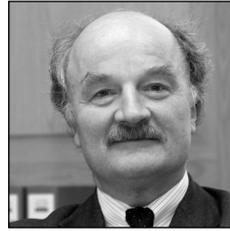


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# Unfair Terms in the Draft Common Frame of Reference

(Comments on the Occasion of the Tartu Conference  
on Recent Development in European Private Law)

## 1. The starting point: Mandatory rules on unfair terms based on directive 93/13/EEC

### 1.1. Some remarks on directive 93/13

Common EU rules on unfair terms will always be based on the well-known directive 93/13/EEC, which will not be analysed in detail in the present limited context.<sup>\*1</sup> The directive contains a mandatory, minimum, internationally applicable instrument of ‘horizontal’ consumer protection, which must be implemented in due form and applied consistently by the Member States and their courts of law in respecting this protective ambit, as interpreted by the ECJ.<sup>\*2</sup>

As will be remembered, this directive, which was a compromise between German and French concepts<sup>\*3</sup>, is currently subject to the review of the consumer *acquis* by the European Commission.<sup>\*4</sup> Several questions have been put to the stakeholders, which have given different answers.<sup>\*5</sup> The questions to be reviewed are many, more than in the European Commission paper. Among them are the following:

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<sup>1</sup> OJ L 95, 21.04.1993, pp. 29–34.

<sup>2</sup> ECJ case C-144/99 (Commission v. Netherlands). – ECR 2001, I–3541.

<sup>3</sup> H.-W. Micklitz, N. Reich, P. Rott. *Understanding European Consumer Law*. Intersentia Antwerp 2008, paragraphs 3.2–3.4.

<sup>4</sup> Green Paper on the Review of the Consumer *Acquis* COM(2006) 744 final of 8.02.2007; see the critical evaluation by H.-W. Micklitz, N. Reich. *Europäisches Verbraucherrecht – Quo vadis? (Überlegungen zum Grünbuch der Kommission zur Überprüfung des gemeinschaftlichen Besitzstandes im Verbraucherschutz v. 8.02.2007)*. – *Verbraucher und Recht (VuR)* 2007, p. 121; Chr. Twigg-Flesner. *No Sense of Purpose or Direction? The Modernisation of European Consumer Law*. – *European Review of Contract Law (ERCL)* 2007, p. 198.

<sup>5</sup> Undated and unpublished Commission Staff Working Paper: Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer *Acquis*; see for a full analysis of the responses M. B. M. Loos. *Review of the European Consumer Acquis*. Sellier 2008, p. 40.

- Should an amended and ‘modernised’ version of the directive be limited to consumer transactions or be extended to ‘mixed contracts’, to contracts with (non-professional) legal persons<sup>6</sup>, to transactions with small and medium undertakings (SMU) or perhaps to all B-to-B and C-to-C contracts? It should be remembered that new Member States have used their discretion in this field very extensively.<sup>\*7</sup>
- What is the decisive yardstick for control, always respecting the principle of freedom of contract, as seen with German law’s concept of *Allgemeine Geschäftsbedingungen* (AGB) — standard business terms imposed on the other party — or the unbalanced contract negotiation via *contrats d’adhésion* between the *non-professionnel* and the *professionnel* as in French law<sup>\*8</sup>, which would include also ‘terms not individually negotiated’, as in directive 93/13 but limited to specific persons in need of protection, like consumers? The EU consultation paper on the review of the consumer *acquis* even asks whether the “discipline of unfair contract terms should also cover individually negotiated terms”<sup>\*9</sup>.
- How could AGB respectively terms not individually negotiated become part of a contract? This concerns the question of controlling the inclusion (*Einbeziehungskontrolle*) covered by directive 93/13 only indirectly in clause 1 lit. i of the annex of the ‘indicative list’ whereby terms “irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract” may be regarded as unfair?
- What is the content of the principle of good faith in article 3? Should a procedural understanding as in UK law<sup>\*10</sup> or a substantive approach as applied in Germany<sup>\*11</sup> be preferred? What is the (limited!) harmonising role of the ECJ<sup>\*12</sup>?
- What exceptions should be made to the substantive scope of application?
- What is the importance of (lack of) transparency of AGB or terms not individually negotiated?<sup>\*13</sup>
- Will there be a ‘grey list’ or blacklist setting forth terms that should normally be regarded as unfair? As will be remembered, article 3 (3) contains an annex with what is called an indicative, non-exhaustive list of terms that “may be regarded as unfair”; Member States do not have a formal obligation of implementation.<sup>\*14</sup>
- What is the impact of an unfair term on an individual contract? Is a national court under a duty to raise questions of unfairness on its own initiative, despite the procedural autonomy of Member States?<sup>\*15</sup> Is this limited only to B-to-C situations, which is the starting point of the existing case law of the ECJ, or can it be extended to any type of contracting, including those involving a business? What about abstract proceedings?<sup>\*16</sup>
- What about different standards of interpretation with regard to the use of terms not individually negotiated or AGB in individual and collective proceedings, as addressed by article 5’s sentences 2 and 3, and as confirmed by the ECJ?<sup>\*17</sup> Is the distinction justified?<sup>\*18</sup>
- Finally, more generally, what shall be the role of collective proceedings? Is it possible and feasible to separate enforcement by way of injunctive relief from the material law? Directive 93/13/EC combines the two and has considerably enhanced the level of consumer protection by obliging Member States to establish public agencies and/or to grant consumer organisations standing to file an action for injunction.

