedy, Three Globalizations of Law and Legal Thought: 1850-2000, in Kennedy, *The New Law and Economic Development*, 2006, 19.

¹⁷ Since 2002 the so-called AGB-Gesetz has been integrated into the German Civil Code, the Procedural Rules are enshrined in the Unterlassungsklagegesetz.

¹⁸ ECJ, 27.6.2000, Case C-240/98, ECR 2000 I-4941.

¹⁹ ECJ, 26.10.2006, Case C-168/05, ECR 2006 I-10421.

²⁰ ECJ, 6.10.2009, Case C-40/08, ECR 2009 nyr.

²¹ ECJ, 17.12.2009, Case C-227/08, ECR 2009 nyr.

²² H. Schebesta, Does the National Court Know European Law? – A note of *ex officio* Application after *Asturcom*, to be published in ERPL 2010.

granted standing had to demonstrate in collective actions that the terms under attack are being used in business practice.²³ During the political debate, at the forefront of the discussion, a number of legal questions arose which until today determine the academic and the political discourse all over Europe.

a) Standardised and or individual contract terms

What kind of contract terms should be submitted to collective control, only *standardised* terms pre-formulated in advance and imposed on a broad variety of consumers or also *individual* terms, i.e. terms which gain importance only in individual contracts and which might have been individually negotiated? Putting emphasis on standardised terms allows for a seemingly clear distinction between collective and individual litigation: standardised terms are submitted to collective litigation, individual terms, i.e. individually negotiated terms, are exempted from collective litigation and may be submitted, if at all, to control in individual litigation. As is well known, this is the policy that Directive 93/13 realised, under strong pressure from Germany.²⁴ In reality, however, the distinction is much less clear cut, rendering the demarcation line difficult. New information technology makes it possible to produce terms which look like standards but in practice might not be. How shall contract terms be classified where the consumer receives a set of pre-determined rules but has to tick boxes in order to make certain choices?²⁵

b) The legal concept of control abstract-general vs. concrete individual

The distinction between collective and individual litigation, between standardised and individual contract terms seems to imply that different standards of control dominate the two types of litigation. As individual circumstances do not play a role in collective actions, it seems evident that the qualified national entities – to use the language of Directive 2009/22²⁶ – have to start from *abstract-general* assumptions in order to determine whether the term is fair or not. Vice versa, *concrete-individual* circumstances gain decisive importance in individual litigation.

Directive 93/13, as confirmed by the ECJ,²⁷ deepens the difference by limiting the scope of the *contra proferentum* rule to individual litigation only. In Member States' practice, the demarcation line is less clear cut, as the control authorities might tend to apply the same test to collective and individual litigation in order to bridge the gap between the two control systems.²⁸

²³ See Ulmer/Brandner/Hensen, AGB-Recht, Kommentar zu den §§ 305-310 BGB und zum UklaG, 10. Auflage, 2006, in concreto H.-D. Hensen, § 1 UKlaG Rdnr. 18, 1787.

²⁴ E. Brandner/P. Ulmer, The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EEC Commission, CMLRev. 1991, 647.

²⁵ See Art. 31 (3) Proposal and under IV. 3.

²⁶ OJ L 110, 23.4.2009, 30.

²⁷ ECJ, 9.9.2004, C-70/03, Commission v. Spain, ECR 2004 I-7999.

²⁸ F. Bultmann, Verklagen oder Verhandeln, 1995.

c) Ex-ante or ex-post control

Should the control be exercised *ex-ante* via a public authority or *ex-post* via public authorities or the judiciary? Ex-ante control did play a prominent role until the 1980's in the field of insurance contracts. However, due to the European liberalisation policy in regulated markets after the Single European Act, ex-ante control via a public agency was rejected and did not gain ground, neither in Germany nor elsewhere. One major reason was the sheer mass of contract terms which would have rendered ex-ante control costly and burdensome. So the discourse moved away from ex-ante control and towards ex-post control. This was a far reaching policy decision indirectly approved in Directive 93/13. A mechanism was needed which could allow for screening the market for unfair terms which were recommended or used by business or business organisations.

Ex post control of standard terms requires competent institutions, appropriate legal remedies and sufficient resources. The time is now ripe to look more closely into post market control management of unfair terms in comparison to various other fields of EU law, where a much more consistent regulatory concept exists, such as Regulation 768/2008 on Market Surveillance²⁹ and Directive 2001/95 on General Product Safety.³⁰

d) Ex post control via the public authority or the judiciary

Member States differ in how to enforce consumer protection law – via a public agency or a court. The majority of Member States rely on public agencies which, however, quite often do not have an enforcement monopoly.³¹ One of the key questions under Directive 93/13 was whether Member States are legally obliged to introduce legal standing for consumer organisations. This automatically leads to judicial enforcement as consumer organisations may not be given public power to take regulatory decisions to the detriment of the users of unfair terms. Although the issue reached the ECJ via a preliminary reference procedure, the question remained undecided as the UK decided to grant legal standing to consumer organisations which made the reference obsolete.³²

Today we find three different models a) some Member States exercise the collective control of unfair terms via consumer and/or trade organisations only through judicial control; b) some Member States left the control entirely and exclusively to public agencies which must or must not go to court to file an action against unfair terms and c) a considerable number of Member States combine administrative control via public authorities with judicial control via business and or/consumer organisations, which raises questions of how the two control entities should and might co-operate.³³

²⁹ OJ L 218, 13.8.2008, 30.

³⁰ OJ L 11, 15.1.2002, 4.

³¹ H.-W. Micklitz/P. Rott/U. Docekal/P. Kolba, Verbraucherschutz durch Unterlassungsklagen, Rechtliche und Praktische Umsetzung der Richtlinie Unterlassungsklagen 98/27/EG in den Mitgliedstaaten, VIEW Schriftenreihe, Band 17, 2007.

³² See J. Dickie, Article 7 of the Unfair Terms in Consumer Contracts Directive, Consumer Law Journal 4 (1996), 112.

³³ See the overview in Münchener Kommentar zur Zivilprozessordnung, 3. Auflage 2008, Vor § 1 Unterlassungsklagegesetz at 45 (author Micklitz).

e) What kind of remedy to invalidate unfair terms in collective litigation

To understand why an action of injunction was chosen as the appropriate tool, we have to understand the parallel between unfair commercial practices and unfair contract terms. Germany took the lead in introducing a judiciary collective redress system.³⁴ Germany had already introduced in the 1960's an action for injunction which allowed for setting an end to unfair and/or misleading advertising via a court sentence. This remedy, which was regarded as a success, was then transposed from unfair commercial practices to unfair contract terms. Much could be said on the similarities and differences between the two areas of the law. Be it as it may, the EC legislator used the German proxy and introduced an *action for injunction* as the EU minimum remedy to fight down unfair *standardised* contract terms in consumer contracts.³⁵ The action for injunction is not legally defined at the EU level and there is no common understanding in the Member States of what an action for injunction implies. Neither is there agreement on whether the action for injunction should and must be preceded by a formal or informal dispute settlement mechanism. In essence the action for injunction provides for a stop-order mechanism. Those who recommend or use standard contract terms are prohibited from further use and further recommendation due to the unfair character of the term in question.

Since the adoption of the German Act on Unfair Contract Terms in 1976 and since the adoption of Directive 93/13 in Europe much has changed. The control of unfair contract terms belongs to the core of consumer protection, everywhere in Europe. Directive 93/13 has led to a certain degree of harmonisation in that all Member States have to provide for collective action via injunction, be it through the competent national authority or national consumer and/or business organisations which have to file an action for injunction in the courts. There is, however, little knowledge on the effects and on the effectiveness of the action for injunction available. This is certainly the case considering the EU level, where the European Commission undertook a highly problematic „empirical“ analysis of collective actions for compensation but exempted the action for injunction from the research.³⁶ At the Member States level, only Austria³⁷ and now Germany³⁸ have showed an interest in evaluating the collective judicial redress system in unfair terms legislation.

Consequence: Our knowledge on the shaping of collective actions in Europe as well as on the effects and effectiveness of the collective action for injunction is rather poor. The current legal reform operates on the basis of hear-say-evidence or of more or less well reasoned assumptions. This is true with regard to the Proposal as well.

³⁴ A. Bakardijeva, Fair Trading in Flux? National Legacies, Institutional Choice and the Progress of Europeanisation, PhD Thesis Stockholm 2003.

³⁵ See H.-W. Micklitz, § 30.11, in N. Reich/H.-W. Micklitz, Europäisches Verbraucherrecht, 4. Auflage, 2003.

³⁶ http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf and

http://ec.europa.eu/consumers/redress_cons/docs/finalreport-focusgroup2-final.pdf

³⁷ Verein für Konsumenteninformation (VKI), Sammelklagen in Österreich, Praktische Erfahrungen – Ökonomische Analyse – Meinungsumfrage, 2008.

³⁸ The project leader is Prof. Caroline Meller-Hannich from the University of Halle in Germany.

2. *The Impact of the Action of Injunction on Individual Litigation*

EC Directive 93/13 does not spend a single word on the relationship between the action for injunction and individual litigation. Member States have been more aware of the problems which might result from the interplay between the two control systems. The German legislative debate turned around the question of whether and under what conditions the legal effects of the action for injunction, i.e. a judgment which holds a term unfair within a collective action, could be extended to individual litigation – what is called in German *Rechtskrafterstreckung*.³⁹ This is in theory possible as long as the party to the consumer contract and the defendant in a collective action are identical. In particular, the new Member States have devoted more attention to the linkage between the two systems.

As the Commission pointed out in its Progress Report on Directive 98/27 – not on Directive 93/13 (!) –, the relationship between the two control systems depends on national procedural law alone. This means that any attempt to define common European standards for the assimilation of the two control systems faces the competence question. The Commission Report bears a critical undertone. However, the findings did not lead the Commission to propose action, neither in the Report, nor in the revised Directive 98/27 which has been replaced by Directive 2009/22. The forthcoming statement in the Progress Report therefore remains the sole document to date in which the Commission at least identifies the problem:⁴⁰

„(25) Lastly, the associations and Member States consulted emphasised the sometimes limited impact of such injunctions. In most Member States, a ruling on an application for an injunction has a mitigated impact. It is mandatory only with respect to the case and the parties in question, i.e. the qualified entity which brought the action and the company which is the subject of the injunction. In practice, this means that if a company commits an infringement identical to that for which another company has already been convicted, a new injunction must be sought to stop the new infringement. In the same way, the annulment of an unfair term in a contract proposed by a company does not prevent the same company from continuing to use this unfair term in a similar contract.

(26) However, in some Member States, this principle is applied more flexibly, in particular as far as unfair terms are concerned. For instance, in Poland, when the court in Warsaw rules that a clause in a contract is unfair, this ruling has an *erga omnes* effect. The ruling is published and applies to an identical clause in any contract proposed to consumers. In Hungary, if a court rules that a clause in a contract between a company and a consumer is unfair, it may declare this clause null and void in all contracts concluded by that company. In Austria, a clause which has been declared unfair in a contract between a company and a consumer may not be used again by the company in other contracts. In Germany and Slovenia, consumers can invoke a ruling declaring a clause unfair in order to suppress the application of an identical provision.”

³⁹ Codified in § 11 Unterlassungsklagegesetz.

⁴⁰ COM (2008) yyy final, Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests;

http://ec.europa.eu/consumers/enforcement/docs/report_inj_en.pdf

This is a correct though rather superficial summary of the law as it stands in the Member States. The truth is that the two procedures (collective and individual) are standing largely side-by-side. This means that in practice the individual consumer cannot benefit from collective litigation. The market slate is wiped clean if anything, but in case of conflict, the individual consumer will have to go to court again, even if the term in question is more or less identical. The two control systems are kept separate.

a) Extension of legal effects in Germany and Poland

Germany, which is one of the most control-active countries, might serve as an example. There are more than 10 thousand judgments dealing with unfair terms in consumer contracts since the adoption of the unfair terms legislation in 1976, in individual and in collective litigation. Let us assume that 1/10 of the cases concern collective litigation. So far not a single case has been reported in Germany where an individual consumer in an individual litigation tried to refer to a judgment taken in a collective action where the identical term used or recommended by the identical supplier has been held unfair. One might argue that the lack of case law provides evidence for the effectiveness of the legal mechanism. The contrary seems to be nearer to the truth however. A consumer and her lawyer would have to know all judgments taken in collective actions, they would have to know the supplier, i.e. the parties to the contract and they would have to check whether the term declared unfair in collective action is identical with the one in the pending individual litigation. The German legislator decided to abolish the much criticised and indeed incomplete register of judgments without seriously discussing the connection between a register and a possible extension of the legal effect of actions for injunction.⁴¹ The search costs for the consumer litigants are therefore high and the outcome unclear as the supplier might have slightly changed the term after he lost the action for injunction filed against him.

The situation in Poland,⁴² which is unique in Europe, deserves a deeper look. Article 479(43) of the Polish Code of Civil Procedure (hereafter: „PCCP”) states that

„a judgment has an effect on the third parties as of the moment of registering it in the Register of Unfair Contract Terms, with reference to Article 479(45)§ 2”.

