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C. Unfair Contract Terms Directive (93/13)

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Executive Summary

1. Transposition deficiencies

Even though most member states did endeavour to accommodate the requirements of Directive 93/13 and the case law of the ECJ, some shortcomings in the member states can be noted. Examples of most importance are

- Some member states (esp. CZECH REPUBLIC, LATVIA and the NETHERLANDS) act on the proviso that unfair clauses are binding unless the consumer invokes unfairness. This legal consequence contradicts the requirements of the ECJ, which in *Océano*,¹ *Cofidis*² and *Mostaza Claro*³ explicitly emphasised, that unfairness is to be determined on the court's own motion. In other member states, the legal situation is unclear, so it remains to be seen whether national case-law will bring the relevant provisions in line with European Community Law.⁴
- According to Art. 3 and recital (15) of Directive 93/13, the member states are obliged to fix the criteria in a general way for assessing the unfair character of contract terms. Although this requirement also applies to pre-formulated individual contracts for single use, the general clauses in AUSTRIA and in the NETHERLANDS only relate to standard terms. Even though in these member states other legal instruments are available to monitor such types of terms, this legislative technique gives rise to the danger that the requirements of the Directive will go unheeded.

¹ ECJ judgment of 27 June 2000, Joined Cases C-240/98 to C-244/98 - *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941.

² ECJ judgment of 21 November 2002, C-473/00 - *Cofidis v. Fredout* [2002] ECR I-10875.

³ ECJ judgment of 26 October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421.

⁴ See *infra*, Part 2 C.IV.4.

- For those member states which only transposed certain parts of the Annex, it remains unclear whether this legislative technique can be accepted through applying the decision of the ECJ in C-478/99,⁵ since in those countries the danger exists, that the consumer will be misled about his rights.⁶
- The principle of transparency prescribed in Art. 5, sent. 1 of the Directive 93/13 has not been explicitly transposed in the CZECH REPUBLIC, ESTONIA, GREECE, HUNGARY, LUXEMBOURG and in SLOVAKIA. Therefore it is doubtful whether the requirements of the Directive have been sufficiently adhered to.⁷
- The requirements articulated by the ECJ in C-70/03⁸ (concerning the transposition of Art. 5 and Art. 6 of the Directive 93/13) have thus far not been implemented in SPANISH law, but a draft is currently being discussed in the Spanish parliament.⁹
- In ESTONIA pre-formulated ambiguous terms must be interpreted to the detriment of the party supplying the term. Directive 93/13, in contrast, goes beyond the mere interpretation to the detriment of the user, since in Art. 5, sent. 2 it requires not only an interpretation favourable to the consumer, but the “most” favourable interpretation.¹⁰
- If one assumes, that the member states are obliged by Art. 7(2) of Directive 93/13, to provide consumer associations with standing to bring collective proceedings against the user of unfair terms, then in LITHUANIA and MALTA an infringement of the Directive can be affirmed, since in both countries consumer associations do not have the right to proceed directly against the user of the clause, but merely to proceed against a measure of the relevant public body or to bring an action before a court for an order requiring the public body to make a compliance order.¹¹

⁵ ECJ judgment of 7 May 2002, C-478/99 - *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147.

⁶ See *infra*, Part 2 C.IV.3.b

⁷ See *infra*, Part 2 C.V.1.b

⁸ ECJ judgment of 9 September 2004, C-70/03 - *Commission v. Kingdom of Spain* [2004] ECR I-7999.

⁹ See *infra*, Part 2 C.II.23.

¹⁰ See *infra*, Part 2 C.V.2.b.

¹¹ See *infra*, Part 2 C.VI.3.b.

2. Enhancement of Protection

a. Extension of scope

Many member states have broadened the scope of application of their national laws on reviewing contract terms, for instance by

- Broadening the notion of consumer;¹²
- Monitoring contractual terms which reflect mandatory provisions;¹³
- Monitoring individually negotiated terms.¹⁴

b. Use of options

The member states have made different use of the options offered by the Directive:

- The Directive largely leaves the member states the choice of collective proceedings which must be put in place in order to prevent the continued use of unfair terms, Art. 7(2). The member states have chosen different enforcement mechanisms based on administrative measures, collective court proceedings and criminal proceedings.¹⁵

c. Use of minimum clauses

Most of the member states have made use of the minimum clause (Art. 8). Some examples of major importance are

- Directive 93/13 is essentially concerned with the establishment of a very pronounced system of control of the content of contractual clauses and of a principle of transparency. The Directive does not prescribe requirements for the incorporation of clauses into the contract (apart from recital 20, according to which the consumer must

¹² See *infra*, Part 2 C.III.1.b. and Part 3 A.III.

¹³ See *infra*, Part 2 C.III.3.a.

¹⁴ See *infra*, Part 2 C.III.3.b

¹⁵ See *infra*, Part 2 C.VI.

have the opportunity to become acquainted with all the terms of the contract). A number of member states do, in contrast, provide for a review of incorporation of the term into the contract, which in some circumstances can bring about a more advantageous position for the consumer (e.g. by way of establishing a duty to bring the terms to the consumers' attention or even a duty to give out the terms).

- Art. 3(1):
 - Whereas according to the Directive, unfairness only exists if a term causes an imbalance and this imbalance is furthermore contrary to the principle of good faith, seven countries make direct reference to “significant imbalance” without mentioning the additional criterion “good faith”. This tends to lead to a lowering of the burden of proof for consumers.¹⁶

- Art. 3(3) in conjunction with the Annex:
 - Many member states have blacklisted Annex No. 1 of the Directive and therefore provide a higher level of consumer protection. Moreover, the blacklist in some member states such as BELGIUM, ESTONIA, MALTA, PORTUGAL and SPAIN, contains more clauses than the Annex of Directive 93/13.¹⁷
 - While Annex No. 2 of Directive 93/13 establishes certain exceptions with regard to clauses used by suppliers of financial services, many member states provide a higher level of consumer protection by having not transposed Annex No. 2.¹⁸

- Art. 4(1):
 - In some member states, while assessing the fairness of contractual terms regard is to be paid not only to the circumstances prevailing at the time of conclusion of the contract (as the Directive provides), but also to conditions following conclusion of the contract.¹⁹

- Art. 4(2):

¹⁶ See *infra*, Part 2 C.IV.2.

¹⁷ See *infra*, Part 2 C.IV.3.b.

¹⁸ See *infra*, Part 2 C.IV.3.b.

¹⁹ See *infra*, Part 2 C.IV.2.

- In many member states the review of terms also encompasses the subject matter of the contract and the adequacy of price.²⁰

- Art. 6(1):
 - If a clause is unfair, then Directive 93/13 basically only requires removal or amendment of the offending term and the contract as such remains in force. However, in some member states the contractual rights and obligations can generally be adjusted, not only concentrating on the specific unfair term. Furthermore, in some member states public bodies can request the incorporation of new terms in order to prevent a significant imbalance between the rights and obligations.²¹
- Some member states (esp. POLAND, PORTUGAL and SPAIN) provide for a Standard Terms Register, whose aim is to increase the protection of consumers by publicising standard terms and judgments on unfair terms, with some effects towards Notaries, Registrars and judges.²²

3. Inconsistencies or Ambiguities

Some major inconsistencies or ambiguities of the Directive are:

- Definition of consumer (regarding mixed contracts).
- Although the Directive is basically applicable to all types of contracts, the Directive uses the terms “seller and supplier” and “goods and services”.
- The wording of the general clause (Art. 3) has caused problems in some language versions of Directive 93/13.²³

²⁰ See *infra*, Part 2 C.IV.2.

²¹ See *infra*, Part 2 C.IV.4.

²² See *infra*, Part 2 C.II.19, 20 and 23.

²³ See *infra*, Part 2 C.IV.2.

With regard to the fairness test (Art. 3) and consequences of unfairness in individual proceedings (Art. 6 (1)) the following inconsistencies and ambiguities can be detected:

- The relationship of the principle of good faith to the criterion of “imbalance” remains unclear. Are these criteria to be understood cumulatively, as alternatives, or in the sense that any clause which generates a significant imbalance is always contrary to the principle of good faith?
- The expression “significant” imbalance has caused some problems, since it is difficult to determine whether this term means that the imbalance is gross (extremely significant with a substantive evaluation) or evident (with an evaluation of its external perception).
- The Directive alone does not reveal the legal nature of the Annex. Clarification in relation to this point became evident with the decision of the ECJ in C-478/99.²⁴
- The wording of Art. 6(1) (consequences of unfairness) does not reflect the ECJ case-law (C-240/98 to C-244/98 - *Océano*²⁵; C-473/00 - *Cofidis*²⁶); C-168/06 – *Mostaza Claro*.²⁷

The principle of transparency laid down in Art. 5 of the Directive 93/13 suffers from some significant ambiguities:

- Transparency is required in Art. 5 “in the case of contracts where all or certain terms offered to the consumer are in *writing*”. This formulation raises the question of whether the requirement of transparency, likewise applies to orally concluded contracts (see thereto recital 11).

²⁴ ECJ judgment of 7 May 2002, C-478/99 - *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147. See *infra*, Part 2 C.IV.3.a.

²⁵ ECJ judgment of 27 June 2000, Joined Cases C-240/98 to C-244/98 - *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941.

²⁶ ECJ judgment of 21 November 2002, C-473/00 - *Cofidis v. Fredout* [2002] ECR I-10875.

²⁷ ECJ judgment of 26 October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421; see *infra*, Part 2 C.IV.4.a.

- The Directive does not explicitly state whether the business has the duty of delivering or making the document available with the terms in the cases where the contract is normally written.
- The Directive does not specify (with the exception of the *contra proferentem* rule) what the consequences of lack of transparency are. Therefore, it is unclear whether the requirement of transparency is a condition for the incorporation of terms, whether clauses that lack transparency are to be assessed according to Art. 3 and whether this lack of transparency per se results in nullity/non-binding effect.

Certain issues in relation to collective proceedings also appear to be in need of regulation:

- From the wording of Art. 7(2) it is not entirely clear whether consumer associations must be given the right of standing in any event.
- The notion “persons and organisations” moreover does not sufficiently explain if a single person or a group of persons, which is not organised could take actions under Art. 7.

Finally, the international scope of application of the unfair terms provisions in Art. 6(2) is not clearly defined, since the Directive does not define the notion of “close connection with the territory of a Member State”.

4. Gaps in the Unfair Contract Terms Directive

The analysis reveals some important gaps in the Directive. Examples of this are:

- As the legal consequences for unfairness of a contractual term are only rudimentarily regulated in the Directive, the danger exists that the requirements of the Directive are not transposed with sufficient effectiveness in the member states. This applies especially in those member states which do not provide for courts/authorities to monitor terms on their own motion. The particular danger in these cases is that the consumer cannot defend himself against unfair terms because he is either not aware of

his rights (and that he has to exercise these rights) or is deterred from asserting them by limitation periods or the costs entailed with bringing a court action.

- The Directive is silent (with the exception of the *contra proferentem* rule) on the consequences of lack of transparency. This gap leads to considerable legal uncertainty and at the same time jeopardises the effectiveness of transposition of the Directive.
- Court decisions in the context of collective proceedings are in the vast majority of member states only binding on the business who is party to the case. Furthermore decisions in collective proceedings are generally restricted to the clause in question in its particular wording. These legal consequences are particularly disadvantageous in those member states which do not have an administrative procedure to monitor unfair terms. Therefore how these can avoid the negative consequences of *res judicata* should be considered.

5. Potential Barriers to (Cross Border) Trade

Obvious barriers to trade in the field of the Directive are

- The different benchmarks in member states when reviewing contractual terms.
- The different standards in member states when reviewing the transparency of contractual terms and the (not harmonised) consequences of lack of transparency.

The case law of the ECJ has not prompted harmonisation in this respect, since the ECJ stressed in C-237/02²⁸ that the court would not decide whether a contractual term is in breach of good faith in a concrete case. Accordingly, traders cannot use a contractual clause which is valid across the EU, but must instead formulate different clauses for each member state. Hence, considerable obstacles to the functioning of the internal market exist. Providers can only perform pre-formulated contracts across borders with considerable transaction costs.

²⁸ ECJ judgment of 1 April 2004, C-237/02 - *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter et Ulrike Hofstetter* [2004] ECR I-3403.