<sup>6</sup> ECJ case C-541/99 (*Cape Snc. v. Idealservice*). – ECR 2001, I-9049. It takes a narrow interpretation of the consumer concept by excluding legal person, even if working on a non-profit basis.

<sup>7</sup> H. Schulte-Nölke (ed.). *Consumer Law Compendium*. Munich: Sellier 2007, p. 677 ff.; N. Reich. *Unfair Terms in the Contract Law of New EU Member Countries — The Example of the Baltic States, Hungary and Poland*, *Contemporary Issues of Law 2006*, 1, based on a preceding study on “Transformation of Contract Law and Civil Justice in the New EU Member Countries”. – F. Cafaggi (ed.). *The Institutional Framework of European Private Law*, *Collected Courses of the Academy of European Law*. Oxford University Press 2006, pp. 271–302.

<sup>8</sup> J. Calais-Auloy, F. Steinmetz. *Droit de la Consommation*. 7ème edition. Dalloz 2006, pp. 195–213.

<sup>9</sup> *Supra* Note 5 at p. 18.

<sup>10</sup> *Director General of Fair Trading v. First National Bank* [2002] 1 Appeal cases (AC) 481; see H.-W. Micklitz. *The Politics of Judicial Cooperation*. Cambridge University Press 2005, p. 418.

<sup>11</sup> H.-W. Micklitz, N. Reich, P. Rott (Note 3), p. 3.1.

<sup>12</sup> ECJ case C-237/02 (*Freiburger Kommunalbauten v. Hofstetter*). – ECR 2004, I-3403. See the opinion of AG Geelhoed.

<sup>13</sup> H.-W. Micklitz, N. Reich, P. Rott (Note 3), paragraphs 3.16–3.18.

<sup>14</sup> ECJ case C-478/99 (*Commission v. Sweden*). – ECR 2002, I-4147; see EC Commission paper *supra* Note 4 at p. 18.

<sup>15</sup> ECJ case C-168/05 (*Elisa Maria Mostaza Claro v. Centro Movil Milenium SL*). – ECR 2006, I-10421; see N. Reich. *More clarity after Claro?* – ERCL 2007, p. 41.

<sup>16</sup> ECJ case C-473/00 (*Cofidis v. Jean Louis Fredout*). – ECR 2002, I-10875.

<sup>17</sup> ECJ case C-144/79 (*Commission v. Netherlands*). – ECR 2001, I-3541, p. 20.

<sup>18</sup> H.-W. Micklitz § 13.23. – N. Reich, H.-W. Micklitz. *Europäisches Verbraucherrecht*. Nomos Baden-Baden 2003.

## 1.2. Proposals of the Acquis Group

Some of these questions had been on the agenda of the Acquis Group.<sup>\*19</sup> It decided to mostly reproduce the wording and structure of the directive as basically a consumer protection instrument as interpreted by the ECJ, with some interesting modifications:

- The concept of the consumer is extended in article 1:201 to “any natural person who is **mainly** [emphasis added — N.R.] acting for purposes that are outside this person’s business activity”, thus partially avoiding the problems of ‘mixed contracts’ that the ECJ created in Gruber by its narrow reading of the concept of consumer contracts according to article 13 of the Brussels Convention.<sup>\*20</sup>
- Chapter 6, on ‘Non-negotiated Terms’, contains general rules on both the terms not individually negotiated and AGB, also including B-to-B transactions, with special rules pertaining to consumer contracts.
- Article 6:201 contains a rule on ‘inclusion of terms’ (with the ‘attention-drawing’ principle, including special provisions according to which consumers must have a “real opportunity to become acquainted before the conclusion of the contract”), based on different sources of secondary law and comparative law material.<sup>\*21</sup>
- Article 6:301 (1) includes the unfairness principle known from article 3 (1) of directive 93/13 without reference to the consumer standard. Paragraph 2 provides for a special rule on unfairness in B-to-B transactions “only if using this term amounts to a gross deviation from good commercial practice”<sup>\*22</sup>. However, it is questionable whether there is enough evidence in the *acquis* to extend the control of unfair terms to B-to-B transactions also, and whether the yardstick used is appropriate and practical.<sup>\*23</sup>
- Article 6:304 blacklists clauses on exclusive jurisdiction of the business domicile in B-to-C contracts, thus following the precedent of the Océano case of the ECJ.<sup>\*24</sup>
- Article 6:305 repeats the ‘indicative list’ of directive 93/13 without amending it or changing its legal content, with the exception of clause (1) (i) of the annex. The comment suggests that the “list as such is ‘grey’”<sup>\*25</sup>, although this is not clear from the wording.
- Article 6:203 reiterates the *contra proferentem* rule of directive 93/13, thereby relying on the use and usefulness of a different interpretation of terms in dependence on the type of the proceedings. The comment refers to the ECJ case law<sup>\*26</sup>, but without taking into account trends in Member States’ courts to set this distinction aside.<sup>\*27</sup>

The *acquis* principles do not challenge the distinction between individually negotiated terms and standard terms, even though this creates uncertainty in the daily enforcement practice. This might be because the *acquis* principles do not deal with enforcement and because, instead, they separate — contrary to the EC directives — substantive law from rights, remedies, and procedures. It must equally be regretted that the *acquis* principles do not make any suggestions on extending both the scope and the legal nature of the indicative list of directive 93/13 by proposing either a “grey” or a “black” list of terms which should not be used in pre-formulated contract terms. The *acquis* principles substantially go behind existing Member State law, which has not been used as a reference point. This is justified in the comment in allegation that “[g]iven the differences in Member States’ law, establishing a blacklist could be seen as an undue interference”.<sup>\*28</sup> This, of course, restricts the ambit of the *acquis* principles substantially and falls behind the goals established in the European Commission proposal of 1992.