Article 479(43) PCCP refers to the Court of Competition and Consumer Protection in Warsaw. It provides for an exception of the general rule of *inter partes* character of judgments in the Polish legal system provided by Article 365§1 of PCCP. Article 479(43) clearly states that a judgment has an effect not only between the parties to a case, but also on third parties,⁴³ unrelated to the case at hand. However, Article 479(43) PCCP neither indicates precisely who should be regarded as a third party: individual consumers, a consumer organisation, a public body, etc; nor does it signal whether the *erga omnes* judgment has an effect „on behalf of all” or „against all”. Two different approaches have been developed to clarify the issue:

⁴¹ Münchener Kommentar zur Zivilprozessordnung, 3. Auflage 2008, § 16 Unterlassungsklagegesetz (author Micklitz).

⁴² I would like to thank Magdalena Bober, third year researcher for the analysis of the Polish legal system.

⁴³ A ruling of the Supreme Court of Poland of 19 December 2003; sygn. III CZP 95/3; OSNC 2005, Nr. 2, poz. 25.

(1) A judgment on unfair contract terms has an effect against each and every consumer and against the entrepreneur, who was a defendant in the collective litigation.⁴⁴ Rulings only effect „on behalf of the third parties”, but never „against the third parties”. Legal exceptions such as Article 479(43) CPPC should be interpreted narrowly. The position is backed via reference to Article 45 of the Polish Constitution which grants a right to be heard by an independent court. A well-known argument raised against opt-out class actions.⁴⁵

(2) A judgment on unfair contract terms has an effect on each and every consumer and each and every other entrepreneur, different from the entrepreneur being a defendant, against whom an injunction was granted.⁴⁶ The ruling registered in the Register has an *erga omnes* effect without any subjective limitations.⁴⁷ A judgment on unfair contract terms is said to have an effect „on behalf of the third parties” and „against all the third parties”.⁴⁸ The consumer protection guidelines require effective remedies especially regarding the protection of the collective interests of consumers. This interpretation is the dominant position in the Polish jurisprudence doctrine and whilst it is influencing the courts, a clear cut judicial statement is still missing.

The Court of Competition and Consumer Protection in Warsaw’s rules, however, clarified that the legal effect does not only cover identical but also similar (*sic*) contract terms.⁴⁹ This interpretation was confirmed by the Supreme Court of Poland.⁵⁰ A judge cannot take into consideration only the literal record of the registered term, but the essence and the meritum of hypothesis.⁵¹ What is still unsolved is what exactly a judge has to do when faced with a standard contract term in an individual litigation. There are *more than 2000 terms* registered in the Register.

A judge is supposed to search in the Register to find out whether or not the identical or a similar term has already been registered by the Court of Competition and Consumer Protection in Warsaw. As there is no common factor for the proper systematisation of rulings, the judge is expected to find out what the essence and merit of the term is, whether it is identical or similar with the term at issue.

The somewhat deeper analysis of the situation in Germany and Poland demonstrates the urgent need to take action – at the European Community level.

⁴⁴ A ruling of the Court of Competition and Consumer Protection in Warsaw of 11 of June, 2003, sygn. XVII 46/02 published in MSiG 2003, Nr. 237, s. 12477; A ruling of the Court of Competition and Consumer Protection in Warsaw of 22 August, 2005, sygn. Ama 21/05, Dz. Urz. UOKiK 2005, Nr. 3, poz. 45.

⁴⁵ There is an abundant literature on the feasibility of a group/class action in Europe, see more recently, M. Casper/A. Janssen/P. Pohlmann/R. Schulze (Hrsg.), *Auf dem Wege zu einer europäischen Sammelklage*, 2009.

⁴⁶ A ruling of the Supreme Court of Poland of 13 June, 2006, sygn. III SZP 3/06.

⁴⁷ *ibidem*.

⁴⁸ A. Zielinski, *Komentarz do Kodeksu Postępowania Cywilnego*, Warszawa 2008, 834-836.

⁴⁹ The ruling of the Supreme Court of Poland of 6 October, 2004 I CK 162/04, *Monitor Prawniczy* 2004, Nr. 21, poz 966.

⁵⁰ A ruling of the Supreme Court of Poland of 13 June, 2006, sygn. III SZP 3/06.

⁵¹ A ruling of the Court of Competition and Consumer Protection in Warsaw of 7 March, 2005 published in the Official Journal of the Office of Competition and Consumer Protection 2005, Nr. 2, poz. 26.

- b) The technical side – how to link collective administrative respectively judicial enforcement via injunction to individual litigation

Under the *res judicata* doctrine the two procedures, the collective and the individual litigation, have to be kept separate. The collective action binds the parties, either the administrative agency and the supplier where the enforcement lies in the hands of public authorities or the consumer/trader organisations and the supplier where the enforcement lies in the hands of the judiciary. The legal question then is how can a decision in a collective litigation bind the parties in an individual litigation?

Two constellations have to be distinguished: (1) a regulatory action by a public authority and (2) a judgment by a court. There is no either or, since Member States which have put the enforcement powers into the hands of an agency, do not follow a common procedure. There are Member States in which the public authority in charge may issue an action for injunction, there are other Member States, however, in which the public authorities have to go to court and to file an action for injunction. In the latter case, the final decision is taken just as in Member States where collective private enforcement is the dominant parameter, via courts and not via public authorities. Only in the former variant, a regulatory decision of a public authority may gain binding effect. That is why the problem is twofold: not only has it to be decided whether a court action in a collective litigation can bind another court in an individual litigation, but it has also to be clarified whether a regulatory action of a public authority may be granted the same legal effect.

Questions of this type are now widely discussed in the field of cartel law, where the European Commission has proposed, after intensive consultation via a Green⁵² and a White Paper,⁵³ to tie administrative actions of national/European cartel authorities and collective actions of compensation together. What matters in our context, is that the European Commission in a widely-known working staff document which was leaked to the public in June 2009 presented a simple solution to the question of *Rechtskrafterstreckung* even in a *transborder dimension*: private parties, including consumers who have suffered from an antitrust injury and who intend to file *an action for collective compensation* before a national court shall be entitled to refer to a binding decision of a national cartel authority or the European Commission or a binding judgment by a national court or the European Court of Justice in an *individual litigation* between the public authority and the wrongdoer. The respective article runs as follows:⁵⁴

„Where a national court rule, in actions for damages, on agreements, decisions or practices under Art. 81 and 82 of the Treaty which are already the subject of a final infringement decision by a national competition authority or by a review court, Member States shall ensure that the national courts cannot take decisions running counter to such infringement decision. This obligation is without prejudice to the rights and obligations under Art. 234 of the Treaty.”

In line with this proposal, the question arises whether the Proposal for a Consumer Rights Directive could, or even shall, contain a similar rule, if not in the transborder context then at least within the mere national legal environment. This question brings us to the substantial side, i.e. whether and to

⁵² COM (2005) 672 final and SEC (2005) 1732 Staff Working Paper.

⁵³ COM (2008) 165 final, 2.4.2008 and SEC (2008) 404-406.

⁵⁴ Art. 12 of the unpublished draft. See on this issue in more detail, J. Basedow, in L. Tichy/J. Terhechte (eds.), forthcoming.

what extent the two procedures are substantially similar or whether they are so different that any attempt to link the two procedures must fail.

- c) The substantial side – what are the differences and similarities between collective and individual litigation in unfair terms outside and beyond the fact that the parties to the conflict are different

Collective actions for injunctions are and remain disconnected from individual litigation. Collective actions, as the argument goes, are meant to examine the incriminated contract term in abstracto. The yardstick for the fairness test foreseen under the directive is the average consumer. Even if we set aside the problem whether the average consumer is the circumspect, well-informed consumer or the weak consumer who is in need of protection, the problem remains that the courts in collective litigation operate and have to operate with standardised and generalised assumptions of what this consumer is supposed to know or of what could be expected from him/her.⁵⁵ In the concrete circumstances of the case, neither the type of business which is at stake nor the factual particularities of a given conflict matter. The more the two procedures are kept separated, the more collective control via courts or administrative agencies takes a fictitious character. I would like to insert a quote from an article which I published some years ago and in which I analysed the fictitious element in the collective control of unfair terms in Germany, France and the UK:⁵⁶

The true problem concerning the German control mechanism lies in what I would like to call „phantom control“. Individual litigation deals with facts and real problems. Collective litigation deals with contracts terms outside facts and reality. It suffices to compare two cases in similar or identical matters in order to understand that judicial control operates at two different levels if not in two different worlds. In collective litigation the German courts have coined the term „kundenfeindlichste“ Auslegung, i.e. the most unfavourable interpretation of standardised contract terms is taken as the starting point to assess their fairness. If such an interpretation rule (i.e. “kundenfeindlichste Auslegung“) is combined with the Leitbild of the legally ignorant consumer as a yardstick for comprehension, standardised terms can be declared unfair relatively easily. The result is ambiguous. The courts may take „fictitious“ modes of interpretation into consideration, in order to be able to argue that the clause in question is unfair. Under such circumstances a contract term might be declared unfair in a collective litigation although its factual (economic and legal) background has never come to the attention of the court. One might argue that the elimination of each and every „unfair“ contract term is one step further towards the re-establishment of party autonomy, whatever the argumentation might be and how far-fetched legal considerations appear. However, at least two situations are imaginable which demonstrate the possible detrimental effects to the system of control of unfair terms. It might be that the courts eliminate contract terms which are of absolutely no importance in business practice. Clearing the market of this sort of term does not affect the usefulness of the legal mechanism. The making of standard terms, their use and their control by consumer organisations, lawyers and judges is then the ideal type of self-referential system in the meaning of Teubner.⁵⁷ Then terms are elaborated, introduced into business, attacked by consumer organisations and declared void by the courts. At least in the long run, the rationality of control is in jeopardy, at least once the „phantom“ character of the control has come clear. Or – and this is the second variant, the same or a similar term is brought to court in individual litigation,

⁵⁵ See on the average consumer St. Weatherill, Who is the average consumer in St. Weatherill/U. Bernitz (eds.), Regulation of Unfair Commercial Practices under the EC Directive 2005/29 – New Rules and New Techniques, 2007, 115.

⁵⁶ H.-W. Micklitz, Some Considerations on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts, in H. Collins (ed.) Standard Contract Terms in Europe, A Basis for and a Challenge to European Contract Law, 2008, 19 at 28.

⁵⁷ Recht als autopoetisches System, 1989.

where the neglected economic and social background reappears. Then the second litigation has to compensate for any possible deficiencies of the first. German courts are aware of the legitimacy gap and responded by way of applying the same standards of interpretation in individual and collective litigation.

Similar experiences may be reported from France and the UK, where the two control mechanisms also stand parallel to each other, disconnected from each other and without an added value for the protection of consumers. One might conclude therefore, in a somewhat overstated fashion, that unfair terms legislation contributes to market clearance but not in assisting consumers to enforce their rights. So it seems that market clearance and individual protection of consumers do not fit together.

This conclusion is far from being satisfactory, politically and legally: *politically*, because unfair terms legislation and in particular collective action has been introduced to improve consumer protection and not to set up a costly but inefficient – in terms of individual protection – clearance mechanism and *legally*, because such a clear cut distinction between collective and individual action is not set in stone as some Member States have demonstrated with yet unsatisfactory results of combining the two mechanisms. Art. 7 of Directive 93/13 as well as Art. 41 (1) of the Proposal require „adequate“ and „effective remedies“. ⁵⁸ So far, EU law on unfair terms is far from reaching such an objective.

d) Does the *acquis* prevent Member States from introducing a procedural link between individual and collective litigation?

There are two possible barriers which might hinder Member States“ legislation: the individualistic approach of the Directive and the maximum principle of the Proposal on Consumer Rights. Art. 6 of Directive 93/13 reads as follows:

1. 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 be 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.

Art. 6 addresses Member States, but it does in no way draw a distinction between the legal effects of a term which are declared void via individual or via collective litigation. The reference to the contract allows a reading that the Directive intends to deal only with individual litigation. The individualistic concept becomes even clearer in Art. II.-9:408 DCFR:⁵⁹

A term which is unfair is not binding on the party who did not supply it.

One might wonder whether these provisions exclude *erga omnes* effects of judgments of injunctions, as the emphasis lies on the party which shall not be bound. The current Art. 37 (version 10.12.2009) combined with the full harmonisation principle does not really clarify the situation:

⁵⁸ Which remains behind the general standards as developed by the ECJ, see H.-W. Micklitz/N. Reich, *Crónica de una muerte anunciada: The Commission Proposal for a ‘Directive on Consumer Rights’*, *Common Market Law Review*, 47 (2009) 471 at 488.

⁵⁹ See Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Full edition, edited by Ch. v. Bar and E. Clive, 2009, Volume I, 656 where the relationship between the legal effects of individual litigation and collective litigation are not even mentioned.

Contract terms which are unfair according to this Directive shall not be binding on the consumer in accordance with national law.

A broad reading would cover both constellations, individual and collective ones. The reference to national law, however, does not allow for such a broad understanding. It seems as if the newly introduced reference to national law paves the way for various national solutions, i.e. the already existing differences with regard to the possible effects of collective litigation on individual litigation would be set in stone – for the next decade at the very least. Does such a finding comply with the right of effective legal protection?

3. *Three Proposals on How to Link the Two Procedures in the Current Proposal on Consumer Rights*

- a) Where is the way out – approximation of the yardstick of control as a precondition for interconnecting collective and individual litigation

The answer is a firm yes and I would even go as far as saying that Directive 93/13, correctly interpreted, paves the way for an understanding of collective litigation which leads to an approximation of the two procedures.