6. Conclusions and Recommendations

In order to remove inconsistencies and ambiguities, the following issues could be tackled:

- Definition of consumer (esp. with regard to mixed purpose cases).
- In place of the terms “seller/supplier” a uniform term should be used for all consumer protecting directives, to denote the contractual partner of the consumer. Conceivable formulations are “business” or “professional”.
- The Directive should clearly express that it is applicable to all types of contracts.
- Clarification of the wording of Art. 3(1) (amendment of misleading wording in some language versions; clarification whether the criteria “good faith”/“imbalance” are to be understood cumulatively, alternatively or in the sense that any clause which generates a significant imbalance is always contrary to the principle of good faith; definition of “significant” imbalance).
- Provisions clarifying the legal nature of the Annex.
- The consequences of unfairness should also be clarified, in that the unfairness of a term can be assessed on the court’s own motion (as referred to in the cases of *Océano*, *Cofidis* and *Mostaza Claro*).²⁹
- Clarification whether the requirement of transparency applies to orally concluded contracts.
- Provisions on whether the business has the duty to deliver or make the document available with the terms in cases where the contract is normally written. Moreover, it should be considered whether the Directive should be amended to expressly incorporate the prohibition of “surprising terms”, in the same way as the proposals of directives of 1990 and 1992.

²⁹ See Part 2 C.IV.4.

- The consequences of lack of transparency should be expressly regulated.
- Certain issues in relation to collective proceedings also appear to be in need of regulation: Clarification whether consumer associations must be given right of standing in any event and whether a single person or a group of persons which have not been organised could take actions under Art. 7. Moreover, it should be considered how the negative consequences of *res judicata* can be avoided.
- Definition of the notion of “close connection with the territory of a member state” in Art. 6(2).

Moreover, in order to remove at least the most obvious barriers to trade, whether application of the minimum clause should be excluded to some of the provisions of the Directive 93/13 thereby bringing about maximum harmonisation in these areas must be considered. In this respect it would be desirable if at least some of the terms listed in Annex no. 1 could be formulated not only in terms of an indicative, illustrative list, but as a blacklist.

A complete harmonisation of the law on unfair terms however, in the present state of development of the law, appears neither possible nor desirable, as the fairness of a clause can only be determined by comparison to (hardly harmonised) dispositive law and maximum harmonisation would bring about a marked reduction in consumer protection in those countries where it is particularly high.

I. Introduction: Policy reasons for monitoring pre-formulated terms

1. The law in the Member States prior to transposition of the Unfair Contract Terms Directive

If one enquires into the policy reasons for monitoring pre-formulated contract terms, two primary lines of argument come to the fore.³⁰

The first theory is based on a consideration of transaction costs: A party using pre-formulated terms is usually better informed about the content of the terms than the other party (whether a consumer or business). By drafting terms just once for several transactions, the user can spread costs an infinite number of times, whereas for the other party it is often too expensive to obtain the information required for negotiating the conditions of the transaction. Informational asymmetries – disparities in the level to which each party is familiar with the terms of the contract – and the uneven distribution of transaction costs therefore have to be balanced by reviewing pre-formulated terms.

A series of legal systems, especially GERMAN, DUTCH and PORTUGUESE law, were based on this model even before transposition of Directive 93/13. Characteristic of these countries is that in principle only standard terms are subject to review, i.e. terms pre-formulated for a multitude of contracts, but not individual agreements. This is due to the fact that an uneven distribution of transaction costs regularly results only where standard terms are used, and not with individually negotiated clauses. At the same time, however, standard terms are capable of endangering not only the consumer, but any contractual partner against whom they are used. Therefore, the protection afforded by monitoring of terms in the aforementioned countries extends not only to B2C transactions, but also to B2B and P2P transactions.

According to the second model (“abuse theory”) the control of pre-formulated contract terms is based, in contrast, upon the notion that unfair terms are often used against weaker parties. The main catalyst for control of terms is not the danger of standard terms, but rather the

³⁰ See e.g. *Kötz*, *Europäisches Vertragsrecht I*, 211 et seq.; *Tenreiro/ Karsten*, in: *Schulte-Nölke/ Schulze* (eds.), *Europäische Rechtsangleichung*, 225 et seq.

protection of a specified class of persons. In view of the economic, social, psychological and intellectual superiority of the business the customer has no choice other than to submit to the clauses in question. A review of validity shall accordingly counter an imbalance in bargaining power and knowledge.

This fundamental notion underpinned the laws of some countries, namely FRANCE, BELGIUM, LUXEMBOURG, even prior to the transposition of Directive 93/13. Characteristic of these countries is that in principle they only protect the consumer, as the inferior party (and especially in FRANCE³¹ those persons concluding contracts which are not directly related to his or her profession). Consequently, this protection does not only cover standard terms, but rather all clauses, whether pre-formulated or individually negotiated.

Alongside both these models many other mixed systems exist as well as the model of the NORDIC STATES, where according to the general clause (Contract Acts, Art. 36), it is possible even in B2B contracts to review individually negotiated standard terms.

2. Model of the Unfair Contract Terms Directive

The first proposals for Directive 93/13 initially followed the French system, in which the rules were limited to consumer contracts, although individually negotiated terms were subject to the fairness test as well. Since the Common Position of the Council in 1992, however, a compromise between the French and the German models emerged: According to Art. 3(1) and (2) of Directive 93/13 individually negotiated terms – in contrast to FRANCE – are excluded from the scope of the Directive, however – in contrast to GERMANY – it is unnecessary for the contract terms to be pre-formulated for a multitude of contracts, so that in addition to standard terms also pre-formulated individual contracts for single use, but not individually negotiated terms, are subject to control of the Directive. This mixture of both systems is particularly emphasised in recital 9 of Directive 93/13, which refers both to the need of protection from abuse of power – as in FRANCE – as well as to the danger for the consumer of unfair exclusion of essential rights – an allusion to the GERMAN model – particularly present in one-sided standard contracts.

³¹ See Part 3 A.III.2.

The ECJ in its case law on Directive 93/13 primarily applies the “abuse theory”. According to the ECJ,³² the system of protection introduced by Directive 93/13 “is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.”

3. The law in the Member States following transposition of the Unfair Contract Terms Directive

Most member states, which prior to enactment of Directive 93/13 already had a developed system of monitoring the content of contractual clauses, limited their transposition of the Directive to minor adaptations to the rules whilst retaining the old system. Those member states, which prior to transposition of the Directive had no extensive system of monitoring of contract terms, by and large followed the model of the Directive. The ten new member states of the European Union which acceded in April 2004 have as far as possible adopted one of the existing systems.

The system of monitoring the fairness of terms in all 25 member states can be classified into four different models:

- In the Nordic States (DENMARK, FINLAND, SWEDEN) review of content relates to all contracts (B2B, B2C, P2P), also individually negotiated terms are subject to review.
- In other States, which traditionally follow the “transaction costs theory”, control of content likewise extends to all contracts (B2B, B2C, P2P), however, according to the standard model only standard terms are subject to review. A review of “terms not individually negotiated” in contrast – in accord with the Directive – is only possible for B2C contracts. This model is followed by GERMANY, PORTUGAL, AUSTRIA and the NETHERLANDS. Also the new member states HUNGARY, LITHUANIA and SLOVENIA

³² ECJ judgment of 27 June 2000, Joined Cases C-240/98 to C-244/98 - *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941, para. (25). See as well ECJ judgment of 26 October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421, para. (25).

have adopted this model.³³ To a certain extent ESTONIA also counts amongst this group, as according to the Estonian Law of Obligations Act review of all contracts is possible, however with the difference that this primarily (and not only, as in the aforementioned member states, for B2C contracts) relates to “terms not individually negotiated”.

- All member states, who restrict the monitoring of content to B2C contracts, but thereby also subject individually negotiated terms to review fall into the third group. These are FRANCE, BELGIUM and LUXEMBOURG as well as the CZECH REPUBLIC, LATVIA and MALTA.
- Finally a number of member states follow the concept of Directive 93/13, in which the content review is restricted to B2C contracts and only terms not individually negotiated can be controlled. These are UNITED KINGDOM, IRELAND, SPAIN, GREECE and ITALY (although some of these member states provide a black list for certain individually negotiated clauses). Amongst the new member states BULGARIA, CYPRUS, POLAND, ROMANIA and SLOVAKIA have opted for this model.

II. Legal framework in the Member States

1. Austria (AT)

Since its inception the AUSTRIAN Civil Code has contained the provision against immorality (CC Art. 879(1)) and general rules on formation of contract. In addition, since 1979 the Austrian Civil Code has prescribed special rules on the incorporation and applicability of contractual clauses: According to CC Art. 864a, unusual standard terms, disadvantageous to the other contractual party, can only form part of the contract if the other party's attention has specifically been drawn to them.

According to CC Art. 879(3), a contractual term contained within the general conditions of business or contractual forms, which does not make clear one of the party's ancillary performance duties, is void, if, in consideration of all the circumstances of the case, it grossly

³³ However, with the peculiarity that in SLOVENIA in B2C contracts even individually negotiated terms are subject to review.

disadvantages one party. Whereas the rules of the CC do not only apply to B2C contracts, but also to B2B and P2P transactions, the Consumer Protection Act which also came into force in 1979 contains special provisions to monitor the content of clauses, which apply only to B2C contracts.

The only changes within this statutory framework so far have been limited to the details. With the Amendment Act of 1 January 1997 the pre-existing “black lists” in Art. 6(1) and (2) of the Consumer Protection Act were slightly extended. Furthermore breach of the transparency imperative in Art. 6(3) of the Consumer Protection Act was recognised as an independent ground of nullity in its own right for the first time.

2. Belgium (BE)

Prior to 1991, there was no explicit protection in the field of unfair contract terms. Thus consumers had to have recourse to principles of general contract law. The Act of 14 July 1991 on Trade Practices and Consumer Protection (hereinafter TPA) was the first general regulation on unfair contract terms. The provisions were enacted in anticipation of the Directive, directly inspired by its content. However, the European Commission notified a reasoned opinion on 8 March 1994 pointing out that a significant number of the provisions of the Act of 1991 did not conform to the Directive. It was perceived as particularly problematic that the TPA does not apply to services provided by liberal professions. The BELGIAN legislator therefore opted to pass a separate Act on unfair clauses in contracts between consumers and practitioners of liberal professions (Liberal Professions Act – LPA).³⁴ Also the TPA was amended on several occasions (Act of 7 December 1998 and the Act of 25 May 1999) in order to meet the Directive’s requirements. The reforms expanded the personal and substantive scope and transposed the interpretation rule and transparency requirement of Art. 5 of Directive 93/13 into the TPA. Moreover, the reform changed the effects of unfair clauses. Whereas according to the earlier version of the Act unfair terms first became ineffective through judicial declaration, since 1998 they have been declared void from the start.

³⁴ Act of 3 April 1997, replaced by the Act of 2 August 2002 on misleading and comparative advertising, unfair contract terms and distance marketing in respect of liberal professions – Liberal Professions Act – LPA.

The TPA goes beyond the scope of the Directive in also bringing within its ambit, terms which were negotiated by the parties, whereas the LPA for liberal professions is confined to unfair standard terms which were not individually negotiated by the parties. However, the LPA contains an exception to this principle since the unfair clauses enumerated in the 'blacklist' in the annex to the Act are prohibited and void, even if they were individually negotiated (Art. 7(4) of the Liberal Professions Act).

Art. 34 of the TPA empowers the King to impose or prohibit by Royal Decree certain clauses in contracts applicable to certain commercial sectors or to specific products or services. The King has also the power to impose type-contracts on the seller – consumer relationship. The power of the King is restricted in two ways. On the one hand the King is only empowered to take action if inevitably to guarantee the balance between the rights and obligations of the parties or to assure the fairness of commercial transactions. On the other hand the King must primarily consult the Unfair Contract Terms Commission and the High Council of Tradespeople (Hoge Raad voor de Middenstand). At present only one Royal Decree has been issued: the Royal Decree of 9 July 2000 on the Essential Data and the Terms and Conditions to be Mentioned on The Order Form of New Cars. A Royal Decree on the contract terms in broker contracts of real estate agents is in preparation.

3. Bulgaria (BG)

Before the transposition of the Directive, general contract law was applied, especially the provisions on invalidity of contracts. Clauses, which infringed legal norms or good faith, caused partial or complete voidness of the contract. Very often this led to results that are similar to the application of the directive. In several cases it was also possible to rescind the contract.

Directive 93/13 was originally transposed in 1999 by the Law on Consumer Protection, but later replaced by the new Law on Consumer Protection of December 2005, which came into force in June 2006. Art. 143 et seq. of the new Law on Consumer Protection provide detailed rules on unfair terms in consumer contracts. The Law on Consumer Protection apply to all B2C contracts. The general clause and even the transposition of the Annex applies also to individually negotiated terms (cf. Art. 143). However, as to the legal consequences Bulgarian

law differentiates between individually and not individually negotiated terms: According to Article 146(1) Law on Consumer Protection, which transposes Art. 6(1) of Directive 93/13, terms not individually negotiated are automatically void. In contrast, unfair terms individually negotiated are remedied only by general contract law.