<sup>19</sup> Comments by T. Pfeiffer, M. Ebers. — Research Group on the Existing EC Private Law (Acquis Group, ed.), Principles of the Acquis Group. Sellier 2007, pp. 213–254 (in the following comment).

<sup>20</sup> ECJ case C-46401 (Johann Gruber v. BayWa). — ECR 2005, I-439. Express critique by Ebers, *supra* Note 19, comment to article 1:201 paragraph 6.

<sup>21</sup> T. Pfeiffer, M. Ebers (Note 19), pp. 222–228.

<sup>22</sup> *Ibid.*, pp. 234–237, referring to the Late Payment Directive 2000/35/EC. — OJ L 200, 8.08.2000, pp. 35–38 (for an interpretation with regard to retention of title see case C-302/05 Commission v. Italy (ECR 2006, I-10597) and to comparative law).

<sup>23</sup> Critique by N. Jansen, R. Zimmermann. Grundregeln des bestehenden Gemeinschaftsprivatrechts? — Juristenzeitung 2007, pp. 1116, 1120.

<sup>24</sup> ECJ case C-240 et al./98 (Océano Gr v. Quintero et al.). — ECR 2000, I-4941. Concerning arbitration clauses see Th. Pfeiffer, M. Ebers (Note 19), p. 246 (referring to the Claro case C-168/05 *supra* Note 15).

<sup>25</sup> T. Pfeiffer, M. Ebers (Note 19), p. 250.

<sup>26</sup> *Ibid.*, p. 230 with reference to ECJ 9.09.2004, case C-70/03 (Commission v. Spain). — ECR 2004, I-7999.

<sup>27</sup> See H.-W. Micklitz. — Münchener Kommentar zum BGB. 4<sup>th</sup> ed. 2000, § 13 AGBG Rdn. 49 ff.

<sup>28</sup> Comment *supra* Note 19 at p. 246.

### 1.3. Proposals in the DCFR

The proposals of the Acquis Group have to some extent been brought over into the Draft Common Frame of Reference as presented at the end of 2007<sup>29</sup>, but this action also shows an attempt to develop them further into a general EU law on unfair terms, used in whatever type of transaction is involved, whether B-to-B, B-to-C, or C-to-C. However, they are not placed in a coherent structure. Article II.–4:209 contains rules on conflicting terms, serving as part of the chapter on the formation of contracts; article II.–8:104 insists on preference for negotiated terms, which is part of the rules on interpretation.

The question of inclusion of terms is regulated in article II.–9:103 ('Terms Not Individually Negotiated'), thus:

- (1) Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.
- (2) If a contract is to be concluded by electronic means, the party supplying any terms that have not been individually negotiated may invoke them against the other party only if they are made available to the other party in textual form.
- (3) For the purposes of this article:
  - (a) 'not individually negotiated' has the meaning set forth by II.–9:403 (on the meaning of 'not individually negotiated') and
  - (b) terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document.

Section 4 of Chapter 9 contains a 'General EU Law of Unfair Terms'. It is an attempt to set general standards while differentiating in several respects between B-to-C and B-to-B (eventually C-to-C) transactions, which makes their understanding rather complex. Its most important provisions are as follows:

- Article II.–9:401, which insists on the "mandatory nature of the following provisions", namely that  
The parties may not exclude the application of the provisions in this section or derogate from or vary their effects.
- Article II.–9:402 ('Duty of Transparency in Terms Not Individually Negotiated'), stating:
  - (1) Terms that have not been individually negotiated must be drafted and communicated in plain, intelligible language.
  - (2) In a contract between a business and a consumer, a term that has been supplied by the business in breach of the duty of transparency imposed by paragraph 1 may on that basis alone be considered unfair.
- Article II.–9:403 ('Meaning of "Not Individually Negotiated"'), which states:
  - (1) A term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms.
  - (2) If one party supplies a selection of terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.
  - (3) The party supplying a standard term bears the burden of proving that it has been individually negotiated.
  - (4) In a contract between a business and a consumer, the business bears the burden of proving that a term supplied by the business, whether or not as part of standard terms, has been individually negotiated.
  - (5) In contracts between a business and a consumer, terms drafted by a third party are considered to have been supplied by the business, unless the consumer introduced them to the contract.
- Article II.–9:404 ('Meaning of "Unfair" in Contracts between a Business and a Consumer'), which sets forth:

<sup>29</sup> For a detailed first evaluation see R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law*. Munich: Sellier 2008, pp. 3–24 (an introductory paper by R. Schulze). See comment to the section on 'Non-negotiated Terms' by T. Pfeiffer at pp. 177–185 in Schulze's. For a review see N. Reich, – *Journal of Consumer Policy (JCP)* 2008, p. 369.

In a contract between a business and a consumer, a term [that has not been individually negotiated] is unfair for the purposes of this section if it is supplied by the business and if it significantly disadvantages the consumer, contrary to good faith and fair dealing.

- Article II.–9:405 (‘Meaning of “Unfair” in Contracts between Non-business Parties’), stating:

In a contract between parties neither of whom is a business, a term is unfair for the purposes of this section only if it is a term forming part of standard terms supplied by one party and significantly disadvantages the other party, contrary to good faith and fair dealing.