This approximation in substance is a necessary and crucial precondition in the search for tying the two procedures more closely together. In short, I have proposed to give up the distinction between abstract-general and concrete-individual and to use a *general-concrete* yardstick of control in collective actions for injunction. Such an understanding of the collective action for injunction would offer the remedy a more realistic outlook.⁶⁰ It would allow consideration of circumstances in which the contract term appears, though in a generalised form. Whilst such a result is – in my opinion – in line with a correct reading of Directive 93/13, as it stands today, a clearer statement in the Directive on what the yardstick of control should be in collective litigation would be of an enormous help to overcome the discrepancies, even disruptions, between the two procedures.

Without such an approximation of collective and individual action, any effort to link the effects of the two procedures together must fail. Therefore, the Proposal on Consumer Rights should be amended as follows:

The reference to the limited scope of the contra proferentem rule in Art. 36 (2) should be deleted.

- b) Revitalising CLABUS – a European wide data file on judgments taken under the general clause

The idea to establish a list of contract terms which might be consulted by the courts and the parties in either collective and individual litigation is not new. Most of the Member States have initiated some sort of data processing in order to keep track on the development of unfair terms case law. The former head of the competent unit within what has become DG SANCO, *Mario Tenreiro*, had initiated in the mid nineties the development of a European wide data file of unfair contract terms judgments of

⁶⁰ See for the UK the analysis of the reports of the Office of Fair Trading, S. Bright, *Winning the battle against Unfair Terms*, 2000 (20) *Journal of the Society of Public Teachers of Law*, 331.

national courts, named CLABUS.⁶¹ For seven years, a substantial number of institutions from various Member States were involved in incorporating national case law into the data file. After seven years of co-operation the European Commission cancelled the contracts with the existing partners and ended the financing, without making the reasons public. Obviously the European Commission regarded such a data file to be useless. This is all the more astonishing as the Proposal on Consumer Rights relies even more heavily on listing incriminated clauses than the current Directive 93/13.

It would certainly be in line with the logic of the Proposal to complement the envisaged list of black and grey clauses with a list of judgments of national courts taken under the general clause, which – this is the Proposal – shall be reported to the European Commission anyway. If this proposal were to be adopted, the European Commission would have all the information in her hands, though in a form which is not accessible and not useable for Member States and their control authorities, be they agencies or courts. Exactly this information would have to be processed and prepared in a way similar to the approach chosen in CLABUS. Here, all judgments were screened under a common scheme and the substantial parts of the judgments were translated into English and French. Whilst there is certainly room for improvement,⁶² CLABUS could serve as a blueprint for establishing such a European wide list of national judgments.

Member States shall notify to the European Commission of final judgments of their courts and/or decisions of regulatory agencies. The Commission shall set up a data file which is made available to the public.

c) Obliging Member States to interconnect the legal effects of collective and individual litigation

EU rules reaching beyond substantive law always have to accept that according to the Treaty, enforcement lays in the hands of the Member States that benefit, as a result of this, from what the ECJ termed in *Rewe*⁶³ „procedural autonomy“. However, in the very same judgment, the ECJ made clear that procedural autonomy is not unlimited. Member States have to respect two sets of principles which the ECJ elaborated over time: the principle of effectiveness and the principle of equivalence. The bottom line of the argument is that Member States shall not render the enforcement of EC law „virtually impossible“, or „excessively difficult“.⁶⁴

The issue here at stake demonstrates clearly the rather limited value of these broad principles. Both are connected to the existence of EU enforceable rights, be they individual or collective. This requirement is easily met via Directive 93/13. The individual consumer has been granted the subjective right to get unfair terms declared void by the competent courts. The same is true with regard to public authorities and/or consumer organisations with regard to collective actions for injunctions. The point is that Directive 93/13 does not provide much guidance on how these two rights should be interconnected. The two principles of effectiveness and equivalence are of not much help either. One might argue that the „effet utile“ of the collective action is undermined if it is not connected to the individual action. It

⁶¹ H.-W. Micklitz/M. Radeideh, CLAB-Europe – The European database on unfair terms in consumer contracts, JCP 2005, 325-360.

⁶² See the proposals in European Commission, The ‘Unfair Terms’ Directive, Five Years On, Evaluation and Future Perspectives, Brussels Conference, 1.-3.7.1999.

⁶³ ECJ, 16.12.1976, C-33/76, ECR 1976, 1989.

⁶⁴ N. Reich, Chapter 8, in Micklitz/Reich/Rott, Understanding EU Consumer Law, 2009, 317.

is a long way down the road, however, to combine the missing „*effet utile*“ of the collective action to the quest if not necessity to interlink the individual and collective actions.

The two principles could be used as *a policy argument* to demonstrate that Directive 93/13 requires effective legal protection of the consumer in the EU which makes it necessary to look for appropriate ways and means to interconnect the two legal procedures. It is certainly not for the European Community to design how such an interconnection should look like.

Therefore, the Proposal on Consumer Rights should provide for a formula which comes near to the following:

Member States shall provide for appropriate and adequate measures which enable consumers in individual litigation, where the outcome of the litigation depends on the validity of a certain contract term, to benefit from national final regulatory actions and/or final judgments of national courts which have declared the identical or a similar contract term void in injunction proceedings.

III. The Gaps in the Scope of the Current and the Envisaged Scope of Application

The history of unfair terms legislation in Europe is marked by a constant battle over the scope of application,⁶⁵ mainly concerning whether collective control should be 1) limited to standard terms or cover individually negotiated terms as well; 2) whether the collective control should be extended to collectively negotiated terms; 3) whether the collective control should cover so-called „core terms“ or whether they should be exempted from control; 4) whether and to what extent contract terms in regulated markets (energy, telecom, transport, financial services) should be submitted to the general standard spelled out in the contract terms legislation or whether they should be subject to specialised standards of control.

The European Commission has indicated in its non-paper⁶⁶ that full harmonisation does not necessarily preclude Member States from extending the scope of application. Such a statement is, legally speaking, useless, as the ECJ has constantly held that the legislative history is not taken into account when it comes down to deciding a concrete conflict. *VTB-VAT*⁶⁷ sends a clear cut message. Member States were told that they have to make sure that their reservations are codified, at the very least in the recitals. Member States should, at this stage, taken the message on board. Reservations, even discussion in the Council are legally irrelevant.⁶⁸

There is an urgent need to reconsider the rather limited scope of the Directive as well as the Proposal on Consumer Rights in light of the recent developments in unfair contract terms law. Two lines of argument can easily be identified. At the Member State level, 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. The other line of argument concerns the relationship between Directive 93/13 and EU rules in sector related markets which affect the position of the consumer, often to his/her detriment, in the

⁶⁵ See Law Commission, Law COM No 292, Unfair Terms in Contracts, 2005.

⁶⁶ Internal document, distributed by the European Commission in the Council, on file with the author.

⁶⁷ ECJ, 23.4.2009, C-261/07 *VTB-VAB v. Total Belgium* and C-299/07 *Galatea BVBA v. Sanoma*, nyr.

⁶⁸ Even more outspoken AG Trstenjak in her conclusions, see H.-W. Micklitz, *VTB v. Sanoma – Vollharmonisierung im Lauterkeitsrecht*, VuR 2009, 110.

sense that the level of protection provided for in sector related markets remain behind the general standards of the unfair terms directive and its successor.

1. Standard Terms and Individually Negotiated Terms

Member States' laws on the degree to which individually negotiated terms are submitted to control differ widely.⁶⁹ This issue was heavily debated prior to the adoption of Directive 93/13. The Commission tried to reach a compromise between the different positions, which deserves to be recalled. Contrary to the German and French, but in a similar way to English law, Article 4 of the 1992 Revised Proposal contained criteria for the unfairness of terms in individual contracts. Two requirements should be met cumulatively in order to cover individually negotiated terms:⁷⁰

- it causes the performance of the contract to be unduly detrimental to the consumer, and
- it has been imposed upon the consumer as a result of the economic power of the seller or supplier and/or the consumer with economic and/or intellectual weakness.

If this provision had been incorporated into Community law it would have constituted the acknowledgment of an element under Community law of *Sittenwidrigkeit* according to German, *abus de faiblesse* according to French or „unconscionability” according to the common law standard. Such a model would comply with the considerations presented by the European Commission in its Green Paper on the Revision of the Consumer Acquis.⁷¹ However, in the Proposal on Consumer Rights, the idea of general clauses shaped according to fairness and good faith, does not appear.

The 1992 draft of Directive 93/13 spells out in a clear cut way the major reason why the distinction between standard terms and individually negotiated terms fails to address the relevant consumer protection issue: the different bargaining power between the consumer and the supplier. A term in an „individually negotiated term“ can easily be the result of the greater bargaining power of the supplier. The current Proposal on Consumer Rights might be read to overcome the distinction between standard and individually negotiated terms by requiring a) that the consumer „*had the possibility of influencing*“ – taken from the 10.12.2009 version to – „*was able to influence the content of certain aspects of the term*“ and b) that the trader bears the burden of proof if he claims that the contract had been individually negotiated. However, neither the Directive nor the December version of the Proposal, requires that individual negotiation led to a factual improvement of the position of the consumer or that due to the intervention of the consumer the content had changed. The much more challenging wording which helps to overcome the debatable distinction would or could be that the consumer „*had influenced*“ the content of the term.

„*Was able*“ to influence requires more than the „possibility of influencing“, but it leaves room for interpretation. What exactly is meant? Does the Proposal on Consumer Rights refer to the concept of

⁶⁹ See H. Schulte-Nölke, The Potential Impact of the Consumer Rights Directive on the Member States Contract Law, side effects on the Member States general contract laws or general sales laws, European Parliament, Director General of Internal Policies, 2009; see Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Full edition, edited by Ch. v. Bar and E. Clive, 2009, Volume I, 631.

⁷⁰ COM (1992) 66 OJ C 73, 24 March 1992, 7.

⁷¹ COM (2006) 744 final, in more detail M. B. M. Loos, Review of the European Consumer Acquis, 2008, at 40.

empowerment which sees the progress of consumer protection in increasing the capabilities of a consumer to defend his/her rights?⁷² Is the „*was able*“ a capabilities test of the consumer? Or does „*was able*“ relate to an „obligation de résultat“, that is the wording of the term in question must have changed? Instead of arguing over the correct interpretation, it seems preferable to clarify the wording and to write down a result-orientated approach.

There are three possible consequences: either to give up the distinction and to revitalise the draft of 1992 or to formulate the current Art. 30 in the following way:

1. This chapter shall apply to contract terms established in advance by the trader or a third party, which the consumer agreed to *without having influenced their content to his/her advantage*.
2. Where the trader claims that a contract term *has been amended by way of individual negotiation to the advantage of the consumer*, the burden of proof shall be incumbent on him in that regard.
3. The fact that the consumer *had influenced 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.

2. Standard Terms and Collectively Negotiated Terms

There is another dimension enshrined in the distinction which is equally old but which has been revitalised by the European Commission in the Services Directive 2006/123.⁷³ This is the question of whether Directive 93/13, or its successor, shall apply where the contract terms have been *collectively* negotiated by a consumer organisation and a trader organisation, at the Member State or the EU level.

a) Standard terms negotiated *outside* a statutory regulatory frame

There was a time when Member States heavily discussed the pros and cons of setting incentives for organisations to develop standard terms.⁷⁴ The then undertaken attempts did not really lead to a new regulatory culture where the two opponent parties got together in order to jointly resolve conflicting issues and then setting a common regulatory frame for contractual relations. Therefore, the few attempts in national unfair contract terms legislation did not gain importance in practice, although some countries adopted rules with regard to the collective negotiation of unfair terms.

In the course of the European codification project, the European Commission initially considered fostering an elaboration of standard terms at the European level by stakeholder organisations from both sides.⁷⁵ These efforts miserably failed. By now there is intensive academic discussion on

⁷² G. Howells, The Potential and Limits of Consumer Empowerment by Information, *Journal of Law and Society*, 2005, 349.

⁷³ OJ L 376, 27.12.2006, 36.

⁷⁴ In particular in France, there were attempts to use experiences in the field of labour law to bind suppliers to collectively negotiated contract terms, see J. Calais-Auloy/J. Steinmetz, *Droit de la Consommation*, 6ed. 2003 at 193 and J. Calais-Auloy, *Collectively Negotiated Agreements: Proposed Reforms in France*, JCP 1984, 115.

⁷⁵ COM (2004) 651 final; thereto H. Collins, *The Freedom to Circulate Documents: Regulating Contracts in Europe* (2004) 10 *European Law Journal*, 787.

collective negotiation, mainly under the modern language of private regulation.⁷⁶ In the public hearing before the European Parliament in early 2010, Commissioner *Reding* argued in favour of revitalising collective bargaining processes.

b) Standard terms negotiated *within* a statutory regulatory frame

The true challenge today results from EU co-regulation, where private organisations negotiate rules within a legally binding regulatory framework. Widely unnoticed by academics, politicians and consumer organisations, Art. 26 (5) of the Service Directive paves the way for contract law making via standardisation in the field of services. It provides for the following:

Member States, in cooperation with the Commission, shall encourage the development of voluntary European standards with the aim of facilitating compatibility between services supplied by providers in different Member States, information to the recipient and the quality of service provision.