4. Cyprus (CY)

Prior to 1996 in CYPRIOT legislation there were no express rules regarding the monitoring of standard contract terms. Instead the general rules of conclusion of contract applicable to all persons of the General Contract Law, Cap 149, were applied. Moreover, the Sale of Goods Law of 1994³⁵ contains a provision which renders null and void those terms excluding the supplier's obligations implied by the aforesaid law. In 1996 the House of Representatives passed the Unfair Terms in Consumer Contracts Act.³⁶ The Act was amended in 1999 to transpose Directive 93/13.³⁷ This Law applies to any term in a contract concluded between a seller or supplier and a consumer where it has not been individually negotiated.

5. Czech Republic (CZ)

Prior to implementation of Directive 93/13 there were no specific provisions in the Civil Code of Czechoslovakia of 1964, whose object was to protect the consumer from unfair terms. Also the Consumer Protection Act 634/1992, which was passed in December 1992 by the Federal Assembly and subsequently (after separation of the state) further developed by the CZECH REPUBLIC and SLOVAKIA separately, did not (and does not) contain any specific provisions to monitor contract terms for the Czech Republic. Moreover, the Consumer Protection Act 634/1992 only specified obligations for the provision of information to consumers, prohibition of misleading advertising and discrimination, and further obligations in the sale of products and provision of services, as well as principles for co-operation and the rights of organisations created for consumer protection. Directive 93/13 was transposed into the Civil Code in 2000 with Act 367/2000. The Czech Republic transposed the Directive almost literally by inserting its provisions into CC Art. 52, 55, 56. The relevant rules only apply in the B2C context. In contrast to the Directive the definition of consumer (Art. 52(3)) in Czech law is not limited to natural persons. Furthermore, terms individually negotiated come within

³⁵ Law 10(I) of 1994.

³⁶ Law 93(I) of 1996.

³⁷ Law 69(I) of 1999.

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its ambit. Unfair terms are considered valid unless the consumer invokes nullity (Art. 55(2), 40a).

6. Denmark (DK)

The DANISH system of consumer protection law is comparable to that of the other Nordic countries (FINLAND and SWEDEN, see 7. and 24.). A key feature of those countries is the vast usage of the general clause, laid down in sec. 36 of the Contracts Acts. This clause makes it possible to wholly or partly disregard an (even individually negotiated) agreement, if the term is unfair/unreasonable with respect to the contract's content, the position of the parties and the circumstances prevailing during and after the conclusion of the contract. The general clause is not limited to B2C contracts, but applies to contracts in general. But it must be noted, that in the context of non consumer contracts, the threshold of unreasonableness is higher. A further characteristic of the Scandinavian states consists of the administrative control of clauses through the Consumer Ombudsman, whose task in Denmark is to monitor compliance with the Danish Marketing Practices Act in the interest of consumers. Directive 93/13 was transposed into Danish law in 1994 by means of amendments to the Contracts Act. Through the transposition an even higher degree of flexibility was achieved, making it possible not only to disregard an agreement in whole or in part, but also to amend it. In addition to approximating the general clause, additional special rules for consumer contracts were inserted into Danish Contract Law (ss. 38a-38d). The definition of consumer corresponds with the Directive, but gives a broader consumer protection by covering not just natural persons, but also legal persons, provided that they are not acting within the course of a business. In the case of consumer contracts, the general clause in sec. 36 of the Contracts Act applies with two modifications. Firstly, in applying the general clause, account may not be taken of circumstances to the detriment of the consumer arising at a later date if this means that a contractual term may not be amended or overridden. Secondly, even if a contract contains terms which are incompatible with proper business practice and cause a significant imbalance to the parties' rights and obligations to the detriment of the consumer, the consumer may ask to have the remainder of the contract retained without amendment, if this is feasible.

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7. Estonia (EE)

Before the transposition of the Directive there were no special rules in national law explicitly covering unfair contract terms. All consumer law questions were regulated by the Civil Code of the ESTONIAN Soviet Socialist Republic of 12 June 1964 (in force from 1 January 1965). On 15 December 1993 the Parliament passed the Consumer Protection Act (hereinafter CPA) which came into force on 1 January 1994. The CPA contained general provisions concerning responsibilities of and restrictions upon the seller (sec. 7 and 8) but did not provide similar special rules as prescribed by the Directive. The Directive had to be implemented into Estonian law after the European Agreement Establishing an Association between the European Communities and their member states and the Republic of Estonia came into force on 1 February 1998. The legislator transposed the Directive in sec. 35-44 of the Law of Obligations Act which includes rules on the non-incorporation of surprising (uncommon or unintelligible) terms, sec. 37(3), the priority of individual agreements over standard terms, sec. 38, the “*contra proferentem*” rule of interpretation, sec. 39(1) and the “battle of forms”, sec. 40. The scope of application is broader than that defined in the Directive. All kinds of persons are covered including consumers, non commercial legal persons and commercial legal persons. Specific consumer protection provisions are included in a black list, sec. 42(3), covering a total of thirty seven terms. If a blacklisted term is used in B2B-contracts, the term is presumed to be unfair, sec. 44.

8. Finland (FI)

The FINNISH system of consumer protection law is comparable to that of other NORDIC COUNTRIES (DENMARK and SWEDEN, see 5. and 24.). As in the other Scandinavian states, the central features are the general clause of Contracts Act (CA) sec. 36 and administrative protection measures and means of control, which in Finland are enforced by the Consumer Ombudsman and the Consumer Agency on the basis of the Act of Consumer Agency (1056/1998) respectively. In contrast to other Scandinavian states, since 1978 a Consumer Protection Act (CPA) has also existed, which in Chapter 3 lays down a general clause which gives the court the power to adjust or disregard express terms of the contract in B2C-contracts, whether individually negotiated or non-negotiated. Directive 93/13 was transposed in 1994 by amendments to a few points in the CPA. In contrast to Directive 93/13 the CPA also relates to individually negotiated terms. Moreover, in contrast to Art. 4(2) of the

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Directive 93/13, Chapter 4, section 1 CPA expressly provides for adjustment of the price. At the end of 1998 there was a further amendment Act to transpose Art. 6(2) of Directive 93/13.

9. France (FR)

The control of unfair contractual terms was initially developed through case law. There were also certain widespread, fragmented rules concerning unfair terms in the Code Civil. The first comprehensive legislative approach was law 78-22 of 10 January 1978,³⁸ the provisions of which were later transferred in 1993 into Art. L-132-1 et seq. of the new Consumer Code. Originally the law 78-22 was enacted in order to set up an administrative system of control of unfair terms before the *commission des clauses abusives*. The commission can only issue recommendations, on the basis of which the executive may prohibit certain clauses by decree. However, this procedure remained practically unused, since only two decrees banning the use of certain terms (black list) had been enacted.³⁹ Against this background, the Cass. civ. established in 1991 established the principle of judicial review of unfair contractual terms in order to spread the control.⁴⁰ In addition to control through administrative bodies and judicial review of content in individual cases, since 1998 it has also been possible for consumer associations to institute legal actions (Art. L-421-1 et seq. of the Consumer Code).

Directive 93/13 was transposed through the enactment of law 95-96 of 1 February 1995 which slightly modified the Consumer Code. The key general clause of Art.L-132-1 of the Consumer Code provides benchmarks for assessing unfairness albeit without explicitly mentioning the requirement of good faith as stated in Art. 3(1) of Directive 93/13. The French provisions still apply solely to terms used in B2C contracts (consumer contracts) but, in contrast to the Directive, individually negotiated terms are covered as well.

10. Germany (DE)

Since 1977 the GERMAN legislator had already comprehensively regulated the use of unfair contract clauses in the Act Concerning the Regulation of the Law of Standard Business Terms

³⁸ Law on Protection and Information for Consumers; so-called “*loi scrivener*”.

³⁹ See Art. R. 132-1, 132-2 and 132-2-1 of the Consumer Code.

⁴⁰ Arrêt du 14 mai 1991, Bulletin des arrêts de la Cass. civ. I, no. 153 and Recueil Dalloz Sirey 1993, jurisprudence, 568.

(Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, hereinafter AGBG). Not only was (and is) the consumer protected, but every natural or legal person, against whom standard contract terms are used. Therefore contracts between private parties and commercial transactions are also, in principle, within its scope. In this respect the scope of protected persons is considerably wider than in the Directive. Prior to implementation of the Directive however it was only possible to review contractual terms pre-formulated for a multiplicity of contracts, unilaterally made by one party. Clauses which were pre-formulated for a one-off contract or contracts which were incorporated on the initiative of a third party (such as notary, agent etc.) thus laid outside of the ambit of the AGBG. The “grey” list of suspicious clauses (clauses whose validity depends on an appraisal) in § 10 of the AGBG (now: CC § 308) as well as a black list of wholly void clauses (clauses whose invalidity is not subject to any appraisal) in § 11 of the AGBG (now: CC § 309) serve as benchmarks for the control of contractual content. Clauses not catalogued in these lists, were judged according to the most important norm (in practice), the general clause § 9(1) of the AGBG (now CC § 307(1)). This provision declares that clauses are void if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable disadvantage.

In transposing the Directive in 1996 the legislator opted for a minimalistic solution. § 12 of the AGBG (international scope) was merely modified and a new provision was introduced in § 24a of the AGBG (now CC § 310(3)), which extends the scope for consumer contracts and also enables a review of clauses, which were formulated for one-off use and introduced into the contract on the initiative of a third party (notary, agent). Within the framework of the reform of the law of obligations, with effect from 1 January 2002 the legislator repealed the AGBG and its substantive provisions were integrated into the CC with minor, mainly drafting changes (CC § 305-310). To meet the requirements of the ECJ (C-144/99⁴¹), CC § 307(1) made clear that clauses which lack transparency are void.

11. Greece (EL)

Even in the 1970s the GREEK academic and judicial communities had begun to intensively address the ever increasing practice of conclusion of contracts through the use of standard terms. This protection was provided in three levels of review (incorporation, interpretation,

⁴¹ ECJ judgment of 10 May 2001, C-144/99 - *Commission v Kingdom of the Netherlands* [2001] ECR I-03541.

and reviewing the content of the clause). In 1991 a comprehensive consumer protection act was passed, which for the first time provided rules expressly for protection against unfair terms, but whose scope of application was limited to consumer contracts (B2C). This act was repealed in 1994 and replaced with a new Consumer Protection Act. The requirements of Directive 93/13 were transposed in Art. 2 of this Act, further amendments followed in 1999. The scope of the Greek provisions extended according to Art. 1(4) to all natural and legal persons, who are the end recipients of goods or services, irrespective of the purpose/nature of the transaction; it thus goes considerably further than the Directive.

12. Hungary (HU)

In socialism general conditions of business were practically irrelevant, it was only at the end of the 1960s that pre-formulated contract terms started to appear. Case law developed special benchmarks for the incorporation of standard contract terms,⁴² consumer law provisions specifically however were still unknown. With the amendment act of 1978 the HUNGARIAN Civil Code (Act IV of 1959) was comprehensively reformed. Henceforth CC Art. 209 provided that unilaterally formulated standard contract terms used by legal persons, which conferred an unjustified advantage on one party, were rescindable. The party entitled to rescind was the “other” contractual party confronted with the clause (in which case the nullity was declared with effect *inter partes*) as well as certain state or community organs (here the nullity applied *erga omnes*).

In 1997 Directive 93/13 was transposed into the Hungarian Civil Code in the part “Law of Obligations”, Title “Contract”, Chapter XVIII. The provisions of the CC have been amended numerous times in recent years to take account of the case law of the ECJ (C-240/98 to C-24498;⁴³ C-372/99;⁴⁴ C-473/00;⁴⁵ C-70/03⁴⁶). The last amendment occurred with the Act III of 2006, in force since 1 March 2006.

⁴² See the 37th opinion of the economic council of the Supreme Court.

⁴³ ECJ judgment of 27 June 2000, Joined Cases C-240/98 to C-244/98 - *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941.

⁴⁴ ECJ judgment of 24 January 2002, C-372/99 - *Commission of the European Communities v. Italian Republic* [2002] ECR I-00819.

⁴⁵ ECJ judgment of 21 November 2002, C-473/00 - *Cofidis v. Fredout*, [2002] ECR I-10875.

⁴⁶ ECJ judgment of 9 September 2004, C-70/03 - *Commission v. Kingdom of Spain* [2004] ECR I-0799.