- Article II.–9:406 (‘Meaning of “Unfair” in Contracts between Businesses’), specifying:

A term in a contract between businesses is unfair for the purposes of this section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

Article II.–8:103 is in line with the *acquis* principles but does not draw a distinction between the interpretation of terms in individual and collective proceedings. Article II.–9:410 bans exclusive jurisdiction clauses. Article II.–9:411 contains a list of “terms that are presumed to be unfair in contracts between a business and a consumer”, thus repeating material from the annex of directive 93/13 but at the same time ‘upgrading’ the items into a grey list. We will comment on the structure and contents of the DCFR and their relation to the *acquis* principles in section 2.2.

## 2. The need for a ‘federal approach’ in the EU

### 2.1. ‘Federalism’ in EU contract law

An analysis of the DCFR can start from different perspectives, one concerned with contents, another with its relationship to existing EU and Member State law, and a third based upon a critical evaluation of the *acquis* and proposals for its reform. The present commentary will take another direction. It will position the DCFR in a federal, multilevel system of governance, which is characteristic of EU legislation on contract law matters.<sup>30</sup> As a starting point, the EU has only a limited jurisdiction over contract law. After the well-known Tobacco judgment of the ECJ of 5 October 2000<sup>31</sup>, it is without doubt that the internal market clause of EC article 95 does not allow for general competence of the EU in all cases of divergence of laws in the Member States, but also the measure envisaged by the EU legislator must show a genuine contribution to establishing the internal market — for example, by removing existing or foreseeable barriers to free trade, or by safeguarding undistorted competition, such as through improving health and safety standards, eliminating transaction costs, and improving consumer confidence.<sup>32</sup> Since most contract law is based on so-called ‘default rules’, the parties at least in B-to-B (and to some extent also in C-to-C) transactions will be able to choose freely the applicable contract law; there is usually no need of harmonisation here, unless a specific relationship to the functioning of the internal market can be shown, as in the Late Payment Directive, 2000/35.<sup>33</sup> Conflict rules, themselves based on freedom of choice of applicable law under article 3 of the Rome Convention (to be superseded by the Rome I Regulation<sup>34</sup>), will usually give the parties sufficient freedom to find the optimal legal regime for their transaction themselves.

Such a starting point with regard to freedom of contract and party autonomy does not exist with regard to mandatory provisions like those on unfair terms, the subject matter of this paper. As experience shows, they can have a double impact on the internal market:

- They may enhance the confidence of ‘passive partners’ to a transaction, particularly consumers, for entering into a business relationship, particularly with a supplier or provider from another EU

<sup>30</sup> See H.-W. Micklitz, N. Reich, P. Rott (Note 3), pp. 1.21–1.22; S. Weatherill. *EU Consumer Law and Policy*. Elgar Pub. Cheltenham UK, 2005, p. 157.

<sup>31</sup> ECJ case C-376/98 (Germany v. EP and Council). – ECR 2000, I–8919.

<sup>32</sup> ECJ joined cases C-453/03 et al. (ABNA et al. v. Secretary of State for Health). – ECR 2005, I–10423 paragraph 108; case C-380/03 (Germany v. EP and Council (tobacco II)). – ECR 2006, I–11573 paragraphs 37–40; AG Trstenjak opinion of 15.11.2007 in case C-404/06 (Quelle v. VZBV) paragraph 44 (not yet published).

<sup>33</sup> *Supra* Note 22. This principle is usually based on ECJ case C-339/89 (Alsthom Atlantique v. Compagnie de construction Sulzer). – ECR 1991, I–107 paragraph 15; N. Reich. *Understanding EU Law*. 2<sup>nd</sup> ed. Intersentia Antwerp 2005, p. 269.

<sup>34</sup> Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) of 15 December 2005, COM(2005) 650 final; but see final compromise amendments by the Legal Committee of the EP of 14.11.2007 which became part of regulation (EC) No. 593/2008 of the EP and the Council of 17 June 2008 on the law applicable to contractual obligations (“Rome I”). – OJ L 176, 4.07.2008, pp. 6–16.

member country, including electronic commerce contracting with partners whose identity may not be known but who still must respect certain mandatory standards.

- On the other hand, overly restrictive mandatory rules may impose an indirect impediment to cross-border trade by creating additional transaction and search costs, particularly for SMU providers.

The EU legislator has to find a balance between these two contradicting objectives, which so far have found support with the ECJ; nothing in the case law suggests that directive 93/13 and the necessary amendments could not be based on EC article 95, including the technique of minimum harmonisation.<sup>\*35</sup> According to article 8:

Member States may adopt or retain the most stringent provisions compatible with the treaty in the area covered by this directive, to ensure a maximum degree of protection for the consumer.

This idea seems to be in contrast with ‘modern’ concepts of EU institutions to do with ‘complete harmonisation’ as used in the recent ‘Unfair Commercial Practices Directive’ document, 2005/29/EC.<sup>\*36</sup> It should, however, be remembered that consumer contract law is not fit for ‘full’ or ‘complete’ harmonisation, because the unfairness concept itself refers to (non-harmonised) national contract law, as the ECJ has recognised in its *Freiburger Kommunalbauten* judgment.<sup>\*37</sup>