In practice, the European Commission mandated CEN and CENELEC, the European standards bodies as well as national standards bodies to elaborate „technical standards“ in the field of services. Quite a number of these „technical standards“ contain „voluntary“ non-binding contractual rights and contractual duties of the contracting parties with regard to all sorts of service contracts, in particular in the area of care for elderly people.⁷⁷ This new regulatory approach of the European Community entails a whole series of questions which call for answers:

- Are these technical standards „standard terms“ in the meaning of Directive 93/13 as well as the Proposal on Consumer Rights? The answer can only be yes, as they are pre-formulated by the standards bodies, national and/or European ones. They are equally meant to cover more than one single contract. The problem, however, is that technical standards are not freely accessible. Users of standard terms have to pay for the right to use the technical standards. How does the copyright affect their controllability? There is, however, no rule and no reason, why purchasable standard terms should be exempted from control. What matters is that they are recommended or used in favour of consumers, not whether suppliers have to pay for the right to use and recommend.⁷⁸
- Are these technical standards exempted from control because they have been developed within a European regulatory framework? Are these „technical standards“ „mandatory or statutory regulatory provisions“ in the meaning of Art. 1 (2) of Directive 93/13 or Art. 30 (3) of the

⁷⁶ See the overview of the current debate in F. Cafaggi, *Private Regulation in European Private Law*, RSCAS 2009/31.

⁷⁷ H.-W. Micklitz, *The Service Directive – The making of consumer contract law via standardisation, the example of the Service Directive*, in *Festschrift für G. Brüggemeier*, 2009, 483.

⁷⁸ A telling, though promising example from a consumer perspective, is the debate in Germany over the legal character of the *Verdingungsordnung für Bauleistungen*, which ended up in a litigation between the German consumer organisation and the recommender of the standard contract terms, see on the background to the conflict H.-W. Micklitz, *Bauverträge mit Verbrauchern und die VOB Teil B, Zur Bedeutung der Richtlinie 93/13/EWG über missbräuchliche Klauseln in Verbraucherverträgen*, Schriftenreihe des Verbraucherzentrale Bundesverbandes zur Verbraucherpolitik, BWV Berliner Wissenschafts-Verlag, Band 2, 2005 and now the judgment of the German Supreme Court, 24.7.2008, At. VII ZR 55/07.

Proposal on Consumer Rights?⁷⁹ The answer here is more complicated and depends on the correct reading of Art. 1 (2) respectively Art. 30 (3). We will come back to this issue, when we discuss the applicability of standard terms legislation on regulated markets.

- Are these standard terms which appear in the disguise of technical standards exempt from the control because consumer organisations are involved in the elaboration of these „technical standards“? At the European level, ANEC (the counterpart to BEUC in the field of standardisation) is involved in the elaboration, at the national level, mostly consumer organisations are taking part in the development of technical standards. This is investigated below.

Neither the Directive nor the Proposal on Consumer Rights deal with collectively negotiated standard terms. However, it might make sense to use the formula of „individually negotiated“ as a yardstick which should be tested in a collective bargaining environment. The point then would be whether consumer organisations „were able“ or „had influenced“ the elaboration of technical standards. The same logic as above applies and the same problems show up. In practice, consumer organisations have little or no influence on the elaboration process. They are more observers or watchdogs as opposed to active negotiating partners. The work is done mainly by the interested business circles, the respective companies and their organisations which usually sponsor the elaboration of these standards, even though it may be by making their expertise available without asking for remuneration.

Therefore it seems possible to introduce a simple ruling in the following sense:

Art. 30 (1)-(3) is equally apply to standard terms which have been collectively negotiated.

3. Core Terms „Price“ and „Quality“

The exclusion of the so-called core terms gave rise to much debate, not only over the question whether core terms should be excluded at all, but also what exactly „core terms“ means and how they can be distinguished from the other contract terms which are submitted to judicial control. The distinction is further complicated by the fact that „core terms“ are and should be subject to the transparency requirement, see Art. 32 (3) of the Proposal on Consumer Rights.

In its Green Paper on the Revision of the Consumer Acquis, the European Commission has raised the question whether the revised EU Directive should cover the core terms.⁸⁰ The replies to the Green Paper did not paint a clear picture. What was again totally absent was a deeper analysis the problems that consumers might face due to the exclusion of core terms. The whole debate remained at a more ideological level.⁸¹

⁷⁹ S. Whittaker, Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract (2000) 116 Law Quarterly Review 95 as well as Judicial Interventionism and Consumer Contracts (2001) 117 Law Quarterly Review 215.

⁸⁰ COM (2006) 744 final, see in more detail M. B. M. Loos, Review of the European Consumer Acquis, 2008, at 40.

⁸¹ Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Full edition, edited by Ch. v. Bar and E. Clive, 2009, Volume I, Art. II. – 9.406, 648.

a) The case of bank charges – different judgments from Member States' Courts

Fortunately or unfortunately – depending on the view point – the consumer dimension behind the demarcation line became abundantly clear in the proceedings of the Office of Fair Trading against the transparency of bank charges in consumer contract. To make a long story short: the Office of Fair Trading had made an in-depth investigation of the UK market on bank charges. Based on a thorough analysis, the OFT then filed an action for injunction before the High Court arguing that four different types of bank charges (unpaid item charges, paid item charges, overdraft excess charges and guaranteed paid item charges) did not meet the transparency requirement and were therefore null and void. The High Court partly confirmed the OFT's action for injunction, as did the Court of Appeal. The Supreme Court,⁸² however, unanimously rejected the complaint in full and found no reason to refer the issue to the ECJ. The German Supreme Court⁸³ had decided a comparable standard contract to be void, as it constituted a violation of the prohibition against § 309 No. 5 BGB (German Civil Code) which runs as follows:⁸⁴

„(Lump-sum claims for damages) the agreement of a lump-sum claim by the user for damages or for compensation in the case of a decrease in value (are unfair) if a) the lump sum, in the cases covered, exceeds the damage expected under normal circumstances or the customarily occurring decrease in value, or b) the other party to the contract is not expressly permitted to show that damage or decrease in value has either not occurred or is substantially less than the lump sum.”

The German Supreme Court avoided the question of whether unpaid or paid item charges as well as guaranteed paid item charges are price clauses or not. There is no direct equivalent to § 309 No. 5. However, one might think of referring to Annex no. 1 lit e.⁸⁵ Is it really „acte clair“ as *Lord Walker* so forcefully argued? Would that not have been a classical case for a reference to the ECJ? After *First National*⁸⁶ it is the second time that the Supreme Court (the former House of Lords) refused to refer an absolutely crucial question of unfair terms litigation to Luxemburg. How can a more homogenous approach to EU private law issues be guaranteed, one in which Member States' courts accept the responsibility under Art. 234, if crucial questions are not referred to the ECJ? The answer reaches certainly beyond mere unfair contract terms litigation, although one might wonder whether all courts in Europe share the initial statement of *Lord Walker* that „*The members of the Court are well aware of the limited (emphasis H.-W. M.) nature of the issues which we have to decide in this appeal*“.

In a time where even judicial exchange and judicial co-operation between national courts rank high on the agenda, it is hard to understand why the Supreme Court (the former House of Lords) did not undertake a comparative survey, especially since the ground work has already been conducted and is available via a Report prepared by the UK Law Commission published a couple of years ago. It is one thing to disagree on the legal qualification of bank charges as price clauses (Supreme Court, former

⁸² Judgment, 25.11.2009, Office of Fair Trading (Respondents) v. Abbey National plc & Others (Appellants), Michaelmas Term (2009) UKSC 6 on appeal from (2009) EWCA Civ 116.

⁸³ BGH WM 1997, 2300.

⁸⁴ Official translation of the Ministry of Justice, http://www.gesetze-im-internet.de/englisch_bgb/index.html

⁸⁵ H. Heinrichs, Der Anhang zur EG-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen (93/13/EWG) und seine Bedeutung für das Deutsche Recht, in L. Krämer/H.-W. Micklitz/K. Tonner (eds.), Liber Amicorum für Norbert Reich, Recht und diffuse Interessen in der Europäischen Rechtsordnung, 1997, 525 at 537.

⁸⁶ H.-W. Micklitz, Judgment of the House of Lords of 25 October 2001, The General of Fair Trading v. First National Bank plc, (2001) UKHL 52, European Review of Contract Law, Vol. 2 (2006) No. 4, 471.

House of Lords) or as lump sum terms (German Supreme Court), but it is another not to explain why a different legal position might be justifiable.

There are two amendments required in order to overcome the dilemma:

- (1) to oblige Member States“ courts to notify the final judgments to the European Commission which has to integrate them into a data file which has to be made publicly available,
 - (2) to oblige or at least to recommend national courts to consult ex officio the data base and to give reasons for deviating judgments.
- b) Common standards on the control of core terms or different standards on the control of core terms

Does the European Community need common standards or can we live with the different handling of similar or even identical decisions on key consumer problems?⁸⁷

If diversity is the standard then the Proposal on Consumer Rights should and must be clearly understood as defining minimum standards. A statement of the European Commission in a non-paper presented to the Council clearly does not suffice.⁸⁸ What would be needed is an explicit reference to the minimum character of Art. 32 (3), respectively of Art. 4 (2) Directive 93/13.

We must recall here that AG *Trstenjak*⁸⁹ confirmed that Member States are free under Art. 8 of the Directive to submit core terms beyond the mere transparency requirement to substantive fairness control. The background to the reference is *Gysbrechts* where the ECJ applied the proportionality doctrine to national standards in the Distant Selling Directive 97/7 which reached beyond the European minimum.

- (1) Member States should remain free in submitting core terms to a fairness test,
- (2) the Proposal on Consumer Rights should explicitly provide for such competence for Member States.

⁸⁷ See the survey in Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Full edition, edited by Ch. v. Bar and E. Clive, 2009, Volume I, Art. II. – 9.406 648.

⁸⁸ Internal document, distributed by the European Commission in the Council, on file with the author.

⁸⁹ C-484/08, Caja de Ahorros y Monte de Piedad de Madrid v. Asociación de Usuarios de Servicios Bancarios (Ausbanc), nyr.

c) Price clauses and ancillary price clauses

If Member States remain free to submit core terms to substantive control, is there a need to a) define price clauses and b) delineate them from „ancillary price clauses“ (Preisnebenabreden) which may be submitted to a substantive fairness test? The Supreme Court (former House of Lords) rejects such a delineation, at least in the field of bank charges, and argues that bank charges refer to the price of the service per se. The German Supreme Court, quite to the contrary, had recognised the importance of such a distinction in the area of bank fees since 1993.⁹⁰

The distinction is not only important in the field of bank charges or bank fees. Similar issues arise in the field of fees for financial services where the price of the „service“ is composed of a broad variety elements which are hard to overlook from a consumer perspective. Financial services might be the most important battlefield but certainly not the only one. The so called Billig-Flieger (low-budget carriers) no longer offer an end price, but a basic price for the transport which does not provide for a full picture of what the consumer has to pay if he/she books the flight (taxes, airport fees, luggage fees etc). A similar phenomenon can be observed in all highly regulated service markets, in particular the new ones in energy, transport, telecommunication and digital services. Here, it is hard to know what the price of the main service is and what has to be paid for ancillary purposes.

Where do we stand in European law? Do we need a particular rule in the Consumer Rights Directive that allows for the „substantive“ = „fairness control“ of ancillary services? Or can the problem be solved by way of an extended control of price transparency?

d) Transparency requirement and price control

The Directive, as well as the Proposal on Consumer Rights, are both seemingly clear. Core terms i.e. price clauses, whether they regulate the main price or only ancillary services, may be exempted from fairness control but *not* from the transparency requirement. Transparency control is the minimum standard EU law provides for, even in the field of core terms.

Price transparency is a key problem not only in the field of bank charges, but in all services, in particular the services provided for by regulated markets, such as energy,⁹¹ telecommunication, digital services and transport. The battle over bank charges, so far highlighted by the case law of Germany and the UK, is of paradigmatic importance in relation to the transparency deficit that consumers are suffering from in Europe. The prices and the transparency of bank fees were analysed in a recent study commissioned by DG Sanco⁹² and resumed in a subsequent report which was published in September 2009.⁹³

⁹⁰ Leading decision on 30.11.1993, BGHZ 124, 254.

⁹¹ See the slightly more specific requirements in Art. 3 (7) of Directive 2009/72 OJ L 211, 14.8.2009, 55.

⁹² Study of the European Commission DG Sanco, Bank Charges in Europe,

http://ec.europa.eu/dgs/health_consumer/library/surveys/sur14_en.pdf

⁹³ Commission staff working document on the follow up in retail financial services to the consumer markets scoreboard, Brussels, 22.9.2009, SEC(2009) 1251 final.

„... 29 % of EU consumers have difficulties in comparing offers in relation to these same current accounts and so they are not in a position to choose the best account for their needs. A recent study monitoring the pricing of electronic bank payment tools such as direct debits and credit transfers confirmed the difficulties in determining the cost of these services due to the opaque tariff structure of bank accounts. *Even for the experts undertaking the research it was difficult to untangle the pricing structures offered by the financial services providers on their websites* (emphasis H.-W. M.). In 69 % of all cases, clarification had to be sought in a follow-up check with the provider in question.”