The CC contains general provisions applicable to all persons on the incorporation and interpretation of standard contract terms (CC Art. 205a et seq.). A content review is likewise available in all contractual relationships, although in stages. According to CC Art. 209(1) (new version), a standard contract term is unfair if, contrary to the requirement of good faith, it causes a considerable and unjustified disadvantage to the other party. Furthermore, with consumer contracts, terms not individually negotiated can be reviewed; a review of individual agreements on the other hand has no longer been possible since 1 March 2006. In respect of B2C contracts, the rules of the CC are complemented with a *black* and a *grey list* by the government regulation 18/1999 (II.5.). Since Act III of 2006 came into force, the legislator has changed the consequences of unfairness. CC Art. 209a(2) provides that unfair terms in consumer contracts are void and that unfairness can only be asserted to the advantage of the consumer. The scope of application of the *actio popularis* has been limited to B2C contracts since 1 March 2006.

Further changes are expected with the planned "big" reform of the CC, including *inter alia* limiting the definition of consumer to natural persons and regulation of the concurrence of standard contract terms (battle of forms).

13. Ireland (IE)

Before transposition of the Directive, there was no protection in IRISH law comparable to that of the Directive. Instead 'fairness' was addressed by a number of contract law doctrines, such as the doctrines of duress and undue influence, mistake and misrepresentation. Moreover, the extent to which a supplier could exclude his liability for breach of the statutory implied terms in contracts for the sale of goods and supply of services was regulated by the Sale of Goods Acts 1893 and 1980 (for sale of goods) and Part IV of the Sale of Goods and Supply of Services Act 1980 (for the supply of services). As regards the sale of goods, any attempt to exclude liability for breach of the statutory implied terms against a consumer was considered void (see e.g. sec. 55 of the Sale of Goods Acts 1893), whereas, in relation to services an express exclusion would be valid if fair and reasonable and if it had been specifically brought to the consumer's attention (sec. 40 of the Sale of Goods Acts 1980).

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Related provisions in the Sale of Goods and Supply of Services Act 1980 allowed a Minister to make orders on various matters, such as: required particulars in contracts; notice on the use of standard form contracts; font size in printed contracts and contracts required to be in writing (sec. 51-54, 1980 of the Act), but they were never implemented.

The Directive was transposed by the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995. Like in the UNITED KINGDOM, the content and structure of the implementing provisions remained quite close to the Directive, limiting the scope of the Regulations to B2C transactions.

It was not until 2000, that the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000 (SI No. 307 of 2000) were introduced to extend enforcement powers under Regulation 8 of the 1995 Regulations to ‘consumer organisations’.

14. Italy (IT)

In ITALIAN law there were no special separate regulations on unfair terms before the implementation of the Directive. However in 1942, within the Italian Civil Code certain general provisions on incorporation (Art. 1341(1), 1342) and interpretation of standard terms applicable to all persons already existed, for instance, CC Art. 1370 (*contra proferentem* rule). In addition, according to CC Art. 1341(2) pre-determined and pre-formulated clauses were void, if they were not individually accepted in writing, especially limitations of liability. Special rules on the review of content of clauses on the other hand were not introduced into the CC until 1996: In order to transpose the Directive, the legislator produced a new chapter in the Civil Code (ex CC Art. 1469-bis to 1469sexies). The scope of these rules was restricted to consumer contracts. Meanwhile the rules have been amended many times. In 1999, in response to pressure from the European Commission, the Italian legislator extended the scope of review of clauses to all contractual relationships (whereas thus far the only contracts to which it applied were contracts for the sale of goods and the supply of services). A further amendment occurred in 2003 with Art. 6 of the Act 14/2003: After the ECJ made it clear in C-372/99,⁴⁷ that Art. 7(3) of Directive 93/13 requires “the setting up of procedures of a

⁴⁷ ECJ judgment of 24 January 2002, C-372/99 - *Commission of the European Communities v. Italian Republic* [2002] ECR I-00819.

deterrent nature and a dissuasive purpose which may also be directed against conduct confined to the recommending of the use of unfair contract clauses, without actually using them in specific contracts”, the Italian legislator refined the relevant provision (CC Art. 1469sexies) according to these guidelines. With the passing of the consumer code, on 22 July 2005 which came into force by legislative decree of 23 October 2005, the provisions on unfair clauses of the CC (ex CC Art. 1469bis-1469sexies) were carried over to the consumer code. This instrument changed the legal consequences of the use of unfair terms by introducing the concept of relative nullity (*nullità di protezione*) in Art. 36(3): Henceforth the consumer can rely on the validity of the contract so long as it suits him, as only he (or the court which is obliged to take into account his interests) can claim nullity and no limitation period looms.

15. Latvia (LV)

In LATVIA the first normative act in the field of consumer protection came into force on 28 October in 1992 – law “On Consumer Rights Protection”. This normative act did not stipulate specific provisions regarding unfair contract terms. However, from 1992 to 1999 (when the new Consumer Rights Protection Act came into force) consumer rights protection developed intensively. In 1999, the Consumer Rights Protection Act was modified in order to transpose Directive 93/13. The provisions only apply to B2C-Contracts, however, the concept of consumer has been extended by the Latvian legislator, since the notion “consumer” encompasses all transactions which are not directly related to his or her entrepreneurial activity, sec. 1(3). Sec. 5(1) provides that contracts between a consumer and a business shall provide for equal rights of both contracting parties. According to sec. 5(2) contract terms (even though they have been individually negotiated) shall be deemed to be contradictory to the principle of legal equality of the contracting parties if the terms put the consumer in a disadvantageous position and are contrary to the requirements of good faith, while sec. 6(3) adopts the wording of Art. 3(1) of Directive 93/13, blacklisting twelve clauses of the Annex. A key feature of Latvian law is the administrative control of contractual clauses by the Consumer Rights Protection Centre, whose competences are laid down in Art. 25 of the Consumer Rights Protection Act.

16. Lithuania (LT)

Consumer protection is a relatively new sphere of law in the Republic of LITHUANIA. Before the transposition of Directive 93/13, consumer law issues were regulated by the 7 July 1964 Civil Code (soviet times code) and since 1994 by the Consumer Protection Act, but Lithuanian law did not provide for a level of protection comparable to the Directive. In 2000, the legislator replaced the Civil Code of 1964 with the new Civil Code of Lithuania (in force since 1 July 2001), closely mirroring the Unidroit Principles and the Principles of European Contract Law. Parallel to this the Act on Consumer Protection (entry into force 1 January 2001) was amended. Both the Civil Code as well as the Consumer Protection Act serve to implement the provisions of Directive 93/13. In contrast to the Consumer Protection Act the Civil Code, however, does contain general rules on standard conditions which are applicable to all kinds of contracts. According to CC Art. 6.185(2), standard conditions prepared by one of the parties shall be binding on the other only if the latter was provided with an adequate opportunity to become acquainted with said conditions. Moreover, the Civil Code provides special rules on surprising terms (CC Art. 6.186(1) and (2)), the battle of forms (CC Art. 6.187) and the interpretation of standard terms (CC Art. 193(4)). CC Art. 6.186(3) also provides that all kinds of parties being confronted with standard terms have the right to claim for dissolution or modification of the contract in the event where, even though the standard conditions of the contract are not contrary to the law, they exclude the party's rights and possibilities that are commonly granted in a contract of that particular class, or exclude or limit the civil liability of the party who prepared the standard conditions, or establish other provisions which violate the principle of equality of parties, cause imbalance in the parties' interests, or are contrary to the criteria of reasonableness, good faith and justice. These rules were complemented with special provisions for the review of terms not individually negotiated in consumer contracts (CC Art. 6.188). The provisions of the Consumer Protection Act correspond with these rules almost word for word. At present, courts apply both acts simultaneously.

17. Luxembourg (LU)

The Consumer Protection Act which was enacted on 25 August 1983 provided comprehensive regulations on unfair contract terms. Structurally very similar to the Directive, the provisions contained a general clause defining criteria for assessing unfairness as well as a non-

exhaustive black list of unfair clauses. Therefore the transposition of the Directive by the Law of 26 March 1997⁴⁸ lead only to slight modifications to the domestic law as four clauses were added to the black list. Parallel to this, provisions on the distinction between individual agreements and pre-formulated clauses were introduced into CC Art. 1135-1 and a new rule on the incorporation of standard terms was adopted: According to CC Art. 1135-1 standard terms are only binding, as long as the other party has had the possibility to acquaint himself with the terms at the time of signing, and if in the prevailing circumstances he is to be treated as having accepted them. Whereas the review of content provided in the Consumer Protection Act is only applicable in the context of B2C relationships, the incorporation rules of CC Art. 1135-1 apply to all persons.

18. Malta (MT)

Before the transposition of Directive 93/13, there were no express legal norms dealing with the use of unfair terms in consumer contracts. However, in practice, the provisions of the Civil Code were utilised by the MALTESE Courts as a legislative tool for regulating the use of unfair terms by traders especially with respect to the exemption of liability clauses.

In 1994 the legislator passed the Consumer Affairs Act. Among other things the Act created (and conferred powers upon) the post of Director of Consumer Affairs, and provided for the establishment of the Consumer Affairs Council, the Consumer Claims Tribunal and the regulation of the role of consumer associations. Directive 93/13 was transposed in 2000, by amending the Consumer Affairs Act 1994,⁴⁹ especially Art. 94 which empowers the Director on his initiative or at the request of a qualifying body to require the deletion or alternation of unfair terms in a consumer contract. The Maltese Consumer Affairs legislation goes beyond the minimum requirements, since the Maltese law extends the protection of consumers to all contractual terms without making any distinction as to whether the term was individually negotiated or not. A characteristic of the Maltese system are the far reaching powers of the Director of Consumer Affairs. If a trader is considered to have acted in breach of the Consumer Affairs Act, the Director of Consumer Affairs can request the initiation of criminal proceedings before the Court of Magistrates (Criminal Jurisdiction). If the trader is found to

⁴⁸ Law of 26 March 1997 (Memorial A No. 30 of 29 April 1997).

⁴⁹ Article 44-47 in Part VI (“Unfair Practices”) and Art. 94-101 in Part IX (“Compliance Orders”).

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be in breach of the requirements of the Consumer Affairs Act, a maximum fine of Lm 2000 (4658 Euros) can be imposed by the aforesaid court.

19. Netherlands (NL)

Before 1992, the DUTCH Civil Code did not contain specific provisions on unfair contract terms. Those terms used in consumer contracts were dealt with by the courts by means of the general doctrine. Also, general terms excluding or limiting the legal liability of the seller or supplier were deemed void as being contrary to good morals or public order.⁵⁰ Furthermore, general terms were interpreted in favour of the consumer in case a term was not very clear. The courts often applied the principle of “good faith” in order to fill in gaps and to nullify unacceptable terms.

The new Dutch civil code which came into force on 1 January 1992 contains special provisions on unfair contract terms (Art. 6:231-6:247). The provisions were inspired by the German act on unfair contract terms.⁵¹ The scope of the provisions also extends to B2B transactions, however, contractual parties who employ more than 50 staff cannot seek review of either incorporation or content (Art. 6:235 BW). The black list and the grey list (Art. 6:235, 6:236 BW) on the other hand relate only to consumer contracts. After the ECJ (C-144/99⁵²) criticised that Dutch Law does not contain explicit provisions on the principle of transparency, the legislator amended CC Art. 6:231 and 6:238 and clarified moreover, that in case of doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. A further amendment occurred in 2004. As Dutch law on unfair terms, in contrast to the Directive, only applied to written contracts, the word “written” was removed.⁵³

20. Poland (PL)

In 1933 Art. 71, 72 of the POLISH law of obligations already contained provisions on unfair terms. Although Polish civil law was familiar with the concept of review of contractual clauses, the level of protection for consumers was very different to the one prescribed by the

⁵⁰ Article 1373 in conjunction with Art. 1371 of the Old Dutch Civil Code.

⁵¹ GERMAN Act Concerning the Regulation of the Law of Standard Business Terms, see above Part 2 C.II.9.

⁵² ECJ judgment of 10 May 2001, C-144/99 - *Commission v. Kingdom of the Netherlands* [2001] ECR I-03541.

⁵³ By the Act of 13 May 2004, Stb. 2004, 210.

Directive, especially up until 1990. Since 1990 certain mechanisms for consumer protection have been established in the Civil Code. By virtue of CC Art. 384 the Council of Ministers could, by means of a regulation, specify particular conditions for concluding and executing contracts with consumers (normative ‘standard forms’), if it was justified by the aim of protecting consumer interests. In fact, the Council adopted only one regulation with a limited scope of application on 30 April 1995 (*on the conclusion and execution of contracts of sale of movable goods with consumers*). CC Art. 385.2 (as per the amendment of the Civil Code of 28 July 1990) stipulated that if contractual clauses, contractual forms or rules secured significantly unjustified benefits for the party who used them, the other party (unless a businessperson) could apply to court to have them declared ineffective *inter partes*, i.e. there was no possibility for abstract control of contractual clauses.