Any EU regulation on unfair terms, whatever its scope of application and basic concepts, will always have to keep in mind the underlying national rules on AGB or terms not individually negotiated, thus presupposing diversity and not unity. We hope that both the proposals of the Acquis Group and the DCFR insisting on their mandatory character do not cast into doubt the basic concept of ‘minimum harmonisation’ but only are efforts to improve the present unsatisfactory state of EC law on unfair terms by proposing a (very limited) number of amendments, which will have to be put on the Community statute books under the corresponding legislative procedures. We will make some suggestions later in this paper as to how this can be done. If they take the form of directives similar to the Recast Directive on the non-discrimination *acquis*, 2006/54/EC<sup>\*38</sup>, Member State law would have to be implemented accordingly wherever necessary. Also, without formal adoption as a directive, these proposals could be used by Member States to review their national law if it shows certain deficits because of having transposed only the minimal rules of directive 93/13, or by traders drawing up and implementing self-regulatory codes of conduct as encouraged by recent EU initiatives.<sup>\*39</sup>

However, it would have been necessary to use more comparative law material, particularly in the field of blacklisted and grey-listed clauses; this should allow for more conformity of standards aimed at combating unfair terms within the EU. But it seems that neither the *acquis* principles nor the DCFR provisions have entailed much comparative study, at least insofar as specific provisions on unfair terms are concerned. In particular, the CLAB database, which allows some information about incriminated contract clauses in the EU to be visible, has not been consulted.<sup>\*40</sup> Finally, it should at least be discussed whether the example of the Unfair Commercial Practices Directive, 2005/29/EC, which blacklists a whopping 31 misleading or aggressive practices<sup>\*41</sup>, could be used as a model to be followed also for unfair terms. The problem is, of course, related to the extent of ‘full harmonisation’ of the directive that is now before the ECJ.<sup>\*42</sup>

## 2.2. Some critical remarks on the DCFR

In our opinion, the basic flaw of the proposals in the DCFR is their ‘double-headed’ approach to unfair terms — namely, that they use at the same time the AGB and the terms not individually negotiated concepts but apply them differently to B-to-C, B-to-B, and C-to-C transactions. Thomas Pfeiffer, himself a member of the Acquis Group, writes:

<sup>35</sup> ECJ cases 382/87 (*Buet et al. v. Min. Public.*) – ECR 1989, 1235; C-361/89 (*Criminal proceedings against di Pinto.*) – ECR 1991, I-1189; C-183/00 (*Gonzales Sanchez v. Medicina Asturiana.*) – ECR 2002, I-3901 paragraph 27; C-71/02 (*Karner/Troostwijk.*) – ECR 2004, I-3025 paragraph 33.

<sup>36</sup> OJ L 149, 11.06.2005, pp. 22–39. For a critical evaluation see G. Howells, H.-W. Micklitz, Th. Wilhelmsson. *European Fair Trading Law*. Ashgate Publishing 2006, pp. 27–48, 244; review by N. Reich. – JCP 2007, p. 39.

<sup>37</sup> *Supra* Note 11. Similar Th. Wilhelmsson. *Full Harmonisation of Consumer Contract Law? – Zeitschrift für Europäisches Privatrecht (ZEuP)* 2008, p. 225.

<sup>38</sup> OJ L 204, 26.07.2006, pp. 23–36; for a comment N. Burrows, M. Robinson. *An Assessment of the Recast Community Equality Directive*. – *European Law Journal (ELJ)* 2007, p. 186.

<sup>39</sup> For an assessment see G. Howells, etc. (Note 36), pp. 195–216; F. Cafaggi. *Self-regulation in European Contract Law*. – *European Journal of Legal Studies* 2007/1.

<sup>40</sup> Its limited reliability has been discussed by H.-W. Micklitz, M. Radeideh. *The European Database on Unfair Terms in Consumer Contracts*. – JCP 2005, p. 325.

<sup>41</sup> H.-W. Micklitz, N. Reich, P. Rott (Note 3), pp. 2.43–2.46.

<sup>42</sup> Case C-261/07 (*VTB-VAB v. Total Belgium*) — not yet decided.

To this extent, the existence of three different definitions of fairness might give rise to the conclusion that there are different ideas of fairness behind these provisions. This, however, is not the case. Judicial control of non-negotiated terms is justified because, in the particular situation of the formation of the contract, there was no free consent to the terms by one side.<sup>\*43</sup>

The *acquis* principles are somewhat more transparent in this context because they proceed from directive 93/13 as such and its concept of terms not individually negotiated; the reference to standard terms serves only for clarification purposes in article 6:101, without attachment of legal importance to it.

The DCFR accords much more relevance to this distinction. According to the definition in Annex I, “‘standard terms’ are terms that have been formulated in advance for several transactions involving different parties, and that have not been individually negotiated by the parties”. This will include terms formulated by third parties, but it must always be meant for multiple, not individual, use — an element sometimes hard to prove, especially in notarised contracts.<sup>\*44</sup> A definition of ‘individual negotiations’ is included in article II.–9:403 (1), similar to that in directive 93/13, with some further specifications and rules on proof relating to standard terms.

The unfairness test in article II.–9:404–406 is divided into three different levels, thereby combining the more substantial concept of good faith with the more procedural concept of fair dealing, which can be demonstrated by using the following matrix.