The Report is dated September 2009 (!) – i.e. prior to the decision of the Supreme Court (the former House of Lords) on bank charges – starts from the obviously erroneous premise that Directive 93/13 is a useful tool in establishing transparency in bank charges:

„The Directive on unfair terms in consumer contracts also provides for some protection against unclear standard contract terms in relation to interest rates or overdraft charges. This Directive obliges a financial services provider to draft its terms and conditions in plain and intelligible language. Standard terms and conditions (including those setting interest rates or *overdraft charges* (emphasis H.-W. M.), which do not comply with this transparency requirement can be challenged if they are imbalanced to the detriment of the consumer. Terms which are found by a national court or administrative body to be unfair under the Directive are not binding on consumers. Furthermore, according to the Directive, a bank or any other financial institution should inform the consumer at the earliest opportunity about a change of the rate of interest due to the consumer. In this case the bank should give the consumer the possibility to terminate the contract immediately. Standard terms and conditions which do not comply with those requirements could be considered unfair.”

One of the major shortcomings in the judgment of the Supreme Court is that it does not elaborate clearly the distinction between price terms that may not be regarded as core terms – i.e. ancillary terms – and the mandatory minimum requirement of Directive 93/13 to exercise control over the transparency of the terms. The more practical problem is that transparency control often serves as a substitute for the otherwise prohibited control of the main price, the core term. The true problem behind the OFT complaint does not seem to be transparency, but the very high prices imposed on consumers when they overcharge their bank account. This might partly result from the fact that current bank accounts in the UK are normally free of charge, in contrast to Germany where most of the banks still charge a monthly fee. These differences might very well be reflected in the amount the banks charge for the overdraft or the failed service.

Claiming that the bank fees or bank charges are not transparent permits a declaration that the contract term in question is unfair and therefore void – provided that the court is ready to apply the mandatory requirements of the Directive. But even such a consumer friendly judgment does not solve the problem that prices might not only be opaque but also „too high“ – which indicates a lack of competition. The contractor who is bound by the verdict, might easily change the rules and lay down clear cut price structures which cannot then be attacked by way of the transparency requirement but which might be deeply „unfair“, because the consumer is charged with all sorts of questionable costs. So there are limits to the transparency principle, even if fully applied.

- e) The solution: A new structure for core terms, ancillary terms and price transparency

Price transparency and price control are interlinked. What is needed is a better and clearer structure of the existing rules on price transparency and price control. As a minimum standard the Proposal on Consumer Rights should provide beyond the transparency requirement in Art. 32 (3) for the following:

Ancillary terms dealing with price elements apart from the core/main price, are submitted to the fairness test.

4. The Applicability of the Unfair Terms Rules to Services in Regulated Markets

Directive 93/13 is not the only one that sets standards for consumer contracts. Hand in hand with the deregulation and privatisation of former state monopolies, public law relationships between the supplier and the customer were gradually but steadily turned into private law relations. This development began in the aftermath of the European Single Act. In the beginning, the regulatory focus was put on the construction of a competitive market. The changing and changed role and function of the former customer into a consumer gained, however, an ever growing importance over time. The following overview is not meant to fully cover the recent development but to sketch the major trends and developments.

- a) The „without prejudice“ approach

In 2009 the European Community had adopted the third generation of directives and regulations in the field of energy and most recently in telecommunication.

Electricity and gas: The Directives 2009/72 on electricity and 2009/73 on gas perpetuate the approach followed in Directives 2003/54 and 2003/55. Both directives lay down particular rules on the respective supply contracts which provide for a binding *minimum* standard of protection. The Directives do not establish a standard contract, they only define binding elements which form part of the usually much broader rights and duties normally spelled out in standard contract terms. The 2003 and the 2009 Directives make clear that Directive 93/13 still applies but they do not provide guidance of what shall happen in case of conflict between the protection standards of Directive 93/13 and Directives 2009/72 and 2009/73.⁹⁴

„Without prejudice to Community rules on consumer protection, in particular 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 and Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the measures referred to in Article 3 are to ensure that customers:...(here we can find the list of issues to be respected in consumer contracts).”

However, which Directive should prevail? Directive 93/13 over Directives 2009/72 and 2009/73 or vice versa?

⁹⁴ Annex I.Directive 2009/72 OJ L 211, 14.8.2009, 55.

Telecommunication: Directive 2009/136 which replaces Directive 2002/22 on universal services provides for a similar approach. Just as its predecessor, Directive 2009/136 defines mandatory standards of protection for the final user, the consumer. The connotation, however, is somewhat different. Art. 1 (4) runs as follows:⁹⁵

„The provisions of this Directive concerning end-users’ rights shall apply *without prejudice* to Community rules on consumer protection, in particular Directives 93/13/EEC and 97/7/EC, and national rules in conformity with Community law.“

The EU rules explicitly recognise the existence of national rules as long as they are in Community law – but which community law is intended? Does Directive 93/13 overrule national law in its scope of application or does Directive 2009/136 overrule national law and what if the two European sets of rules are in conflict which each other?

Financial services: The overwhelming number of directives in the field of financial services does not mention Directive 93/13. This holds true for both the Financial Services Action Plan (FSAP) Directives and the Post-FSAP Directive which provide, in principle, for *full* harmonisation: Directive 2000/46/EC, Directive 2000/64/EC, Directive 2001/17/EC, Directive 2001/97/EC, Directive 2001/107/EC, Directive 2001/108/EC, Directive 2002/12/EC, Directive 2002/83/EC, Directive 2002/13/EC, Directive 2002/47/EC, Directive 2001/65/EC, Directive 2003/48/EC, Directive 2001/24/EC, Directive 2002/87/EC, Directive 2003/51/EC Directive 2002/92/EC, Directive, Directive 2003/41/EC, Directive 2004/25/EC, Directive 2006/48/EC, Directive 2006/49/EC, Directive 2005/60/EC, Directive 2006/43/EC, Directive 2006/46/EC, Directive 2007/63/EC, Directive 2007/44/EC, Directive 2009/14/EC, Directive 2007/36/EC, Directive 2007/64/EC, Directive 2009/111/EC, Directive 2009/49/EC, Directive 2009/110/EC, Directive 2009/65/EC. The same is true with regard to the Lamfalussy Directives: MiFID-Directive 2004/39/EC – but see Article 4 (1),⁹⁶ Market Abuse 2003/6/EC, Prospectus-Directive 2003/71/EC, Transparency Directive 2004/109/EC.

There are a few exceptions: Article 15 (burden of proof) Directive 2002/65/EC for distance marketing of consumer financial services, refers to Directive 93/13. Directive 2009/44/EC amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims has introduced a new third paragraph in Article 2:⁹⁷

„*Without prejudice* to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and national provisions concerning unfair contract terms, Member States shall ensure that debtors of the credit claims may validly waive, in writing or in legally equivalent manner:

(i) their rights of set-off vis-à-vis the creditors of the credit claim and vis-à-vis persons to whom the creditor assigned, pledged or otherwise mobilised the credit claim as collateral; and

(ii) their rights arising from banking secrecy rules that would otherwise prevent or restrict the ability of the creditor of the credit claim to provide information on the credit claim or the debtor for the purposes of using the credit claim as collateral.”

⁹⁵ OJ L 337, 18.12.2009, 11.

⁹⁶ OJ L 145, 30.4.2004, 1 which leaves some room for the Member States, although it seems hard to bring unfair terms legislation under Art. 4 (1).

⁹⁷ OJ L 168, 27.6.2002, 43.

What does „without prejudice“ mean? Is the „without prejudice approach“ to be understood as a highlighting that *lex specialis* precedes *lex generalis*, that Directive 93/13 applies only as long as the energy, telecom and financial services do not provide for more specific rules? What is specific and what general?

What shall happen in cases where the Directives do not mention Directive 93/13 at all, but nevertheless define binding rules on the relationship between the consumer and the supplier? Before we try to answer this question we might need to investigate the relationship between the scope of Directive 93/13 which applies to standard terms elaborated by private parties for its use and/or recommendation and mandatory contractual rules in secondary Community law.

b) Are Directives to be regarded as „mandatory or statutory regulatory provisions“ in the meaning of Art. 1 (2) of Directive 93/13 and/or Art. 30 (3) of the Proposal on Consumer Rights

Art. 1 (2) has been widely discussed after the adoption of Directive 93/13. The ECJ has so far had no chance to interpret its meaning, perhaps aside from *Cofidis*.⁹⁸ The underlying problem is manifold:

- What are mandatory or statutory regulatory provisions? What does „mandatory“ mean? Mandatory in the meaning of mandatory requirements under Art. 30 of the Treaty or mandatory in the meaning of mandatory between two parties? Binding mandatory rules only or also default rules?
- Are such „regulatory provisions“ only national and international regulatory provisions or also European provisions laid down in directives and regulations? Directives are addressed to the Member States. This seems to indicate that Directive 93/13 refers to national regulatory provisions only. However, Member States have agreed in the Council to adopt the sector related Directives, which then have to be translated into national law.
- What happens where the supplier amends, complements or supplements the mandatory rights and duties laid down in the different Directives via standard contract terms?

There is little knowledge available on how the Member States deal with the relationship of „mandatory or statutory regulatory provisions“ and the control of connected standard contract terms in the various fields of regulated markets. The Consumer Law Compendium provides information only on the question whether and to what extent Member States have implemented Art. 1 (2),⁹⁹ but the Compendium does not answer one of the more tricky legal questions as mentioned above.

More information on the applicability of Directive 93/13 to public undertakings is available from a study undertaken by the Institut National de la Consommation (INC) on behalf of the European Commission in 1997.¹⁰⁰ Unfortunately this information is largely outdated as the Member States had to establish competitive markets for electricity, gas, telecommunication, postal services and transport.

⁹⁸ ECJ, 21.11.2002, C-473/00, *Cofidis S.A. v. Jean Louis Fredout*, ECR 2002 I-10875; H.-W. Micklitz, Chapter 3.5., in Micklitz/Reich/Rott, *Understanding EU Consumer Law*, 2009.

⁹⁹ H.-Schulte-Nölke/Ch. Twigg-Flesner/M. Ebers (eds.), *EC Consumer Law Compendium, The Consumer Acquis and its transposition in the Member States*, 2008, 225.

¹⁰⁰ http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/uct02_fr.pdf

Thereby, they had and have transformed public into private law relationships. A new study which would update these findings is urgently needed.¹⁰¹ However, what remains as a major finding from the research deserves to be highlighted and reiterated as it does not yet seem to have lost its overall importance:

„If member States exempt public undertakings, i.e. public service providers from the scope of application of unfair contract terms legislation and regulate the customer supplier relationship in particular sector related regulations, the then defined scope of protection remains behind that what private undertakings have to accord in the open market economy”.

More sophisticated case law can be reported from Germany where the Supreme Court was actively involved in various litigations between consumers and public service suppliers.¹⁰² The bottom line of the argument, developed over decades, might be summed up as follows: it is not for the Court to control, via unfair terms legislation, statutory rules adopted to regulate the relationship between the customer and the supplier. Unfair terms legislation cannot be used to challenge the fairness of regulations adopted by the competent authorities, even if these regulations deviate from the protection standards enshrined in the unfair terms legislation. This is a general finding which is also highlighted in the INC study.¹⁰³

However – if the supplier develops and uses standard terms with similar or identical rights and duties as laid down in the regulations or if the standard terms amend or supplement the regulations – then at least in principle the way is free for the applicability of the unfair terms legislation. This approach seems feasible to circumscribe in broad terms the relationship between „mandatory or statutory regulatory provisions“ and unfair terms legislation.

Even if such an assessment would withstand a deeper comparative analysis, one might wonder whether the current revision of Directive 93/13 does not provide ground for clarifying the relationship between the two sets of rules, the mandatory statutory ones and the standard contract terms.

c) Proposal for clarifying the relationship between mandatory and statutory rules and unfair terms legislation

The INC study was conducted in 1997. The policy the European Commission pursued was very much determined by a sector related approach. The European Commission did not tackle the question on whether the exemption with regard to public undertakings lifted generally but choose a sector-by-sector approach. In hindsight, it is clear that the overall idea was to adopt particular sector related rules which should protect the consumer in the process of deregulation and privatisation. These sector related rules are then complemented by the control of the growing standard terms in the de-regulated and privatised sector via Directive 93/13. The result is a rather complex if not confusing situation in

¹⁰¹ The study launched by the European Commission on consumer protection in energy markets, touches upon contract terms but only in between a series of other issues and only to a limited and not much deepened sense, see G. Bellantuono/Botta, *Energy Regulation and Consumer Interests*,

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120928; G. Bellantuono, *Contratti e regolazione nei mercati dell'energia*, 2009.

¹⁰² See *Münchener Kommentar zum BGB*, § 307 Rdnr. 1-20 (author Kieninger), in more detail, P. Rott/B. Butters, *Öffentliche Versorgungsbedingungen und Vertragsgerechtigkeit im Lichte des Gemeinschaftsrechts*, *VuR* 1999, 107.

¹⁰³ See at page 270.

which mandatory sector related EU rules, aiming at full or minimum harmonisation, overlap with remaining national regulations and general EU unfair terms legislation.

The overall idea here defended is to guarantee the consumer the best level of protection and not to get involved in tricky delineation issues. That is why the Proposal on Consumer Rights should provide for a rule such as this:

Statutory regulatory provisions in community or in national law, as far as it is in compliance with community law, which lay down binding mandatory standards of the rights and duties of the parties are exempted from the scope of application.