The Directive was transposed by the Act *on the protection of some consumer rights and liability for damage caused by a dangerous product* of 2 March 2000 amending the Polish Civil Code of 1964 – Arts. 384-385.4. The new concept distinguishes between forms used in all contracts, those used in contracts between professionals (traders) and those used in contracts with consumers. A review of the incorporation of standard terms is according to CC Art. 384 in principle not confined to B2C relationships, but yet stronger provisions on incorporation apply to consumer contracts. The battle-of-forms rule in Art. 485, modelled on Art. 2:209 PECL, on the other hand, relates only to B2B contracts. A review of the content of standard terms is limited to B2C transactions. The notion of “consumer” differs from the Directive, since a person can also be regarded as a consumer when he is concluding a contract for a purpose not directly related to his business.

Since transposition of Directive 93/13 Polish law also contains in Art. 479³⁶ et seq. of the Polish Civil Procedure Code rules on the abstract review of terms in collective proceedings for the first time. Standing is enjoyed not only by consumer associations, local consumer ombudsmen as well as the President of the Office for Competition and Consumer Protection, but every person, who could have concluded the contract following an offer by the user. If the designated consumer court in Warsaw prohibits the use of a certain contractual clause, the decision is published in the Economic and Court Journal and entered in a register with the President of the Office of Competition and Consumer Protection. Once the judgment has been published in the Register it has general effects. The Register is open to the public, and at present it contains more than 1000 clauses.

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21. Portugal (PT)

The PORTUGUESE legislator had already established provisions for the protection against standard contract terms in 1985 with the Decree-Law 446/1985 of October 25. It followed the German Act Concerning the Regulation of the Law of Standard Business Terms of 1976 very closely, i.e. it was also applicable to contracts concluded between businesses (B2B) and amongst private parties (P2P). Conversely the scope of application was limited to standard terms pre-formulated for frequent use. The content review was carried out according to the general clause of Art. 15 (contradiction against good faith). Additionally, in Art. 18 et seq. and Art. 21 et seq. the act contains four different catalogues of forbidden clauses, whereby the first two (black and grey list) apply generally, whereas the other two (also a black and a grey list) are only applicable to consumer contracts.

Directive 93/13 was transposed by means of legislative decree 220/1995 of August, in which the decree merely made some minor amendments, above all a correction of the prohibited lists and an extension of some procedural provisions. In the course of transposition the legislator began to compile a register of those judgments, as a consequence of which the use of clauses was prohibited or declared ineffective. As far as substantive scope is concerned, with the repeal of the old Art. 3(1)(c) it enabled a review of clauses that were imposed or approved by legal persons of public law. Only through a further amendment in 1999 (Decree-Law 249/1999 of July 7) on the other hand did pre-formulated individual contracts come within the purview of the act.

22. Romania (RO)

Prior to 2000, in ROMANIAN legislation there were no express rules regarding the monitoring of standard contract terms. Instead, general contract law was applicable; before the transposition of the Directive, there was no protection in Romanian law comparable to that in the Directive.

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In 2000, the Romanian Parliament passed Law No. 193/2000 on unfair terms in contracts between traders and consumers. This Law applies to any term in a contract concluded between a “seller” and a consumer where the clause has not been individually negotiated.

23. Slovakia (SK)

Prior to transposition of Directive 93/13 there were no specific provisions in the Civil Code of 1964 or in the Consumer Protection Act 1992 which had the protection of the consumer from unfair terms (see above, 4.) as their aim. Public control and market surveillance authority in the field of consumer protection were regulated by the Act 274/1993 on Jurisdiction of Bodies in Matters of Consumer Protection, which defined the powers of individual authorities in matters of consumer protection (Ministry of Economy and other ministries and other institutions of state administration, Trade Inspection, county offices, district offices, municipalities).

In order to transpose the Directive, the SLOVAKIAN legislator amended the Civil Code in 2004,⁵⁴ inserting the provisions of the Directive almost literally. These rules were complemented by the Consumer Protection Act, also adopted in 2004,⁵⁵ whereby the notion of consumer contract was more closely defined, Art. 23a of the Consumer Protection Act, and general provisions for public control and market surveillance authorities as well as the rights of consumer organisations were laid down. The scope of application of the domestic provisions is broader than the one prescribed by the Directive since legal persons are also regarded as consumers, provided they are acting for purposes outside their trade, business or profession. One key feature of Slovakian Law is the co-operation between the government and non-government organisations in promoting consumer protection and policy. According to Slovakian Law, Consumer organisations have a legal right to work with public authorities in both creating and monitoring consumer policy, and in improving the effectiveness of its administration. Their representatives sit on the government’s advisory Consumer Policy Council (the Vice-Chairman is the representative of the Association of Slovak Consumers).

⁵⁴ Amendment No 150/2004 Fifth head: Consumer contracts: Art. 52-54, date of coming into force 1 April 2004.

⁵⁵ Last amendment 616/2004, date of coming into force: 25 November 2004.

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24. Slovenia (SL)

Before the transposition of Directive 93/13 into SLOVENIAN law, the Code of Obligations of 1978 (replaced by a new Code in 2002) contained two articles regarding general terms and conditions of the contract. Neither of them included a detailed description or definition of unfair terms. Art. 143 provided that any provisions of general terms and conditions that oppose the actual purpose for which the contract was concluded or good business customs shall be null and void, even if the general terms and conditions in which they are contained were approved by the relevant authority. In addition, the court could reject the application of individual provisions of general terms and conditions that remove another party's right to object or appeal, or provisions based on which a party loses contractual rights or deadlines or that are otherwise unjust or too strict for the party.

The Slovenian legislator transposed the Directive in February 1998, amending Arts. 22-24 of the Consumer Protection Act. The new provisions came into force on 28 March 1998. Compared with the Directive Slovenian law provides greater protection for consumers because individually negotiated terms can equally well be declared unfair and therefore null and void. Terms used in other contracts (B2B or P2P) can be reviewed under Art. 121 Code of Obligations. Art. 121 of the Code of Obligations provides that general terms and conditions that oppose the actual purpose for which the contract was concluded or good business customs shall be null and void.

25. Spain (ES)

Although in SPAIN there was not a separate Law on unfair contract terms, there did exist a concise regulation on the topic with protection to some extent comparable to that of the Directive. In 1980 *Law 50/1980 of October 8 on the insurance contract* was passed, whose Art. 3 deals with standard terms and unfair terms in contracts of insurance. Apart from that branch of the Law, taking a more general approach, Law 26/1984 of July 19 on Consumer Protection created a full regime on unfair contract terms in contracts concluded by consumers. Art. 10 of the Law 24/1986 contained (mixing to some extent the notions of standard terms and unfair terms, with some confusion) a definition on standard contract terms and the formal requirements for them to be considered part of the contract, a general rule on equity in contractual clauses and a list of 12 sections on forbidden terms, a rule on the interpretation

contra stipulatorem, the priority of particular clauses over general clauses and the sanction of nullity. This regulation on unfair contract terms was inspired by Comparative Law, with a particular influence of the GERMAN Law on standard terms in contracts.⁵⁶

Directive 93/13 was transposed in 1998 by the enactment of Law 7/1998, 13 April 1998, on standard terms in contracts and Law 26/1984 of July 19 on Consumer Protection, in which the list of unfair clauses was extended by a further 29 clauses. Both acts are different in terms of scope and content. The act on standard contract terms deals with standard terms in contracts in general, its provisions apply equally to B2C contracts and B2B contracts. This act however only regulates the incorporation and interpretation of standard terms, and does not review content. The General Consumer Protection Law on the other hand contains (for consumer contracts) provisions on content review.

One of the main characteristics of the domestic system of preventive control of unfair terms is the Spanish Standard Terms Register, listing terms that have been declared unfair by final court decisions. The Notaries and Registrars of the Land Registry and the Commercial Registry must adhere to this Register and refuse to authorise contracts containing any of the listed terms. The public Register enables anybody to invoke the unfairness of these terms before the courts.

The requirements articulated by the ECJ in C-70/03⁵⁷ (concerning the transposition of Art. 5 and Art. 6 of Directive 93/13) have thus far not been implemented in Spanish law, but there is currently a draft being discussed in the Spanish parliament, modifying not only the wrong transposition, but also some other questions on unfair terms (e.g. round-off clauses against the consumer, unfair practices in service contracts, unfair clauses on requisites for termination).

26. Sweden (SE)

In 1971 SWEDEN issued an Act on Contract Terms in consumer relationships (Contract Terms Act, CTA) which contained mainly market law rules, enabling the Consumer Ombudsman to negotiate with suppliers' organisations and issue prohibitions against the use of unreasonable

⁵⁶ GERMAN Act Concerning the Regulation of the Law of Standard Business Terms of 1976, see above I.9.

⁵⁷ ECJ judgment of 9 September 2004, C-70/03 - *Commission v. Kingdom of Spain* [2004] ECR I-0799.

terms and conditions. Measures could be taken to fend off the use of certain contract clauses which were considered unreasonable. Such cases are tried separately via the Consumer Ombudsman and the Swedish Consumer Agency and before the Market Court as the only and final court, since Market Court's judgments cannot be appealed. Furthermore, since 1976 all contractual clauses (in B2C, B2B and P2P relationships) can also be subjected to a content review under sec. 36 of the Contracts Act – as also in the other SCANDINAVIAN COUNTRIES (DENMARK and FINLAND, see 5. and 7.). With the accession of Sweden to the EU the CTA 1971 was repealed and replaced with the CTA of 15 Dec 1994 (1994:1512). The Act (covering only B2C relations) contains not only marketing law, but also civil law provisions, that essentially refer to sec. 36 of the Contracts Act. However, the general clause in sec. 36 of the Contracts Act applies with two modifications. Firstly, circumstances that occurred after conclusion of the contract can only be considered if this would not be to the disadvantage of the consumer (CTA Art. 11(2)). Secondly, the possibility of amendment of unreasonable contract terms is limited; in the case of unfair terms which have not been individually negotiated, the consumer can request that the remainder of the contract shall remain unchanged i.e. the court does not amend the remaining clauses.

27. United Kingdom (UK)

Even before legislative regulations came into force case law had developed a series of protective mechanisms to review standard contracts. According to the case law, standard terms would only then form part of the contract, if the user had given the other contractual party reasonable opportunity to become acquainted with the terms (reasonable notice test⁵⁸). An additional role was played by the interpretation of contracts according to the *contra proferentem* rule and even a review of content was possible within limits. The first piece of legislation was the *Unfair Contract Terms Act 1977* (UCTA). UCTA is not limited to consumer contracts; it applies to B2B contracts, and also, in limited circumstances, to P2P contracts. However, it only covers a narrow range of terms, since it is designed to control exclusion clauses, where one party attempts to exclude or limit their normal liability for negligence or breach of contract or tries to “render a contractual performance substantially

⁵⁸ *Parker v. South Eastern Railway Co Ltd.* [1877] 2 CPD 416; *Thornton v. Shoe Lane Parking Ltd* [1971] 2 QB 163.

different from that which was reasonably expected". UCTA remained unaffected in transposing the Directive and remains in force.

The Directive was initially transposed in 1994 via a statutory instrument (Unfair Terms in Consumer Contracts Regulations, UTCCR) resembling the Directive almost word for word. Since the implementation of the Directive, the Office of Fair Trading (OFT) has been the leading regulator in this field. However, contrary to Art. 7 of Directive 93/13, the UNITED KINGDOM did not introduce a general right of standing for consumer associations, since this had been opposed by the privity of contract doctrine. The Queen's Bench Division of the High Court therefore asked the ECJ whether the Directive allowed private persons or organisations having a legitimate interest in protecting consumers to take action before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for use are unfair. However, the question was withdrawn: as a result of political change, the government gave right of standing to consumer associations in the Consumer Contracts Regulations 1999 and granted the Claimant Consumers' Association the right to litigate.

The dual applicability of UCTA 1977 and UTCCR 1999 results in a particularly complex legal framework, since the two laws contain inconsistent and overlapping provisions, using different language and concepts to produce similar but not identical effects. The Law Commission and Scottish Law Commission in February 2005 therefore published a draft Unfair Terms in Contracts Bill and proposed in its final report to clarify and unify the legislation on unfair terms presently contained in UCTA 1977 and UTCCR 1999.⁵⁹ The report also recommends improved protection for small businesses and to allow them to challenge any standard term of the contract that has not been altered through negotiation, and is not the main subject matter of the contract or the price.

⁵⁹ See the final report of the Law Commission and the Scottish Law Commission on unfair terms in contracts, LAW COM No. 292/SCOT LAW COM No. 199.