Form/scope	B-to-C	B-to-B	C-to-C
Terms not individually negotiated	(left open?) + significant disadvantage – good faith / fair dealing	–	–
Standard terms	+	+ gross deviation from good commercial practice – good faith and fair dealing	+ significant disadvantage – good faith and fair dealing

Instead of applying a single criterion for controlling unfairness and leaving discretion to national law or national judges on how to apply it to the relevant categories of transactions (the federal dimension), the DCFR artificially divides substantive protection against unfair terms into classes according to differentiated layers of formal requirements, like ‘terms not individually negotiated’ and ‘standard terms’, on the one hand, and different concepts of ‘unfairness’, on the other, as shown in the matrix above. It is obvious that such a scheme will make the formal and substantive elements in its scope of application decisive, without really being able to provide for any clarification of the concepts used. As a legal commonplace it may be true that consumers in B-to-C contracts are in the most need of protection, and that businesses in B-to-B situations should be protected only in extreme situations. Finally, C-to-C transactions seem to range in the middle: there is some need of protection, but this should apply only to ‘standard terms’, not to terms not individually negotiated.

The matrix, based as it is on the proposals of the DCFR, tries to put a rigid borderline between different types of transactions — indeed it takes its starting point from different market relations that in practice are not so easily distinguishable. It should be remembered that the concept of the consumer has been, according to the definition portion of the DCFR, extended to persons acting ‘primarily’ outside their business capacity; ‘mixed contracts’ may therefore be regarded as B-to-C transactions enjoying a higher degree of protection than transactions in cases where the business element is dominant — a distinction that is hard to verify in practice. The concept of C-to-C transactions is completely new in EC law, and it is not clear how they have to be qualified if a ‘non-business party’ uses an agent, such as in the not infrequent case of the sale of a used car by a private person via a commercial agent. The European Commission in its review paper on the consumer *acquis* ponders whether “contracts between private persons [should] be considered consumer contracts when one of the parties acts through a professional”.<sup>\*45</sup> This problem has not even been mentioned by the DCFR! The idea of combining the principles of good faith and fair dealing appears elegant; however, it does not overcome the substantial differences behind these concepts, which make it even more necessary to grant Member States’ courts a certain margin for interpretation. To put it bluntly, for the years to come there will be substantial differences in the degree to which control is exercised, with regard to the type of term, the modes of interpretation, the substance of control, and enforcement via courts and/or public agencies.

<sup>43</sup> *Supra* Note 19 at p. 179.

<sup>44</sup> See the list of exclusions in article I.–1:101 (2).

<sup>45</sup> *Supra* Note 4 at p. 16.

## 2.3. The first proposals on ‘implementing’ the DCFR and the *acquis* principles in EU law

### 2.3.1. The DCFR as an ‘optional instrument’?

The legal nature of the DCFR is still unclear, and the European Commission so far has taken a low profile in clarifying its character. It has, however, put forward the idea of an ‘optional code’ or a 26<sup>th</sup> resp. 28<sup>th</sup> instrument — that is, an instrument that the parties to a contract, whether B-to-B, B-to-C, or C-to-C, could freely choose and thus avoid being subject to different Member State law determined on the basis of the Rome Convention resp. the coming Rome I Regulation.<sup>\*46</sup> The attractiveness for business would be that only the mandatory provisions of the optional instrument would set limits to contractual autonomy, not the diverging Member States’ consumer protection provisions under the principle of minimum harmonisation. If such an instrument is to be made attractive, consumers must be confident that, by being subject only to EU law, they still are guaranteed a high level of protection.<sup>\*47</sup>

This approach has been criticised as a ‘clandestine attempt’ to circumvent the minimum protection rule of the existing consumer *acquis* and to achieve the preferred European Commission objective of ‘full harmonisation’ through the back door.<sup>\*48</sup> This critique depends, obviously, on the level of harmonisation and protection that can be achieved through the DCFR. The paper of Hugh Beale<sup>\*49</sup> delivered at the Tartu Conference is quite explicit on this point:

I believe that an optional instrument would also be valuable for consumer transactions. This is not because I think that consumers are particularly worried about their rights under whatever law they contract under (even though this argument has been used to justify many of the directives). Consumers do not think there is much risk that they personally will get into a dispute with the seller in the conditions of which it will matter what the governing law is. I think the optional instrument would be more for the benefit of businesses that are seeking to sell to consumers from other Member States. For the business, a large number of hoped-for transactions may in the aggregate impose significant legal risk. The business may therefore be reluctant to advertise and sell to consumers in other jurisdictions. Again the concern is particularly strong for SMEs. Larger firms will probably set up a subsidiary in each Member State, and that subsidiary will know and use the local law. An SME is much less likely to be able to afford that. Instead it may wish to export by direct marketing, but it may well be put off by differences between the underlying systems of law. These may be of two kinds. First, there is the risk that the Member State that is the destination of the SME’s potential sales will have given consumers more than the minimum rights required by the various directives. Secondly, there may well be significant differences in areas of law that are outside the field of application of any directive. For example, in a consumer sale, the buyer’s rights to damages and the measure of those damages are governed entirely by national law.

The rules of article 6 of the proposed Rome I Regulation<sup>\*50</sup>, entitling consumers to the protection of the mandatory rules of their ‘home’ law in a wide set of circumstances, have the potential to create particularly serious barriers to trade of this kind. This will be the case particularly if the ‘home law’ rule is to be applicable to a consumer who buys on the Internet from a seller in another Member State, on the basis that the Internet seller is targeting consumers in other EU countries. In effect, the Internet seller would be required to be familiar with the law of every Member State. This would be highly problematic, particularly for SMEs, and may well lead to them refusing to accept orders from other Member States.

Short of unification of contract and sales law across Europe, I think the best solution lies in the optional instrument. The seller should be permitted to offer to sell to the consumer **either** on terms giving the consumer the minimum protection of the law of the consumer’s home country **or** under the optional instrument, which would be a European contract and sales law. The optional instrument would contain all consumer protection required by the directives, plus general rules of contract law (which together would solve 99% of the cases likely to arise). If the parties choose the optional instrument to govern their contract, they (especially the seller) would be bound by all of the rules of the optional instrument — individual rules would not be optional, save as the instrument has provided.