Standard contract terms which contain similar or identical provisions as provided for in the statutory regulatory provisions in the meaning of para 1 or which supplement or complement these statutory regulatory provisions are submitted under the scope of application of the unfair terms directive.

In case of a conflict between statutory regulatory provisions in the meaning of para 1, the consumer benefits from the more favourable level of protection regardless of whether these rules are enshrined in statutory regulatory provisions in the meaning of para 1 or in the unfair terms Directive.

IV. Black, Grey Lists and General Clauses – What Approach for a European Yardstick?

The Proposal on Consumer Rights in its published form provides for a three tier structure, a general clause, a grey list and a black list. It thereby reaches beyond the more cautious approaches of the Acquis and the Study Group. Full harmonisation would mean that Member States would be precluded from maintaining or establishing a national list of black or grey clauses side by side with the European black and grey list. In its non-paper,¹⁰⁴ The European Commission has confirmed such a reading of the Proposal on Consumer Rights. Member States should notify relevant national judgments and/or regulatory decisions taken under the general clause to the European Commission. The European Commission would then have the right to initiate via the comitology procedure a debate of the need to extend the existing black or grey list. Due to the strong resistance of the European Parliament the 10.12.2009 version proposes to set aside the notification duty and the comitology procedure, but sticks to the full harmonisation approach.

Both the original Proposal on Consumer Rights and the December version do not spend a single word on the question of what should happen with the abundant case-law which exists in quite a number of Member States. The European Commission seems to start from the premise that the proposed black and grey lists reflect the current state of settled case-law in the Member States. However, the existing lists are in no way based on a comparative analysis of the case-law and an attempt to find a common denominator which would condense the experience and the wisdom of national courts working for

¹⁰⁴ Internal document, distributed by the European Commission in the Council, on file with the author.

decades in this field. Neither the Acquis nor the Study Group provide information on the substantial differences and substantial similarities between national lists and the existing and/or proposed list.¹⁰⁵

In light of the foregoing, the argument is that

- the *general clause* should therefore set only *minimum* standards;
- national and European *grey lists* should stand side-by-side, – this would mean that the case-law of the Member States could be maintained;
- however, a *black list of fully harmonised* unfair contract terms should be set up which summarises and condenses the experience of the Member States.

1. The Control Structure in Directive 93/13, in the Proposal on Consumer Rights and Benchmarks

Directive 93/13 introduced as a minimum standard a general clause combined with an indicative list of unfair terms. The ECJ had not yet had the opportunity to elaborate and shape the control concept, the notion of fairness, the importance of good faith, the interplay between good faith and significant imbalance.¹⁰⁶ The various judgments made clear, however, that it is in principle for the Member States to decide whether a particular contract term in the given circumstances must be regarded as unfair. There is one notable exemption, *Océano*,¹⁰⁷ where the ECJ referred to the indicative list to declare jurisdiction clauses void. This verdict reappears in Art. II – 9:409 DCFR.

The Proposal on Consumer Rights is shaped very much in line with and against the experience of the Unfair Commercial Practices Directive 2005/29,¹⁰⁸ which combines a black list of incriminated practices with different types of general clauses (aggressive, misleading and fairness). However, the UCPD does not provide for a comitology procedure, although the European Commission was advocating for such a mechanism in the legislative process. When it comes down the discussion of the Proposal on Consumer Rights it seems therefore crucial to look at the first experiences with the UCPD in order to overcome possible shortcomings of a similar design for unfair contract terms.

The UCPD turned the then prevailing control logic in Member States“ laws upside down. The black list is meant to clear the market, the general clause, in particular the general fairness test shall only apply under exceptional circumstances. It is a kind of safety net which deals with issues that the incriminated list does not properly handle.¹⁰⁹ The first judgment of the ECJ in *VTB-VAT*¹¹⁰ demonstrates the difficulties with a black list that declares certain practices unfair but leaves room for

¹⁰⁵ All that is made available is information on the existence or non-existence of a black and grey list, but no analysis of the content. Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Full edition, edited by Ch. v. Bar and E. Clive, 2009, Volume I, 663.

¹⁰⁶ Both First National and Bank Charges would have been a major opportunity for clarifying the concept and the structure of unfair terms control in Europe, see under III.3.c).

¹⁰⁷ ECJ, 27.6.2000, C-240/98, ECR 2000 I-4941.

¹⁰⁸ OJ L 149, 11.6.2005, 22.

¹⁰⁹ J. Stuyck/E. Terryn/T. v. Dyck, Confidence through fairness? The new Directive on unfair Business to Consumer Commercial Practices in the internal Market, (2006) Common Market Law Review 141.

¹¹⁰ ECJ, 23.4.2009, C-261/07 *VTB-VAB v. Total Belgium* and C-299/07 *Galatea BVBA v. Sanoma*, nyr; confirmed in ECJ, 14.1.2010, C-304/08, *Zentrale zur Bekämpfung des unlauteren Wettbewerbs v. Plus*, nyr.

judicial interpretation. *VTB-VAT* demonstrates – as well as a series of pending references – that one of the key conflicts over the forthcoming years will be what kind of practices exactly are fully harmonised via the black list and how much leeway remains for Member States in the application of the general clause. The European Commission got full support by the ECJ in *VTB-VAT* for its overall approach where the black list ranks top and where the general clause comes last, but the practical questions resulting from the revised pyramid are far from being resolved.

Not all Member States have yet implemented the UCPD.¹¹¹ Therefore, experience is still limited. My personal reading of the first experience is that the list of 31 incriminated practices serves mostly political purposes, in that on the surface unfair commercial practices are fully harmonised, but that underneath the surface Member States maintain and defend the existing differences in the actual handling of conflicts.¹¹² There are a number of reasons:

- the black list is not really a black list, as it leaves much room for controversial interpretation,
- the European Commission has, contrary to the area of competition law, not developed guidelines for giving meaning to the 31 incriminated practices,¹¹³
- the UCPD lacks any mechanism which would allow the European Commission and the Member States to keep track of the development of the law at the Member States level, via judgments or regulatory actions,
- the UCPD does not provide for a notification duty, at least not in a clearly worded manner,¹¹⁴ neither is there a committee in which the authorities and/or organisations responsible for the enforcement get together and exchange experience.

2. A Differentiated Model: Exhaustive Fully Harmonised Black List, Non-Exhaustive (Minimum Harmonised) Grey List and a (Minimum Harmonized) General Clause on Unfairness

The here proposed differentiated regulatory model takes the experiences of the UCPD, the existing unfair term legislation at the EU and at the Member States level into account. Conceptually it uses the reversed pyramid as the starting point of a modern legislative approach at the European level.

a) Fully harmonised blacklist

The black list will constitute the major regulatory rule which allows for screening the market from contract terms which are so blatantly and so clearly unfair that the circumstances of the case, of the sector, of the contract term, whether the term is subject to individual or collective litigation, do not

¹¹¹ See http://ec.europa.eu/consumers/rights/index_en.htm

¹¹² See now the PhD from B. Kersbilck, *Foundations of Economic Law in Europe, A Harmonised Law of Unfair Commercial Practices and its Interaction with Competition Law After Modernisation*, PhD Leuven, 2010.

¹¹³ There is an implementation guide, but it does not go into details of the black listed practices, http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf at page 53.

¹¹⁴ See Art. 2 (6) in combination with Art. 2 (5).

matter. In this way, the full harmonisation approach deserves support. The clearly black-listed contract terms should under no circumstances and nowhere in the European Community become part of a contract between a supplier and a consumer. This can only be achieved if the revised European Directive *fully* harmonises these contract terms. These terms should be blacklisted throughout the European Community. Without full harmonisation the market screening effect could not be fully realised.

Full harmonisation of black listed terms can only be achieved as far as it is possible to define the standards in such a clear cut way that no deviating interpretation is possible. Without such clear cut interpretation-resistant standards, full harmonisation will remain political fiction.¹¹⁵ However, such clear cut standards would define the ceiling and the floor independent of whether they are declared fully harmonising or minimally harmonising standards. This is due to the fact that the Member States would have no leeway anymore if the requirements of EU law were so specific that higher standards of protection are *per definitionem* not imaginable.

b) Minimally harmonised non-exhaustive grey list

The grey list outlaws those contract terms which are generally assumed to be unfair, but where the illegality depends on legal categories which deserve to be specified according to the sector concerned, according to the type of contract concerned or according to the type of litigation concerned, be it individual or collective. Just to give an example which might help to understand what is meant. A grey list will have to refer e.g. to *reasonable* time periods, *reasonable* information duties, *reasonable* advice, *reasonable* remedies and the like. What reasonableness might mean does not only depend on the *general concrete* circumstances in collective litigation or the *individual concrete* circumstances in individual litigation, the notion of reasonableness is also embedded in the very peculiar national legal rules. The determination of a reasonable time period requires a careful analysis of the legal environment in which the time period and its effects come to bear. The grey list in Annex III of the Proposal, which contains terms which are presumed to be unfair, is full of such notions which need to be concretised.

Therefore grey lists are different from black lists. The differences between the national legal orders matter. *Therefore* full harmonisation is simply not the appropriate approach. Even if the European Commission succeeds in pushing the full harmonisation of grey lists through the legislative machinery, full harmonisation would not lead to a unified standard of protection in the European Community. *Therefore* grey lists can *per se* not be more than minimum standards. Any other reading of grey lists would simply mislead the democratic public.

The consequences of the minimum character of grey lists affect the degree of harmonisation. As grey lists leave room for national deviations, Member States will in practice have different variations of a European grey list. So there will be a European grey list, as defined in the Proposal on Consumer Rights, accompanied by different national variations of the European grey lists. Reasonableness does not have the same meaning in all 27 Member States and in all 27 Member States' legal orders.

¹¹⁵ See for a deeper analysis under IV.3.

c) The minimally harmonised general clause

It is simply a fiction to argue that the introduction of a fully harmonised general clause would lead to a common standard all over Europe. More important and more powerful arguments against full harmonisation result from the necessity to openly recognise the existing diversity in the understanding of what „good faith“ and „significant imbalance“ mean, could, and should mean in 27 Member States.¹¹⁶

The reference to UCPD might again serve as an example. Here, the European Commission relied on full harmonisation, but then had to delineate the notion of fairness, from „taste, „decency“ and „culture“. The relationship between the different categories is highly complicated and far from being clear. The reference to taste, decency and culture allows Member States to exempt certain commercial practices from the scope of application of the UCPD.¹¹⁷ A fully harmonised concept of „fairness in consumer contract law“ raises similar issues, as fairness in contract law is equally related to national differences in legal traditions, in different legal cultures and also to different moral values which influence the national understanding of fairness. A European concept of good faith and significant imbalance in no way clarifies the relationship of „good faith“, of „significant imbalance“ to „moral values“. It might well be that Member States would regard a contract term being in compliance with good faith but being infringing the principle of „bonos mores“.¹¹⁸

d) Safeguard measures

The differentiated model of combining a fully harmonised black list, with a minimally harmonised grey list and a minimally harmonised general clause requires safeguard measures in order to guarantee its workability and feasibility.

There is a need to establish a mechanism under which a prohibited term via a grey list or even via the general clause could be „upgraded“ to the black list. Such a mechanism requires that the European Commission and the Member States, i.e. their competent enforcement bodies, are regularly exchanging information on the ongoing developments in the Member States' legal orders. They need to regularly get together in an organised forum. There is much more needed than a mere notification duty of all final judgments and/or regulatory actions of national competent authorities to the European Commission. All parties concerned need to develop a spirit of co-operation which is guided by the idea of realizing the best possible protection of consumers – despite the existing and the remaining differences in national legal orders. This can only be achieved by the establishment of a committee composed of national enforcement authorities, along the line of Regulation 2006/2004. The said Regulation had to find a mechanism of how to handle the problem that not all Member States are

¹¹⁶ C. v. Dam, Who is Afraid of Diversity? Cultural Diversity, European Co-operation, and European Tort Law, (2009) 20 KLJ 281.

¹¹⁷ H.-W. Micklitz, Das Konzept der Lauterkeit in der Richtlinie 2005/29/EG, Liber Amicorum Bernd Stauder, Droit de la Consommation/Konsumentenrecht/Consumer Law (Hrsg.), L. Thévenoz/N. Reich, 2006, 297.

¹¹⁸ A promising example for supposedly different interpretations is a recent judgment of the German Supreme Court, 25.11.2009 – VIII ZR 318/08, which upheld the consumer right to withdrawal although the contract violated the principle of bonos mores, M. Schirmbacher, Kommentar, BB 2010, 273. Similar issues could easily arise in the field of unfair terms.

putting the enforcement of consumer law in the hands of Member States' authorities.¹¹⁹ The authorities designated under Regulation 2006/2004 could be understood as enforcement authorities in the meaning of the Directive on Consumer Rights. The committee should only have an advisory function. It should provide for a common platform where information can be exchanged in order to enhance co-operation.

The European Commission shall develop guidelines on how the terms enshrined in the black and grey list should be understood.

The European Commission shall be assisted by an advisory committee under Art. 3 Decision 1999/468 of represent actives of national enforcement authorities. The Committee shall examine all matters relating to the application of this Directive, either on its own initiative or at the request of the representative of a Member State.