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III. Scope of application

1. Consumer, Seller and Supplier, Public-sector undertakings

a. B2C, B2B and P2P Contracts

Directive 93/13 is applicable to terms in contracts concluded between a seller or supplier and a consumer (B2C). All member states have, in the course of transposition of the Directive, introduced special B2C rules to review pre-formulated clauses.

In addition to this, in a number of member states a review of B2B and P2P contracts is possible at different levels.

In the NORDIC STATES (DENMARK, FINLAND, SWEDEN), due to the general clause of sec. 36 Contracts Act, a content review of unfair terms (even if they are individually negotiated) has always been possible in all manner of contractual relationships, thus also in B2B and P2P contracts. However, according to sec. 36 Contracts Act, in determining what is unfair, regard shall not only be paid to the content of the contract and to the circumstances prevailing at and after the conclusion of the contract, but also to the positions of the parties. This means that in B2B contracts, very strict requirements must be overcome to render a clause unfair.

In GERMANY, PORTUGAL and ESTONIA as well as in AUSTRIA, HUNGARY, LITHUANIA, NETHERLANDS and SLOVENIA there are general clauses which provide for a content review of standard terms, which do not merely apply to B2C contracts, but also to B2B and P2P contracts. A further special feature of Germany, Portugal and Estonia is that in relation to B2B contracts a grey list and black list are also employed:

- The GERMAN provisions for monitoring of standard terms (CC § 305 et seq.), in principle, protect all contractual parties against whom standard terms are used. So far as standard terms are being used against a business, certain specific provisions do not have any direct application, especially the grey list (CC § 308) and black list (CC §

309), which apply to B2C contracts (CC § 310(1)). However, where the use of a particular clause against consumers would be prohibited according to CC §§ 308, 309, in a B2B situation the judge must examine whether the clause is also to be considered void in the business sphere. According to the case law of the BGH, the black list especially (CC § 309) has an indicative effect of whether the relevant rule leads to a disproportionate imbalance to the detriment of the business.

- PORTUGUESE Law, in addition to the general clause applying to all transactions (Art. 15 of the Decree-Law 446/1985), also has a grey and a black list, which are applicable to all contractual relationships (Art. 18, 19 of the Decree-Law 446/1985).
- In ESTONIA, the general clause for standard terms (Art. 42 of the Law of Obligations Act) is applicable to both B2C and P2P contracts alike. The black list, which applies to B2C contracts (Art. 42(3) of the Law of Obligations Act) is, pursuant to Art. 44, to be considered as a grey list in respect of B2B contracts.⁶⁰

In the UNITED KINGDOM, a review of standard contract terms for both B2B and P2P contracts is possible, since UCTA 1977 also applies to contracts between businesses and certain “private” contracts for the sale of goods where neither of the two parties is a business. However, UCTA applies only to exclusion and limitation of liability clauses and indemnity clauses.

In contrast, there are no special general clauses providing for a content review of pre-formulated terms in BELGIUM, BULGARIA, CYPRUS, CZECH REPUBLIC, FRANCE, GREECE, IRELAND, ITALY, LATVIA, LUXEMBOURG, MALTA, POLAND, SLOVAKIA and SPAIN.

It is nevertheless worth noting, that in some of these member states a content review is possible indirectly: many member states regulate the incorporation of standard terms, which have a general application to all kinds of contractual parties.⁶¹ In the course of reviewing incorporation and interpretation this often represents a hidden form of content review, in

⁶⁰ Cf. Art. 44 of the ESTONIAN Law of Obligations Act: “If a standard term specified in subsection 42(3) of this Act is used in a contract where the other party to the contract is a person who entered into the contract for the purposes of that person’s economic or professional activities, the term is presumed to be unfair”.

⁶¹ See *supra*, Part 2 C.II.1.-25.

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which not only formal aspects are examined. Thus for example, in a number of member states the incorporation of standard terms does not merely depend upon whether the other party has had the opportunity of becoming acquainted with the contractual terms (such formal requirements are e.g. the duty of the user to inform the other party of its use of standard terms; the duty of the user to give the other party genuine opportunity to become acquainted with the terms; duty of the user to communicate the standard terms; the duty of the user to draft the terms visible). Rather, in some of the member states the content of the clause (and its fairness) are considered as well, when deciding whether or not a term has been incorporated into the contract.

Finally it should be noted, that many member states (e.g. BELGIUM and SPAIN⁶²) apply general concepts, which can be used to correct an extremely disproportionate imbalance in the main performance duties, also in B2B contracts, such as on the basis of the *laesio enormis* or the benchmark of “public policy/good morals”. In FRANCE, the Cass. civ. has sporadically allowed a review of clauses between two businesses (via the doctrine of *cause*, CC Art. 1131), although the French provisions on content review are in principle limited to consumer contracts.⁶³

b. Definition of consumer⁶⁴

Art. 2 lit. (b) of Directive 93/13 defines consumer as any natural person who is acting for purposes which are outside his trade, business or profession. The member states have only partly followed this definition. In a number of member states one finds deviating definitions of consumer. In SPAIN, GREECE and HUNGARY all “final addressees” are protected as consumers. In most cases, this concept offers wider protection than Directive 93/13, since it also encompasses atypical transactions, which are not related to a further transfer. In FRANCE, POLAND and LATVIA businesses concluding contracts which are not directly related with his

⁶² SPANISH courts quite often use “indirect control” by applying the general theory on vices of consent (mistake, fraud, etc.). Moreover, the Civil law of Navarre and Catalonia admits a *laessio enormis* (but not the Spanish Civil Code).

⁶³ Cass. civ. 22 October 1996 D. 1997, 121 *Société Bancheureau v. Société Chronopost*. In later decisions however the Cass. civ. did place limitations on the extent of the principles developed in Chronopost, see Chambre mixte 22 April 2005, pourvoi n° 02-18326 and 03-14112; Chambre commerciale 21 February 2006, pourvoi n° 04-20139.

⁶⁴ See thereto in detail Part 3 A. of the study.

or her profession are also protected as “consumers” or “*non-professionnels*”.⁶⁵ In AUSTRIA, BELGIUM, CZECH REPUBLIC, DENMARK, FRANCE, GREECE, HUNGARY, SLOVAKIA and SPAIN (controversial), legal persons are treated as a consumer, provided that the purchase is for private use or (in GREECE, HUNGARY and SPAIN) the legal person is the final addressee. HUNGARY is presently planning to limit the notion of consumer to natural persons. In PORTUGAL, it is unclear whether legal persons can be protected as “consumers”, however, a draft of a new Consumer Code acknowledges that legal persons may, in certain circumstances, benefit from the protection conferred to consumers. ROMANIAN law protects groups of natural persons, organised in associations.⁶⁶

In MALTA, any other class or category of persons whether natural or legal may, from time to time, be designated as “consumers” for all or any of the purposes of the Consumer Affairs Act by the Minister responsible for consumer affairs after consulting the Consumer Affairs Council. Furthermore, in Malta the notion of “consumer” includes any other individual not being the immediate purchaser or beneficiary, whether or not a member of the consumer’s household, who, having been expressly or tacitly authorised or permitted by the consumer, may have consumed, used or benefited from any goods or services provided to the consumer by the trader.

c. Definition of seller or supplier⁶⁷

According to Art. 2 lit. (c) “seller or supplier” means any natural or legal person who is acting for purposes relating to his trade, business or profession, whether publicly or privately owned. The notion of business in Art. 2 lit. (c) of Directive 93/13 is autonomous to European law and is to be interpreted widely. The Directive states that the term seller/supplier encompasses all natural and legal persons in the course of their business or profession, thus including farmers and freelancers.

Most member states have transposed the terms “seller” and “supplier” (in part under the generic term “professional/business”) in accordance with Directive 93/13. In some member

⁶⁵ As to the situation in the UNITED KINGDOM see in detail Part 3 A.III.2.

⁶⁶ Article 2(1) of the Law No. 193 of 6 November 2000 on unfair terms in contracts between sellers and consumers.

⁶⁷ See thereto in detail Part 3 B. of the study.

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states on the other hand, there are no express definitions, above all in FRANCE and LUXEMBOURG. In BELGIUM, there is the peculiarity that separate rules are enacted concerning contracts between consumers and practitioners of liberal professions; instead of broadening the scope of the TPA the legislator preferred to pass a separate Act dealing with unfair contract terms in consumer contracts with practitioners of liberal professions. In MALTA any category or class of persons can be designated as a “trader” by Order of the Minister responsible for consumer affairs after consulting the Consumer Affairs Council, and publication in the Gazette.

d. Public Sector Undertakings

For detailed information on the domestic legislation of the 15 “old” member states with regard to unfair terms used in contracts for public services please refer to the study “*Application de la Directive 93/13 aux prestations de service public, Rapport de synthèse*” conducted by Harriet Hall and Claire Tixador.⁶⁸

2. Exclusion of specific contracts

a. Contracts in the area of succession rights, family, employment and company law

According to recital 10, contracts relating to employment, succession rights, rights under family law and contracts relating to the incorporation and organisation of companies or partnership agreements are excluded from the Directive, as such contracts, as a rule, are not consumer contracts. For contracts relating to employment, succession rights and rights under family law this is uncontroversial as there is hardly a case imaginable, in which such a contract could at the same time be a consumer contract. Whether member states can exclude contracts relating to the incorporation and organisation of companies or partnership agreements from a review of clauses on the other hand is doubtful, as according to the wording and the preparatory works⁶⁹ the exceptions named in recital 10 shall only apply in

⁶⁸ Online at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/unf_cont_terms/uct02_fr.pdf. See as well Part 3 B.I.4 and Part 3 B.III.3. of this study.

⁶⁹ See the common position of the council of 22 September 1992.

the absence of a consumer contract. With company contracts concerning the acquisition of company rights as a capital investment without a business function, however, a consumer contract can be present.

Contracts relating to employment, succession rights, rights under family law and to the incorporation and organisation of companies or partnerships are above all in CYPRUS and IRELAND expressly excluded from the scope of application of the national provisions. The DUTCH provisions do not relate to contracts of employment, in ESTONIA company law contracts are excluded. Since the modernisation of the law of obligations, contracts of employment in GERMANY are also in principle subject to review of standard terms (CC § 310(4)); company law contracts on the other hand are excluded, although according to the case law of the BGH company law contracts remain subject to content review under CC § 242, 315. In the UNITED KINGDOM contracts in the areas of family law, succession law, employment law and company law were expressly excluded from the scope of application by UTCC 1994, Schedule I a)-d); this limitation was however abolished in 1999.

b. Real property contracts

The Directive is basically applicable to all types of contracts. However, there is the view in academic literature that real property contracts are not included, as according to recital 5, Directive 93/13 refers only to “goods and services”. This is also confirmed by the English language version of Art. 4(1) of Directive 93/13, as its term “goods” only encompasses movable objects. But a difficulty with this view is already presented by the French language version, which with the term “*biens*” does not contain any limitation to moveable objects.

Accordingly in the UNITED KINGDOM, the CA correctly clarified in *Khatun & Others v. Newham LBC*,⁷⁰ that both the Directive and the English implementing act apply to contracts relating to land. The court reasoned that to exclude contracts relating to land from the scope of “goods and services” would go against the grain of the aim and purpose of the Directive, which is to provide a high level of protection. There can thus be no justification for doing so. Although English common law distinguishes between real and personal property, other language texts of the Directive use terminology that can just as readily apply to immovable

⁷⁰ CA judgment of 24 February 2004 - *Khatun & Others v. Newham LBC* [2004] EWCA Civ 55.

goods as to movables. Furthermore, the text and preparatory works of the Directive indicate that the drafters attached no significance to the distinction between land and other transactions and proceeded on the basis that the Directive would apply to both. Such materials powerfully suggest that if they were to be excluded from the scope of the Directive, then this would have been specifically provided for. Similar arguments have been made in IRELAND about the application of the regulations to contracts relating to land. However, there is no Irish authority on this point although the United Kingdom case *Khatun & Others v. Newham LBC* would represent persuasive authority.

The ROMANIAN law 193/2000 refers to assets, without making any distinction as to their nature (i.e. movable or immovable). The general rules of interpretation provide that where the legislator did not distinguish, the interpreter of the law shall not distinguish either. Because of this it might be argued that the Romanian law applies both to movable and immovable assets.

BELGIAN law did not originally encompass contracts for real property, it was only clarified with the Act of 7 December 1998, that such contracts are included.