The consumer could be asked which is his or her home state. If the seller were prepared to contract on terms reflecting the requirements of that law, it could simply accept the consumer’s order. If it is not

<sup>46</sup> S. Grundmann. The Optional European Code on the Basis of the *Acquis*. – European Law Review (ELRev) 2004, p. 698.

<sup>47</sup> See D. Staudenmayer. Ein optionelles Instrument im Europäischen Vertragsrecht? – ZEuP 2003, pp. 829, 839 ff.

<sup>48</sup> N. Reich. Der Common Frame of Reference und Sonderprivatrechte im Europäischen Vertragsrecht. – ZEuP 2007, p. 177.

<sup>49</sup> In this volume at pp. 10–17.

<sup>50</sup> Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I): Outcome of the European Parliament’s first reading (Brussels, 28–29 November 2007) (3 December 2007).

prepared to sell on those terms because (following my argument) it does not know what the law of the consumer's home state demands, it should have the right to refuse the order unless the consumer agrees that the sale should be governed by the optional instrument. The consumer could exercise this choice by pressing a 'Blue Button' on the screen, showing his or her acceptance of the optional European law. Such a Blue Button could be designed in the style of the European blue flag with the 12 stars, possibly with an inscription such as 'Sale under EU Law'. It would make the benefits of European law visible to all businesses and consumers wishing to make use of the internal market.

This kind of opt-in instrument would be a form of legislation, and settling its terms would entail the same kind of political choices — of the kind of rules, the degree of consumer protection, etc. — involved in drawing up any contract code. This is not altered by the fact that it would be 'optional'. Parties would frequently opt in without knowing exactly, or even approximately, what rules would then apply to their transaction and the degree of protection that they would be afforded, and businesses might not have the bargaining power to avoid the optional instrument or something even less favourable. The rules of the optional instrument would not be a purely technical matter; legislative choices would have to be made.

The draft CFR does not purport to be a definitive proposal for an optional instrument. Rather, it is just a first draft that might be used to prepare a detailed proposal. Then some means of ensuring both a reasonable degree of social justice in the provisions of the instrument and a modicum of democratic input would be essential.

This is certainly a proposal worth considering, one that could even be based on the new article 81 (1) of the Draft Reform Lisbon Treaty on the Functioning of the European Union, which reads:

The Union shall develop judicial co-operation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such co-operation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

The adequate measure here would certainly be a regulation to which the parties could opt in by choosing the Blue Button on their PC, as suggested by Hugh Beale for e-commerce.<sup>51</sup> It may, however, be subject to some doubt whether the 'regulation' could be called a 'measure' of the approximation, because it will be an instrument independent from Member State law but still based on it. As an autonomous instrument of EU law, it would set aside conflicting Member State law and its mandatory provisions would take direct effect in the relations between the parties.

Another possibility for the adoption of an optional instrument in the form of a regulation would be the use of EC article 308 (as eventually amended by the reformed treaty), which had been confirmed by the ECJ justifying the use of a regulation for the creation of a *Societas Europaeae Cooperativa*<sup>52</sup>:

In those circumstances, the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to co-operative societies but has as its purpose the creation of a new form of co-operative society in addition to the national forms.

The use of a regulation as an optional instrument in the sense proposed by Hugh Beale would, in our opinion, require that the protective ambit of the proposed provisions of the DCFR on unfair terms be considerably upgraded and increased, in particular with regard to the blacklisting or grey-listing of certain clauses; otherwise, consumers risk accepting a much lower standard of protection than is usually guaranteed by their national law, going beyond directive 93/13. The same is true for persons who are not covered by the narrow concept of the consumer.

Even if an optimal level of EU protection against unfair terms not individually negotiated or AGB could be attained, it would be impossible to completely exclude a reference to (the highly different and diverging) Member State law. As the *Freiburger Kommunalbauten* case itself shows, the standard of unfairness in a specific contract term can usually be determined only by measuring it against applicable national law. Good faith and fair dealing stand side by side! In litigation this will be determined by the court with competence according to the jurisdiction rules of regulation 44/2001. The mandatory rules on consumer protection in articles 15–17 will always be applicable in cases of disputes and provoke a 're-nationalisation' of the conflict even if the parties have chosen the 'optional instrument' to govern their transaction. A national court eventually seized in this context will probably apply that Member State's own law of unfair terms to the conflict if the provisions are as unclear and incomplete as those in the DCFR.

<sup>51</sup> In a similar direction H. Schulte-Nölke. *EC Law on the Formation of Contracts — from Common Frame of Reference to the "Blue Button"*. – ERCL 2007, p. 332.

<sup>52</sup> Case C-436/03 (*Parliament v. Council*). – ECR 2006, I-3733 paragraph 46.

### 2.3.2. The *acquis* principles as a ‘European consumer contract law regulation’

The *acquis* principles are intended to restate and extend the existing EU consumer law in a coherent form. They come close to what the European Commission in its review paper<sup>\*53</sup> has called a horizontal instrument. Traditionally, the consumer law directives had been based on EC article 95 as a measure of internal market policy. The limits of this approach have been debated extensively in the wake of the Tobacco advertising judgment, even though the court has not yet cast any doubt on the legal basis of the consumer contract directives on the basis of minimum harmonisation. However, AG Trstenjak in her opinion of 17.07.2008 in the Gysbrechts case<sup>\*54</sup> has challenged the Belgian legislation forbidding prepayment clauses in distance contracts under the minimum protection clause of article 14 of directive 97/7/EC<sup>\*55</sup> as creating an obstacle to exports against EC article 29. The judgment of the ECJ is awaited by the end of 2008.