3. *Examples on Clauses Qualifying as „Black” Throughout the EU*

The revised Proposal on Consumer Rights of December 2009 contains six contract terms which shall be unfair in all circumstances. The following analysis is not meant to be complete. It is only meant to highlight how a black list should be drafted in order to comply with the above mentioned requirements – crystal clear and without room for interpretation by national courts or even by the ECJ.

Lit a) prohibits the restriction of liability of the trader for death or personal injury caused to the consumer. It is in line with Annex 1 lit a) of Directive 93/13. Such a clause is a perfect example of how a clear cut prohibition should look like. It defines a standard which is common throughout the European Community.

Lit aa) prohibits the restriction of liability of the trader for damages to the property through intent and gross negligence. This term is equally clear, but it raises doubts as to its content. Does lit aa) imply that the trader is allowed under all circumstances to exclude liability to any degree of responsibility below gross negligence? Or are Member States allowed to refer to the general clause to test whether the trader may nevertheless be liable under more particular circumstances? And what does gross negligence mean? Is there a common understanding of gross negligence throughout the European Community? At the very least lit aa) requires clarification in two directions:

- with regard to the applicability of a general clause for all types of exclusion clauses below gross negligence,
- with regard to the definition of gross negligence, although one might wonder whether such a classification is possible at all.¹²⁰

Lit c) prohibits terms which „exclude or hinder the consumers right to take legal action or exercise any other remedy, particularly by requiring the consumer to take disputes not covered by legal provisions exclusively to arbitration“. It slightly revises lit q) of the Annex to Directive 93/13.

Lit c) as it stands refers to two types of contract terms which raise much concern in consumer policy and law: jurisdiction and arbitration clauses. A deeper look into the field discloses that the term is not

¹¹⁹ See S. Kaye, Regulation EC 2006/2004 on Consumer Protection-Co-operation, in G. Howells/A. Nordhausen/D. Parry/Ch. Twigg-Flesner (eds.), *The Yearbook of Consumer Law*, 2007, 417.

¹²⁰ See here the work of ECTIL, European Centre of Tort and Insurance Law, <http://www.ectil.org/>

black at all as it leaves room for interpretation. The ECJ declared jurisdiction clauses unfair in *Océano*¹²¹ but refrained from doing the same with arbitration clauses in *Mostaza Claro*.¹²² The two judgments demonstrate that the wording – which is identical – leaves room for interpretation in a particularly sensitive field. Jurisdiction clauses are prohibited although they are not mentioned. Arbitration clauses are not prohibited although they are mentioned. Lit q) in the meaning given to it by the ECJ paved the way for an extremely heterogeneous practice in the Member States. Arbitration clauses are in some Member States prohibited, in others they are permitted.¹²³ So in fact the proposal is hammering down a practice which is not black at all, as arbitration clauses are not prohibited under all circumstances and in all Member States. What is such a term all about? What does it serve? The problem is that lit q) leaves too much room for interpretation, as could easily be demonstrated. The options are the following:

- to shift lit c) from the black list to the grey list and leave it there,
- to clearly state in the black list that contract terms are prohibited which „*exclude or hinder the consumer's right to take legal action via jurisdiction or arbitration clauses*“.

Lit d) declares unfair terms as „*restricting the evidence available to the consumer or imposing on him a burden of proof, which, according to the applicable national law, should lie with the trader.*“ Such a verdict cannot set common standards for Europe as a whole. The rules on evidence and burden of proof are not harmonised in European consumer law, at least not at a general level. Sometimes directives contain rules on the burden of proof such as the one in Directive 93/13 which obliges the trader to provide evidence that the terms have been negotiated individually. Common standards, even common minimum standards, are missing in the highly sensitive field of product liability law.¹²⁴ So what lit d) actually achieves, at the very best, is that national rules on evidence and burden of proof cannot be ruled out in standard terms. This, however, is not to be equated with blacklisting contract terms European wide.

Lit e) prohibits the granting of the right to determine „*whether the goods or services supplied are in conformity with the contract*“¹²⁵ or the exclusive right „*to interpret any term of the contract*“ to the trader. Lit e) deals with two entirely different situations. The first links the blacklisting to conformity rules. Conceptually such a link makes sense provided the rules on consumer warranties and guarantees in sales contracts are fully harmonised. We have argued elsewhere that the former Directive 99/44 on

¹²¹ ECJ, 27.6.2000, C-240/98, ECR 2000 I-4941.

¹²² ECJ, 26.10.2006, C-168/05, ECR 2006 I-10421.

¹²³ N. Reich, Negotiation and Adjudication. Class Actions and Arbitration Clauses in Consumer Contracts, in F. Cafaggi/H.-W. Micklitz, *New Frontiers in Consumer Protection*, 2009, 345; R. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, *The Journal of American Arbitration* 2002, 1; same author, *The Future of Consumer Law in the US – Arbitration and the Destruction of Common Law*, University of Houston Public Law and legal Theory Series 2008-A-09; with regard to then existing smalls claims procedures.

¹²⁴ On the differences in the Member States, U. Magnus/H.-W. Micklitz, *Liability for the Safety of Services*, 2006; S. Whittaker, *Burden of Proof in the Consumer Acquis and in the Draft Common Frame of Reference: Law, Fact and Things in Between*, 2008, *European Review of Contract Law*, 411.

¹²⁵ See on the difficulties with regard to consumer sales and Directive 99/44 S. Whittaker, *Unfair Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of 'Full Harmonisation'*, *ERCL* 2009, 223, 241.

consumer sales could not be an appropriate target for full harmonisation.¹²⁶ If, however, European consumer sales law provides for minimum standards only, the blacklisting of terms such as those coming under the first variant of lit e) does not make sense, as Member States are allowed to provide for deviating standards. The situation is even more complex with regard to contracts of services. Here, no European standards regarding the conformity of products exist. What shall be fully harmonised then and what shall the yardstick be? National laws on conformity? It might be worth recalling that the first draft on unfair contract terms in consumer contracts contained a similar clause to lit e) which then triggered the elaboration of Directive 99/44 on consumer sales. This version aimed at prohibiting the exclusion of warranties in sales contracts without there being European rules on contractual remedies against defective products.¹²⁷

The second constellation raises different questions. What can be the added value of such a blacklisted term? At first hand sight, it seems blatantly unfair if the trader reserves the right to unilaterally interpret a contract term. In this way, such a practice could and should indeed be blacklisted. The true importance of such a term, however, becomes clear only if the term is put in the context in which it applies, e.g. the respective business sector, or e.g. the respective strategies of certain traders. Blacklisting such terms might come near to what I have termed „phantom control“. It does not cause harm, but its practical effects are limited.

Art. 31 (3) prohibits pre-ticketing: „If the trader has not obtained the consumers express consent but has inferred it, by using default options, which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment“. This verdict could easily be generalised and integrated into the blacklist. Therefore, the black list should be amended accordingly. What cannot be solved via a black list is the compensation or reimbursement issue. Whilst such an obligation as foreseen in Art. 31 (3) and indeed deserves support, it touches upon on a much more general issue, one which requires utmost attention far beyond pre-ticketing – the restitution of the ill-gotten gains resulting from the use of unfair terms.

V. Skimming off Benefits Resulting from the Use of Unfair Contract Terms?

So far the Directive as well as the Proposal on Consumer Rights provides for an action of injunction, without clearly saying what an action of injunction means and without clarifying whether the action of injunction should become the only remedy under the full harmonisation approach or whether Member States are free to go beyond it. In light of the Member States' competence under the Treaty to enforce EU law, it is hard to imagine that Art. 41 of the Proposal on Consumer Rights is meant to fully harmonise collective remedies in the field of unfair terms.

The other and more interesting question is whether the Proposal on Consumer Rights should not be extended beyond injunctions to allow either public authorities and/or consumer organisations to skim-off the benefits which result from unfair contract terms. An example might illustrate what is meant: The German Supreme Court declared that certain bank charges violate the unfair terms act and were void. In the aftermath of the judgment, which was filed by a consumer organisation, the question arose as to how it could be ensured that the banks reimburse the costs they had illegally charged to

¹²⁶ H.-W. Micklitz/N. Reich, *Crónica de una muerte anunciada: The Commission Proposal for a 'Directive on Consumer Rights'*, *Common Market Law Review*, 47 (2009) 471, similar S. Whittaker, *Unfair Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of 'Full Harmonisation'*, *ERCL* 2009, 223, 241.

¹²⁷ OJ C 243, 28.9.1990, 2.

consumers. As German law did not know, and indeed does not yet know, a collective remedy in the field of unfair terms which allows for taking collective action, consumers had to contact their bank individually in order to get the money back. Not surprisingly, only a few of consumers pursued their rights and the bank could in practice keep the profit which resulted from the use of the unfair term. A second example is provided by the Proposal though in an individualised form. Illegal pre-ticketing enables the consumer to claim reimbursement of the payment he/she made e.g. for a travel insurance.

The question is whether to introduce into EU law a right of collective action which reaches beyond injunction, which further has to be put into the context of the EU initiatives to establish collective actions to the benefit of consumers.

1. State of Affairs of EU Initiatives on Collective Actions in Antitrust and Consumer Law

Courage, decided 2001¹²⁸ and confirmed 2006 in *Manfredi*,¹²⁹ placed the European Commission in a prominent position. It accepted the invitation of the ECJ and launched a study aimed at investigating the rights and remedies that Member States' laws provide for private enforcement of *antitrust injuries*. The so-called *Ashurst* study, conducted in 2004,¹³⁰ revealed that private enforcement in the vast majority of Member States fell largely by the wayside. The study found, and the European Commission reiterated the finding, that national legal systems are largely deficient when it comes to private enforcement. On the 19 December 2005, the European Commission adopted a Green Paper on damages actions for breach of the EC antitrust rules,¹³¹ which was followed on the 2 April 2008 by the White Paper on Damages Actions for Breach of the EC Antitrust Rules.¹³² The justification for the proposed action was taken from a study that analysed the possible impact of private law enforcement in antitrust law.¹³³ In June 2009 a Proposal for a Council Directive on rules governing damages actions for infringements of Articles 81 and 82 was leaked to the press, which transposed the Green and White Paper into a coherent concept. It provided for an opt-out representative action and an opt-in group action which seems to reflect some kind of minimum consensus in the academic debate, not only in consumer law circles.¹³⁴ The public awareness provoked, the obviously intended, strong reactions of some of the Member States. There were even rumors that Member States made the reelection of *Baroso* contingent upon the withdrawal of the proposal. Since then nothing has happened. The future of a Community action is uncertain.

In *consumer law* the starting point is different. Here, no bold ECJ judgment(s) triggered Community action, but rather steadily growing regulatory activities of the Member States, which have adopted or intend to adopt collective redress mechanisms in the field of consumer law, stimulated action.¹³⁵ In a

¹²⁸ ECJ, 20.9.2001, C-453/99, *Courage*, ECR 2001 I-6297.

¹²⁹ ECJ, 13.7.2006, Joined Cases C-295-298/04, *Manfredi*, ECR 2006 I-6619.

¹³⁰ <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>

¹³¹ COM (2005) 672 final and SEC (2005) 1732 Staff Working Paper.

¹³² COM (2008) 165 final, 2.4.2008 and SEC (2008) 404-406.

¹³³ Renna/Peysner/Riley/van den Bergh/Keske/Pardolesi/Camili/Caprile, Making anti-trust damages actions more effective in the EU: welfare impact and potential scenarios, report submitted to the European Commission on 21. December 2007.

¹³⁴ See in particular the contributions of Wagner, Howells and Roth, all in Casper/Janssen/Pohlmann/Schulze (Hrsg.), *Auf dem Weg zu einer europäischen Sammelklage?*, 2009, 41, 97, 109,

¹³⁵ See for an up-to-date analysis, the national reports prepared for the Centre for Socio-Legal Studies,

first step the European Commission launched two studies in 2008, one on the „Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union“, focusing specifically on collective redress in the EU.¹³⁶ It evaluates the effectiveness and efficiency of existing collective redress mechanisms and assesses whether consumers suffer a detriment in those Member States where collective redress mechanisms are not available. It also examines the existence of negative effects for the Single Market and distortions of competition. The other study focused on „the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems“. ¹³⁷ In a second step the European Commission presented its Green Paper on Consumer Collective Redress, which takes the findings of the two studies into account.¹³⁸ The Green Paper is seeking advice on four options: no action, co-operation between the Member States, a mix of policy instruments and judicial collective redress procedures. There is as yet no White Paper. The European Commission seems to consider a policy mix as preferential, in which collective ADR mechanisms play a role¹³⁹ and where public authorities might be given the competence to combine administrative sanctions against consumer law infringements with the collective compensation of consumers. The latter conclusion is openly addressed in the 2008 report on the application of the Directive on Injunctions.¹⁴⁰

2. *A Separate Initiative in the Proposal on Consumer Rights on Skimming-Off Procedures? Yes!*

The future of the activities in the field of antitrust law is uncertain. Even if a proposal will be published in due course it will deal, at the very best, with skimming off mechanisms in antitrust law but in all probability not in unfair commercial practices or unfair contract terms. Whether the initiative in consumer law will lead to concrete proposals of the European Commission, which explicitly deal with skimming off procedures in the field of unfair terms, is subject to speculation.