3. Exclusion of specific contractual terms

a. Contractual terms based on mandatory provisions

According to Art. 1(2) of Directive 93/13 contractual terms which reflect mandatory statutory or regulatory provisions and provisions or principles of international conventions, particularly in the transport area, are excluded from the scope of the Directive. Roughly half of the member states have implemented this exclusion, namely BELGIUM (in the Liberal Professions Act), CYPRUS, CZECH REPUBLIC, GERMANY, ESTONIA, HUNGARY, IRELAND, ITALY, LATVIA, PORTUGAL, ROMANIA, SLOVAKIA, SPAIN (in the law 7/1998 on standard terms) and the UNITED KINGDOM. Under SLOVAKIAN law only legislative rules on the creation of legal instruments are excluded; however, according to Art. 7(5) of the Slovakian Constitution certain international conventions take priority over laws of the Slovak republic. In GERMANY, CC § 307(3) excludes mandatory provisions from content review (via the general clause assessing

unfairness and the black and grey lists). Nevertheless, clauses repeating mandatory legislative provisions may be reviewed in terms of incorporation and transparency.

The remaining member states, i.e. AUSTRIA, BELGIUM (Trade Practices Act), BULGARIA, DENMARK, FINLAND, FRANCE, GREECE, LITHUANIA, LUXEMBOURG, MALTA, NETHERLANDS, POLAND, SLOVENIA and SWEDEN have decided not to transpose Art. 1(2) of Directive 93/13 at all. To some extent the exclusion of mandatory provisions may nonetheless be established as an unwritten principle through case law and/or legal literature, for example in the Nordic countries (DENMARK, FINLAND, SWEDEN) and also in AUSTRIA, GREECE and LITHUANIA. In FRANCE clauses in contracts with companies in public control e.g. contracts for gas, oil, electricity, telecommunications as well as contracts for public transport or the provision of public services, are capable of review. In any event it is uncertain whether these are in the jurisdiction of the administrative courts (according to the Cass. civ.) or of the ordinary courts (the academic view).

b. Individually negotiated terms

Art. 3 of Directive 93/13 excludes contractual terms which have been individually negotiated by the consumer. 15 member states have adopted this exclusion: AUSTRIA, CYPRUS, ESTONIA, GREECE, GERMANY, HUNGARY, IRELAND, ITALY, LITHUANIA, NETHERLANDS, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SPAIN and the UNITED KINGDOM.

The remaining 10 member states, by not having transposed this exclusion, allow their courts/authorities to monitor individually negotiated terms. This is the case in the NORDIC COUNTRIES (Denmark, Finland, Sweden) and also in BELGIUM (Trade Practices Act), CZECH REPUBLIC, FRANCE, LATVIA, LUXEMBOURG, MALTA and SLOVENIA. The BELGIAN Liberal Professions Act opts for the middle way. The unfair contract terms, mentioned in Annex n° 1 of the Directive are sanctioned with relative nullity even when individually negotiated (Art. 7(4) LPA). The principle of Art. 3 of Directive 93/13 (Art. 7(2) LPA) applies to other contractual terms. In BULGARIA, the general clause and even the black list of Art. 143 applies to all contract terms. However, as to the legal consequences Bulgarian law differentiates between individually and not individually negotiated terms: According to Article 146(1) Law on Consumer Protection, which transposes Art. 6(1) of Directive 93/13, terms not individually

negotiated are automatically void. In contrast, unfair terms individually negotiated are remedied only by general contract law.

According to Art. 3(2), sent. 3 of Directive 93/13, where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him. This provision has been transposed faithfully by nearly all member states. In GERMANY “individually negotiated terms” are excluded from review, but this is counterbalanced through a very narrow definition of the aforementioned notion. The BGH held that for a term to be individually negotiated the customer has to fully understand the content of the contract and be aware of its legal consequences.⁷¹

Although 10 countries generally provide for a review of individually negotiated terms, of those only FRANCE and SLOVENIA have decided not to transpose Article Art. 3(2)(3). It can be concluded that in the remaining countries which allow the monitoring of individually negotiated terms (BELGIUM, CZECH REPUBLIC, DENMARK, FINLAND, LUXEMBOURG, LATVIA, MALTA, SWEDEN) the distinction between standard and negotiated terms remains relevant for assessing unfairness i.e. that different benchmarks apply. However BELGIAN practice doesn't show such a different approach.

⁷¹ BGH judgment of 19 May 2005, NJW 2005, 2543.

IV. Assessing the fairness of contract terms according to Art. 3

1. Concept of the Unfair Contract Terms Directive

The most important provision of the whole Directive in practical terms, the general clause in Art. 3(1) defines the standard of the unfairness test:

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The general clause according to its wording requires an “imbalance in the parties’ rights and obligations”. This does not relate to the main performance duties, as these are not subject to the fairness test according to Art. 4(2) of Directive 93/13. Therefore, it only relates to the remaining rights and duties arising out of the contract. An imbalance can, above all, be present if the respective contractual positions are structured differently by the terms with regard to one and the same question. The issue of whether an imbalance is present in a given case however, cannot be assessed in isolation from the surrounding legal context. Rather, the position of the consumer has to be compared to the position in which he would have been but for the term in question. Therefore, the term must be judged in its regulatory context, arising by virtue of the respective member state law. An imbalance only then exists “to the detriment of the consumer”, if the dispositive statutory law is more advantageous to the consumer than the clause in question. Furthermore, according to the principle *minima non curat praetor*, this imbalance must be significant.

In addition to these criteria the Directive also requires that the imbalance is “contrary to the requirement of good faith”. The relationship of the principle of good faith to the criterion of “imbalance” remains unclear. The wording of the Directive suggests that a clause is unfair only if it causes an imbalance *and* this imbalance is furthermore contrary to the principle of good faith. Following this reading, a clause can therefore cause an imbalance without simultaneously being contrary to good faith. Others however, assume that any clause which generates a significant imbalance is always (automatically) contrary to the principle of good

faith.⁷² It is ultimately worth considering whether the criteria “significant imbalance” and “good faith” are to be understood as alternatives in the sense that the two criteria operate independently of one another, so that a clause is unfair if it results in a significant imbalance, *or* if it is contrary to the requirement of good faith. In view of these multifarious interpretation possibilities it is not surprising that the member states have constructed their general clauses very differently.⁷³

According to Art. 4(1) the unfairness of a contractual term shall be assessed (1) by taking the nature of the goods or services for which the contract was concluded into account, and (2) by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and (3) in relation to all the other terms of the contract or of another contract upon which it is dependent. Additionally, the annex to Directive 93/13 has a certain indicative effect in the assessment of the fairness of a clause.⁷⁴

2. The form which the general clause has taken in the Member States

The member states are obliged by Art. 3 of Directive 93/13 in conjunction with recital 15 to fix the criteria for assessing the unfair character of contract terms in a general way. All member states prescribe such general clauses to monitor terms. However, although Art. 3 of the Directive applies to pre-formulated individual contracts for single use, the general clauses in AUSTRIA and in the NETHERLANDS only relate to standard terms. Even though in these member states other legal instruments are available to monitor such types of terms, this legislative technique gives rise to the danger that the requirements of the Directive will go unheeded.

A word for word transposition of Art. 3(1) of Directive 93/13 has admittedly only occurred in eight member states, namely CYPRUS, CZECH REPUBLIC, HUNGARY, IRELAND, ITALY, ROMANIA, SPAIN and the UNITED KINGDOM. Most notably in Italy, the verbatim transposition of the Italian language version of the Directive led to the term “*malgrado la buona fede*” in the Italian Consumer Protection Act (*Codice del Consumo*). This formulation obviously is

⁷² Cf. *Tenreiro*, ERPL 1995, 273, 279.

⁷³ See *infra*, under Part 2 C.IV.2.

⁷⁴ On the legal nature of the Annex and its transposition in the Member States see *infra*, under Part 2 C.IV.3.

based on a translation error, as the expression “*malgrado il requisito della buona fede*” does not mean “contrary to good faith”, but rather “despite good faith”.

The other member states, in contrast, have not transposed the criteria in Directive 93/13 word for word, but either retained the general clauses of their respective national laws or adopted principles deviating from, or even going further than that prescribed in the Directive for the review of terms:

- In AUSTRIA the principle of good faith is not mentioned, instead CC Art. 879 applies a test of whether the relevant term grossly disadvantages the other contractual party, taking account of all circumstances of the case.
- In BULGARIA Art. 143 Law on Consumer Protection contains a general clause which is not a word for word transposition of the Art. 3(1) of the Directive 93/13 but uses a very similar wording. Art. 143(1) Law on Consumer Protection states that a term, arising from a contract concluded with a consumer, shall be regarded as unfair if, to the detriment of the consumer and contrary to the requirement of good faith, it causes a significant imbalance in the rights and obligations of the trader/supplier and the consumer, whereas the clause falls under the black list of Art. 143(1), No. 1-17 or imposes other similar conditions (Art. 143(1), No. 18).
- BELGIAN law applies the principle of good faith indirectly. The key feature of the Belgian domestic legislation on unfair contract terms is the existence of two slightly different general clauses. According to TPA Art. 31(1), an unfair term is a clause or a condition which creates a “manifest”⁷⁵ imbalance between the parties’ rights and obligations. By contrast, in respect of the liberal professions LPA Art. 7(2) defines an unfair term as a clause or a condition which has not been individually negotiated and which creates a “significant” imbalance between the parties’ rights and obligations arising under the contract, “to the detriment of the consumer”. At present BELGIAN practice does not show any distinction between the application of both criteria (manifest imbalance versus significant imbalance).

⁷⁵ The term “manifest” may also refer to the legal concept of marginal control by the judge, which means that the powers of the judge are confined to the assessment of whether the contract is in conformity with the requirements of good faith.

- The vast usage of classic general clauses is a key feature of DANISH law. The most important one is laid down in Art. 38c(1), 36 of the Consolidated Act 781/1996 on Contracts Act. It refers to the criterion “significant imbalance” and the characteristic of “*stridende mod hæderlig forretningsskik*” (literal translation; “violating honest business practices”). However, the Danish legislature did not use the wording of the Directive (“*god tro*”), since according to Danish legal language the expression that a person is in “*god tro*” means that this person did not know and could not have been aware of a certain fact. Against this background the expression used in Art. 38c(1) seems to many authors to be a more adequate way of expressing the criterion of “good faith”. In order to meet the requirements of the Directive, the legislator included a special provision (Art. 38c(2)) which explicitly states that circumstances arising after the contract has been concluded cannot be taken into consideration to the detriment of the consumer. Furthermore, in contrast to the Directive (Art. 4(2)) adequacy of price, and subject matter of the contract are not beyond its scope. Overall the Danish approach, although not referring to the principle of good faith, offers a higher level of protection than the Directive.
- In ESTONIA, pursuant to Art. 42(1) of the Law of Obligations Act, a standard term is deemed void if the term causes “unfair harm” to the other party, particularly if it causes a “significant imbalance in the parties’ rights and obligations” arising from the contract to the detriment of the other party or if the standard term is “contrary to good morals”. Additionally, according to para. (2) “unfair harm” is presumed if a standard term derogates from a fundamental principle of law or detrimentally affects the rights and obligations of the other party in a manner inconsistent with the nature of the contract in such a manner that it becomes questionable as to whether the purpose of the contract can be achieved. However, this does not necessarily indicate that results differ from those that would be achieved under the Directive.
- In FINLAND, Chapter 3 Section 1 of the Consumer Protection Act (CPA) states that a business offering consumer goods or services shall not make use of a contract term which, in view of the price of the good or service or other relevant circumstances, is to be deemed unfair from the consumer’s point of view. The principle of good faith,

although known in general contract law, is not applied when it comes to assessing unfairness. Besides, in contrast to the Directive the review of terms also encompasses the subject matter of the contract and the adequacy of price.

- In FRANCE clauses in consumer contracts are unfair according to Art. L 132-1(1) of the Consumer Code whose object or effect is to achieve a significant imbalance in the rights and obligations of the contractual parties to the detriment of the consumer („*un déséquilibre significatif entre les droits et obligations des parties au contrat*“). Whilst the concept of good faith in France exists as a general principle of interpretation (CC Art. 1134(3)), it does not however play a role in the review of contract terms. It was deliberately not adopted, as the view was held that a business which endeavours to achieve a significant imbalance cannot, by definition, be acting in good faith. Furthermore, the French legislator did not take over the definition “*bonne foi*” as the French language version of the Directive (like the Italian, *ante*) is regarded as misleading.
- GERMAN law by contrast in CC § 307 attaches significant emphasis to the principle of good faith. The “significant imbalance in the parties’ rights and obligations arising under the contract” on the other hand is not named. According to the general clause of CC § 307(1) standard contract terms are invalid, if they “place the contractual partner of the user at an unreasonable disadvantage contrary to principles of good faith”. CC § 307(2) lists examples of where this is presumed (incompatibility with the essential basic principles of the statutory rule from which it deviates, restriction of essential rights or duties resulting from the nature of the contract in such a manner that there is a risk that the purpose of the contract will not be achieved).
- In GREECE, Art. 2(6), sent. 1 of the Consumer Protection Act provides that standard contract terms which lead to a disturbance in the balance of the contractual rights and duties to the detriment of the consumer may not be used and are invalid. The concept of good faith was not adopted. One also observes that the general clause not only serves the review of terms in individually negotiated transactions, but also – by mentioning the “use” of terms – as a basis for collective proceedings. A further characteristic is that owing to the non-transposition of Art. 4(2) of Directive 93/13 the

main subject matter of the contract and the adequacy of price are also subject to review.