In a different context, suggestion was made to use the specific consumer law provision of article 153 (3) (b) EC for the adoption of a ‘European consumer contract law regulation’ (ECCLR) based on the principle of minimum harmonisation as set forth in paragraph 5 of article 153:<sup>\*56</sup>

The ECCLR as such would be a “measure to support [...] the policy pursued by Member States”. Since all Member States now have — either on their own or implementing EU directives — their national consumer contract law, the general principles of an overall EU approach to consumer protection based on information and fairness before entry into and within transactions, and specific rules on ‘cooling-off’ periods in direct and distance marketing, on unfair terms, and on legitimate quality expectations as rather well-developed areas of EU consumer contract law, could easily be elaborated and ‘codified’. This would be a ‘measure’ of legislative character as is expressly recognised in the (somewhat scant) practice under article 153 (3) b).<sup>\*57</sup> In its directive 98/8/EC on unit pricing<sup>\*58</sup>, the EU has used article 153 (3) b) for a truly legislative measure. There seem to be no reasons not to continue this approach and avoid the intricacies of the internal market competence issues. The transformation of existing directives into directly applicable regulations meets the requirement of effectiveness, which the European Commission itself put forward as a criterion for reviewing existing European consumer protection directives. It has often been said that directives are in harmony with the subsidiarity principle as set forth in the protocol on subsidiarity, attached to the Amsterdam Treaty. But practice with implementing directives has shown long delays, different methods of implementation, and additional distortions of competition. Several Member States had to be taken to court before finally implementing a long-adopted directive. In the case of minimal harmonisation directives, the differences in the level of protection among Member States were indeed considerable, sometimes even greater than before ‘harmonisation’ — a fact deplored by the European Commission. The use of directives as an instrument for consumer protection has, unfortunately, not been a success story.

The ECCLR would apply in parallel with existing Member State law. It would remove the existing contradictions of EU directives and provide for a common level of consumer protection in the EU that would be directly applicable. The usually applicable Member State law would determine which consumer protection provisions are mandatory. The ECCLR would apply only in a subsidiary manner. It would set aside conflicting Member State law only in cases where said law does not guarantee the necessary minimal protection.

### 2.3.3. Combination of an optional instrument and an ECCLR?

In an ideal world of ‘federal’ law-making and implementation in the EU, combination of the two instruments with existing international conventions like the CISG might be able to solve the fundamental dilemma of EC contract law: to allow parties optimal freedom of choice of ‘their’ contract regime while at the same time guaranteeing a sufficiently high level of consumer protection, namely:

- ‘Internal transactions’, whether B-to-B, B-to-C, or C-to-C, would be governed by applicable Member State law, supplemented by the ECCLR, guaranteeing minimum standards in consumer transactions wherever they take place in the EU.

<sup>53</sup> *Supra* Note 4 at p. 9.

<sup>54</sup> Case C-205/07 not yet published; for a critique see N. Reich, H. W. Micklitz. Volle Harmonisierung durch die Hintertür? – VuR 2008 (forthcoming).

<sup>55</sup> Directive 97/7/EC of the EP and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. – OJ L 14, 4.06.1997, p. 19.

<sup>56</sup> N. Reich. A European Contract Law, or an EU Contract Law Regulation for Consumers? – JCP 2005, p. 383.

<sup>57</sup> H.-W. Micklitz, N. Reich, P. Rott (Note 3), paragraph 1.23; G. Howells, St. Weatherill. Consumer Protection Law. Ashgate Aldershot 2005, p. 128.

<sup>58</sup> Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers. – OJ L 80, 18.03.1998, pp. 27–31.

- ‘Cross-border transactions’ follow either conflict rules under Rome I or the ‘optional instrument’ of the DCFR, either by including B-to-C transactions if the level of protection can be regarded as sufficient, or at least as equivalent to national law, or with reference to the ECCLR, which makes reference to national laws superfluous.
- ‘International’ B-to-B sales transactions may apply the CISG rules or ‘soft law instruments’ like the UNIDROIT principles<sup>59</sup> under their respective provisions and be supplemented by the optional instrument.

The second alternative of this combination may be particularly useful if the optional instrument should become a real ‘option’ in cross-border B-to-C transactions, especially in e-commerce: the ECCLR would guarantee the consumer a European standard of consumer protection that is shielded by the optional instrument, itself a directly applicable regulation, against differing Member State rules. The optional instrument need not in itself contain consumer protection provisions (such as the above-mentioned grey lists and blacklists of unfair clauses) as is the case now with the somewhat unsatisfactory DCFR. Instead, it could simply refer to the ECCLR, which then would include the common EU rules on consumer protection without the need to refer to Member State law. Such a technique would, of course, require that the level of consumer protection be sufficiently high to allow for setting aside Member State law on the basis of the principle of minimum harmonisation. This so far is not the case. However, it could provide for an incentive in this direction to make the optional instrument attractive also for application to B-to-C transactions.

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<sup>59</sup> This was originally foreseen by article 3 of the draft Rome I Regulation, see *supra* Note 34. Article 3 of regulation 593/2008 has not expressly taken up this possibility, but mentions it in recital 13.