The revision of the Proposal on Consumer Rights and the political decision to integrate into the Proposal on Consumer Rights collective remedies at least in the form of an action for injunction – the much more convincing approach would be to elaborate a horizontal directive on collective actions in the field of consumer law which regulates inter alia the action for injunction – allows for the unique opportunity to open the door to collective action through a relatively minor change of the wording of the current Art. 41.

http://www.csls.ox.ac.uk/european_civil_justice_systems.php

¹³⁶ http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf

¹³⁷ http://ec.europa.eu/consumers/redress_cons/docs/finalreport-focusgroup2-final.pdf

¹³⁸ COM (2008) 27.11.2008 794 final; see Fairgrieve/Howells, ICLQ, 2009, 379.

¹³⁹ For an understanding of what is behind see Viitanen, in Casper/Janssen/Pohlmann/Schulze (Hrsg.), 2009, 219.

¹⁴⁰ COM (2008) yyy final, http://ec.europa.eu/consumers/enforcement/docs/report_inj_en.pdf and Ch. Hodges, 2008.

- a) The first step: reinstall the wording of Art. 7 Directive 93/13 to guarantee an action of injunction as the minimum standard of protection

The current highly deficient wording of Art. 41 of the Proposal should be brought into line with the former Art. 7 (1), (2) and (3) of Directive 93/13. Art. 41 neither defines the objective of the individual nor the collective action nor does it cover economic actors which recommend the use of unfair terms.

As Art. 41 stands at this stage, it cuts back the level of protection for consumers in Europe considerably, maybe inadvertently. But the effect of Art. 41 would be that the leeway for Member States in what they understand to be „adequate and effective“ will be widened and that the action of injunction will no longer be the minimum standard for collective action in Europe. It is hard to understand how a project, which intends to improve the rights of consumers in the name of full harmonisation, devotes so little attention to the most important dimension of collective actions.

Art. 7 of Directive 93/13 runs as follows (the parts in italics are completely missing in the current Art. 41):

1. Member States shall 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.
2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision *as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.*
3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.

- b) The second step: extending Art. 7 Directive 93/13 and Art. 41 Proposal so as to cover ill-gotten gains

Once Art. 7 is reinstalled, a minor amendment could produce far reaching effects, in line with the enforcement structure set up by the Directive and in line with the principle of procedural autonomy which would give the Member States space and freedom to shape and elaborate the details of how the ill-gotten gains could be skimmed off. EU law should not go into details here, but just set the standard to be applied in the Member States.

- 1 Member States shall 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 *as well as to recover ill-gotten gains resulting from terms which have been declared unfair.*
2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may

take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms, *as well as to recover ill-gotten gains resulting from terms which have been declared unfair.*

VI. Conclusions and Recommendations

A deeper analysis of the Proposal reveals that the European Commission is guided by only one idea – to transform minimum into maximum standards. The European Commission is not prepared to accept that the regulation of unfair terms touches upon different conceptual issues in national private legal orders which require a deep and careful analysis. As it stands the Proposal defines a set of „minimum“ standards for consumer protection in the field of unfair contract terms legislation. The truly crucial issues of consumer protection, so controversially debated in theory and practice, are simply set aside. Whatever the Proposal might be, it is certainly not a substantial step forward in unfair contract terms legislation. It is the attempt to set the minimum compromise in stone. One might argue that such a block of fully harmonised rules would do no harm to consumer protection, as long as Member States remain free to regulate unfair terms outside the scope of the block legislation. However, such a conclusion is misleading and even dangerous as it neglects all problems which would result from the unforeseeable impact of fully harmonised rules on national contract law.

It is to be hoped that the final outcome of this exercise will not be fully harmonised European unfair terms legislation. Even with regard to a set of blacklisted terms, full harmonisation is not really needed. A set of terms clearly worded and prohibiting certain terms would and could lead to market clearance independent of whether the said rules are defined as minimum or maximum standards. They would simply constitute the ceiling and the floor of the EU level of protection. Member States would have no leeway for deviating standards, as long as the terms are unequivocally worded. One might therefore hope that the wisdom of all those involved in the legislative machinery will prevail over the short-sighted perspective of full harmonisation. Minimum harmonisation should be brought back on the agenda. Then the Proposal would not cause harm, although one might wonder whether it is needed at all, as it does not bring about substantial changes to Directive 93/13. What is really needed is a serious attempt to critically evaluate the pros and cons of decades of experience in the Member States at a comparative level, in order to define a set of rules which can claim to be apt in dealing with the most prominent issues of unfair terms legislation in Europe.

Bibliography

- R. Alderman, *The Future of Consumer Law in the US – Arbitration and the Destruction of Common Law*, University of Houston Public Law and legal Theory Series 2008-A-09
- R. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, *The Journal of American Arbitration* 2002, p. 1
- A. Bakardjeva, *Fair Trading in Flux? National Legacies, Institutional Choice and the Progress of Europeanisation*, PhD Thesis Stockholm 2003
- Ch. von Bar/E. Clive, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Full edition, Volume I*, 2009
- J. Basedow, in L. Tichy/J. Terhechte (eds.), forthcoming 2010.
- G. Bellantuono, *Contratti e regolazione nei mercati dell'energia*, 2009
- E. Brandner/P. Ulmer, *The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EEC Commission*, *CMLRev.* (1991), p. 647
- S. Bright, *Winning the battle against Unfair Terms*, 2000 (20) *Journal of the Society of Public Teachers of Law*, p. 331
- F. Bultmann, *Verklagen oder Verhandeln*, 1995
- F. Cafaggi, *Private Regulation in European Private Law*, *RSCAS* 2009/31
- J. Calais-Auloy, *Collectively Negotiated Agreements: Proposed Reforms in France*, *JCP* 1984, p. 115
- J. Calais-Auloy/J. Steinmetz, *Droit de la Consommation*, 6ed. 2003
- M. Casper/A. Janssen/P. Pohlmann/R. Schulze (Hrsg.), *Auf dem Wege zu einer europäischen Sammelklage?*, 2009
- H. Collins (ed.), *Standard Contract Terms in Europe, A Basis for and a Challenge to European Contract Law*, 2008
- H. Collins, *The Freedom to Circulate Documents: Regulating Contracts in Europe* (2004) 10 *European Law Journal*, p. 787
- C. v. Dam, *Who is Afraid of Diversity? Cultural Diversity, European Co-operation, and European Tort Law*, (2009) 20 *KLJ*, p. 281
- J. Dickie, *Article 7 of the Unfair Terms in Consumer Contracts Directive*, *Consumer Law Journal* 4 (1996), p. 112
- D. Fairgrieve/G. Howells, *Collective Redress Procedures-European Debates*, *ICLQ*, 2009, 379.

- H. Heinrichs, Der Anhang zur EG-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen (93/13/EWG) und seine Bedeutung für das Deutsche Recht, in L. Krämer/H.-W. Micklitz/K. Tonner (eds.), *Liber Amicorum für Norbert Reich, Recht und diffuse Interessen in der Europäischen Rechtsordnung*, 1997, p. 525
- Ch. Hodges, *The Reform of Class and Representative Actions in the European Legal System, A new Framework for Collective Redress in Europe*, 2008
- G. Howells, *The Potential and Limits of Consumer Empowerment by Information*, *Journal of Law and Society*, 2005
- S. Kaye, Regulation EC 2006/2004 on Consumer Protection-Co-operation, in G. Howells/A. Nordhausen/D. Parry/Ch. Twigg-Flesner (eds.), *The Yearbook of Consumer Law*, 2007, p. 417
- D. Kennedy, *The New Law and Economic Development*, 2006
- B. Kersbilck, *Foundations of Economic Law in Europe, A Harmonised Law of Unfair Commercial Practices and its Interaction with Competition Law After Modernisation*, PhD Leuven, 2010
- M. B. M. Loos, *Review of the European Consumer Acquis*, 2008
- U. Magnus/H.-W. Micklitz, *Liability for the Safety of Services*, *VIEW Schriftenreihe, Band 21*, 2006
- R. Micheals/N. Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, *AJCL* 2007, p. 843
- H.-W. Micklitz, *VTB v. Sanoma – Vollharmonisierung im Lauterkeitsrecht*, *VuR* 2009, p. 110
- H.-W. Micklitz, *The Service Directive – The making of consumer contract law via standardisation, the example of the Service Directive*, in *Festschrift für G. Brüggemeier*, 2009, p. 483
- H.-W. Micklitz, *Some Considerations on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts*, in H. Collins (ed.), *Standard Contract Terms in Europe, A Basis for and a Challenge to European Contract Law*, 2008, p. 19
- H.-W. Micklitz, *Judgment of the House of Lords of 25 October 2001, The General of Fair Trading v First National Bank plc, (2001) UKHL 52*, *European Review of Contract Law*, Vol. 2 (2006) No. 4, p. 471
- H.-W. Micklitz, *Das Konzept der Lauterkeit in der Richtlinie 2005/29/EG*, *Liber Amicorum Bernd Stauder, Droit de la Consommation/Konsumentenrecht/Consumer Law*, L. Thévenoz/N. Reich (Hrsg.), 2006, p. 297
- H.-W. Micklitz, *Bauverträge mit Verbrauchern und die VOB Teil B, Zur Bedeutung der Richtlinie 93/13/EWG über missbräuchliche Klauseln in Verbraucherverträgen*, *Schriftenreihe des Verbraucherzentrale Bundesverbandes zur Verbraucherpolitik*, Band 2, 2005
- H.-W. Micklitz/M. Radeideh, *CLAB-Europe – The European database on unfair terms in consumer contracts*, *JCP* 2005, pp. 325-360
- H.-W. Micklitz/N. Reich, *Crónica de una muerte anunciada: The Commission Proposal for a 'Directive on Consumer Rights'*, *Common Market Law Review*, 47 (2009), p. 471

- H.-W. Micklitz/N. Reich/P. Rott, *Understanding EU Consumer Law*, 2009
- H.-W. Micklitz/P. Rott/U. Docekal/P. Kolba, *Verbraucherschutz durch Unterlassungsklagen, Rechtliche und Praktische Umsetzung der Richtlinie Unterlassungsklagen 98/27/EG in den Mitgliedstaaten*, VIEW Schriftenreihe, Band 17, 2007
- N. Reich, *Negotiation and Adjudication. Class Actions and Arbitration Clauses in Consumer Contracts*, in F. Cafaggi/H.-W. Micklitz, *New Frontiers in Consumer Protection*, 2009, p. 345
- N. Reich/H.-W. Micklitz, *Europäisches Verbraucherrecht*, 4. Auflage, 2003
- N. Reich/H.-W. Micklitz, *Unfair Terms in the Draft Common Frame of Reference Comments on the Occasion of the Tartu Conference on Recent Development in European Private Law*, *Juridica International, Law Review*, University of Tartu, 2008, p. 58
- P. Rott/B. Butters, *Öffentliche Versorgungsbedingungen und Vertragsgerechtigkeit im Lichte des Gemeinschaftsrechts*, *VuR* 1999, p. 107
- P. Rott/E. Terryn, *The Proposal for a Directive on Consumer Rights*, *ZEuP* 2009, p. 456
- H. Schebesta, *Does the National Court Know European Law? – A note of ex officio Application after Asturcom*, to be published in *ERPL* 2010
- M. Schirnbacher, *Kommentar zu VIII ZR 318/08 v. 25.11.09*, *BB* 2010, p. 273
- H. Schulte-Nölke, *The Potential Impact of the Consumer Rights Directive on the Member States Contract Law, side effects on the Member States general contract laws or general sales laws*, European Parliament, Director General of Internal Policies, 2009
- H. Schulte-Nölke/Ch. Twigg-Flesner/M. Ebers (eds.), *EC Consumer Law Compendium, The Consumer Acquis and its transposition in the Member States*, 2008
- J. Stuyck/E. Terryn/T. van Dyck, *Confidence through fairness? The new Directive on unfair Business to Consumer Commercial Practices in the internal Market (2006)* *Common Market Law Review*, p. 141
- G. Teubner, *Recht als autopoetisches System*, 1989
- K. Tonner/M. Tamm, *Der Vorschlag einer Richtlinie über Rechte der Verbraucher und seine Auswirkungen auf das nationale Recht*, *JZ* 2009, p. 277
- P. Ulmer/E. Brandner/H.-D. Hensen, *AGB-Recht, Kommentar zu den §§ 305-310 BGB und zum UKlaG*, 10. Auflage, 2006
- VKI (Verein für Konsumenteninformation) *Sammelklagen in Österreich, Praktische Erfahrungen – Ökonomische Analyse – Meinungsumfrage*, 2008
- St. Weatherill, *Who is the average consumer*, in St. Weatherill/U. Bernitz (eds.), *Regulation of Unfair Commercial Practices under the EC Directive 2005/29 – New Rules and New Techniques*, 2007, p. 115

- S. Whittaker, Unfair Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of 'Full Harmonisation', ERCL 2009, p. 223
- S. Whittaker, Burden of Proof in the Consumer Acquis and in the Draft Common Frame of Reference: Law, Fact and Things in Between, 2008 European Review of Contract Law, p. 411
- S. Whittaker, Judicial Interventionism and Consumer Contracts (2001) 117 Law Quarterly Review, p. 215
- S. Whittaker, Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract (2000) 116 Law Quarterly Review, p. 95
- A. Zielinski, Komentarz do Kodeksu Postepowania Cywilnego, 2008