- In LATVIA, Art. 6(1), sent. 3 of the Consumer Rights Protection Law clarifies that a manufacturer, seller or service provider may not offer such contractual terms as are in contradiction with the “principle of legal equality of the contracting parties”. Additionally, pursuant to para. (3) “a contractual term which has not been mutually discussed by the contracting parties shall be deemed to be unfair, if to the disadvantage of the consumer and contrary to the requirements of good faith, it creates a substantial disparity with respect to the rights and duties of the contracting parties provided for by the contract”. Thus Latvia combines the principle of “good faith” and the broad new emerging principle of “legal equality”. Moreover, the scope of review is broader than envisaged in the Directive, since the subject matter of the contract and the adequacy of price are also subject to review (Latvia has not transposed Art. 4(2) of Directive 93/13).
- In LITHUANIA, CC Art. 6.188(2) (Peculiarities of conditions in consumer contracts) only provides a brief definition of unfairness: “Conditions of a consumer contract which have not been individually negotiated shall be regarded as unfair if they cause a significant imbalance in the parties’ rights and duties to the detriment of consumer rights and interests...”. There is no reference to the principle of good faith, but the provision is supplemented by a comprehensive list of forbidden terms as a black list, which is a verbatim translation of the Annex of Directive 93/13. Moreover, Art. 11(2) of the Lithuanian Law on Consumer Protection provides that contractual terms (other than those in the black list) may also be regarded as unfair, provided that they are contrary to the requirements of “good will” and cause inequality of mutually enjoyable rights and obligations between the seller, service provider and consumer.
- In LUXEMBOURG, Art. 1 Consumer Protection Act provides a definition of unfairness very similar to the French concept (see above). The provision solely refers to an imbalance in the rights and obligations to the detriment of the consumer (*déséquilibre des droits et obligations au préjudice du consommateur*). In contrast to France and most other member states, price adequacy and subject matter of the contract are not

excluded from review since Luxembourg has decided not to transpose Art. 4(2) of Directive 93/13.

- MALTA has developed quite a unique system for monitoring the unfairness of terms. Art. 44-45 of the Consumer Affairs Act contain a combination of different concepts: Firstly, the provisions refer to “a significant imbalance between the rights and obligations of the contracting parties to the detriment of the consumer” (Art. 45(1) lit. (a)), a verbatim transposition of the Directive. Secondly the legislator adopted the principle of good faith (“or is incompatible with the requirements of good faith”, Art. 45(1) lit. (d). Additionally, a term may be regarded unfair if “it causes the performance of the contract to be unduly detrimental to the consumer” (Art. 45(1) lit. (b)); or causes the performance of the contract to be significantly different from what the consumer could reasonably expect” (Art. 45(1) lit. (c)). All these definitions are applied as alternatives, i.e. it is sufficient for a term to fulfil one of the criteria to be considered as unfair.
- Pursuant to Art. 6-233 lit. (a) of the DUTCH Civil Code, a standard contract term is considered voidable, if it is “unreasonably disadvantageous” (*onredelijk bezwarend*) to the other party. In addition to the possibility for the other party to annul a specific unfair clause, they can also argue that the stipulation – although valid – is not applicable in the sense that, in the given circumstances, this would be unacceptable according to the criteria of reasonableness and justice. There is no reference to good faith, significant imbalance or other related concepts.
- In POLAND, CC Art. 385/1(1), sent. 1 states that contractual clauses do not bind the consumer if they shape his/her rights and obligations in a manner contrary to good faith, strikingly (distinctly, disproportionately) (*rażąco*) infringing his/her interests (referred to as “prohibited contractual clauses”). It has to be noted that the principle of “good faith” has been introduced into the Civil Code with the aim of gradually replacing another general clause – the principle of social cooperation which has been used throughout the Socialist period and is still in existence at present.

- In PORTUGAL, the general clause Art. 9(2) of Consumer Protection Act 24/96 refers to the elements of significant imbalance (*desequilíbrio nas prestações gravemente*) and good faith (*atentatório da boa fé*). Another formulation taken from the Directive, to the detriment of the consumer (*significativo desequilíbrio em detrimento do consumidor*), can be found in Art. 9(2) lit. (b).
- In SLOVAKIA, CC Art. 53(1) states that a consumer contract may not include contract terms, which cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (unacceptable condition in the contract). CC Art. 54 provides, that the terms of the consumer contract may not deviate from the provisions of Civil Code to the disadvantage of the consumer. The consumer may not waive the rights conferred on him by law (as these provisions are mandatory). According to the general provision CC Art. 39 an agreement shall be invalid if its content or purpose contradicts or circumvents the law, or contravenes proper morals. Overall the Slovakian concept is rather analogous to the concept envisaged in the Directive, albeit without mentioning the principle of good faith.
- In SLOVENIA, according to the general clause Art. 24(1) of the Consumer Protection Act, the terms of the contract are considered unfair (1) if they bring about a significant imbalance in the contractual rights and obligations of the parties to the detriment of the consumer or (2) if they cause the fulfilment of the contract to be detrimental to the consumer without good reason or (3) if they cause the fulfilment of the contract to differ substantially from what the consumer rightly expected or (4) if they go against the principles of fairness and good faith. The Slovenian approach combines the benchmarks prescribed by the Directive ("significant imbalance", "to the detriment of the consumer", "good faith") with the principle of fairness. Finally, in contrast to the Directive (Art. 4(2)) there are no restrictions concerning the adequacy of price and subject matter of the contract.
- SWEDISH law contains no precise definition of unfairness. There is Art. 11 of the Act on contract terms in consumer relations (CTA) (1994:1512) which makes reference to Art. 36 of the Contracts Act (CA) which has been in force and unchanged since 1976. CA Art. 36(1), sent. 1 states very broadly: "A contract term may be adjusted or held

unenforceable if the term is unreasonable with respect to the contract's content, circumstances at the formation of the contract, subsequent events or other circumstances". Good Faith, imbalance or other concepts do not form part of the law as far as unfair terms are concerned. Circumstances that occurred after conclusion of the contract can only be considered if this would not be to the disadvantage of the consumer (CTA Art. 11(2)). The overall level of consumer protection is considered to be higher than that prescribed by the Directive, not only since there are no restrictions concerning the monitoring of adequacy of price and subject matter of the contract, i.e. the Courts are entitled to adjust payment.

The above overview illustrates that the general clause has taken a number of very different forms in the member states. The requirement of "good faith" is only explicitly mentioned in fifteen member states in total, namely in BULGARIA, CYPRUS, CZECH REPUBLIC, GERMANY, HUNGARY, IRELAND, ITALY, LATVIA, MALTA, POLAND, PORTUGAL, ROMANIA, SLOVENIA, SPAIN and UNITED KINGDOM.

The following countries make direct reference to "significant imbalance" in their general clauses: BELGIUM, BULGARIA, CYPRUS, DENMARK, ESTONIA, GREECE, FRANCE, HUNGARY, IRELAND, ITALY, LITHUANIA, LUXEMBOURG, MALTA, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, GREECE, SPAIN and the UNITED KINGDOM. However seven of these countries do not mention (explicitly⁷⁶) the additional criterion "good faith": BELGIUM, DENMARK, FRANCE, GREECE, LITHUANIA, LUXEMBOURG and SLOVAKIA. This legislative technique tends to result in a lowering of the burden of proof for consumers.

Another issue treated differently in the member states is whether the fairness test encompasses the subject matter of the contract and the adequacy of price. In AUSTRIA, DENMARK, GREECE, LATVIA, LUXEMBOURG, ROMANIA, SLOVENIA, SPAIN and SWEDEN Art. 4(2), (1st alternative) has not been transposed, so that in principle, the monitoring of the main subject matter of the contract and the adequacy of price is possible. However, in some member states (for example, Greece and Spain), this silence has produced uncertainty in

⁷⁶ The LITHUANIAN Law on Consumer Protection uses the expression "good will" instead.

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interpreting national law with the result that academia and case law use different approaches to solve the problem with contradictory solutions.⁷⁷

⁷⁷ For a comparative law perspective in this regard see *Cámara Lapuente*, El control.

3. Transposition of the Annex in the Member States

a. Legal nature of the Annex

According to Art. 3(3) of Directive 93/13, the “Annex shall contain an indicative and non-exhaustive list of the terms which *may* be regarded as unfair.” Therefore, a contractual term corresponding to the Annex is not automatically unfair. In contrast to the preliminary drafts of Directive 93/13,⁷⁸ the Annex does not contain a so-called “black list” of terms which are always (per se) ineffective. Rather, the Annex – as the ECJ emphasised in C-478/99⁷⁹ – “is of indicative and illustrative value”. As stated in the opinion of advocate general *Geelhoed*⁸⁰ – “The list thus offers the courts and other competent bodies, affected groups and individual consumers, sellers and suppliers – including those from another member state – a criterion for interpreting the expression unfair terms. Thus by giving concrete form to the open provision contained in Art. 3(1), that is to say, the first criterion for determining whether a contractual term is unfair, their certainty is reinforced.”

In this respect the Annex to Directive 93/13 is usually referred to as a “grey list”.

b. Transposition of the Annex in the Member States

The following table indicates whether the provisions of No 1 lit. (a)-(q) of the Annex have been transposed (1) by a *black letter rule* according to which clauses are always considered per se unfair, (2) by a *grey letter rule* according to which clauses may be considered unfair, or, (3) whether the respective provisions of the Annex have not been transposed at all.⁸¹

The table cannot claim to mirror member states’ law exclusively as it reflects mainly written law, and not case law, which can have wide ramifications and is difficult to outline. In certain

⁷⁸ See COM 90, 322 final and COM 92, 66 final.

⁷⁹ ECJ judgment of 7 May 2002, C-478/99 - *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147 at para. (22).

⁸⁰ At para. (29).

⁸¹ This is to be distinguished from the question of whether the consumer must assert that a clause is non-binding, see on this point Part 2 C.IV.4.b.

circumstances it can therefore be the case that rules indicated in the table as “grey letter rules” have to all intents and purposes become “black letter rules” through the member state case law. However, reference to case law of the database is provided in footnotes wherever possible.

In AUSTRIA, BELGIUM, BULGARIA, CZECH REPUBLIC, ESTONIA, GREECE, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, ROMANIA, SLOVENIA⁸² and SPAIN the clauses in the Annex – insofar as they have been transposed – are always regarded as unfair (black list). In MALTA, the Minister responsible for consumer affairs after consultation with the Consumer Affairs Council is empowered to amend, substitute or revoke any of the terms in the black list. GERMANY, HUNGARY, ITALY, NETHERLANDS and PORTUGAL in contrast, have opted for a combination of both black and grey lists. The blacklist in some member states, for instance, those of BELGIUM,⁸³ ESTONIA, MALTA, PORTUGAL and SPAIN, contains more clauses than the Annex of Directive 93/13.

In CYPRUS, FRANCE, IRELAND, POLAND, SLOVAKIA and the UNITED KINGDOM on the other hand there are only non-binding grey lists. In special cases, however, other legislation (such as in the UNITED KINGDOM through the UCTA 1977) can result in certain clauses being rendered unfair per se. In FRANCE, the Annex is by contrast only a “light” grey, as the list is not binding on the judge. The clauses contained in the Annex have an indicative function, as according to Art. L 132-1(3), sent. 2 of the Consumer Code, a consumer involved in a dispute is not relieved of the burden of proving a term is unfair. Moreover, the judge must decide whether the criteria of unfairness are fulfilled on a case by case basis.

In DENMARK, FINLAND and SWEDEN, no part of the Annex is explicitly transposed, but the Annex to Directive 93/13 was reproduced in the preparatory work for the Act implementing the Directive and, according to well established legal tradition common to the Nordic countries, preparatory work constitutes an important aid to interpreting legislation. This legislative technique was accepted by the ECJ in C-478/99.⁸⁴ However, for member states in

⁸² The wording of the Slovenian Consumer Protection Act (“contract terms are regarded as unfair”) indicates a black list, however, until now there is no case-law or literature confirming this interpretation.

⁸³ See Art. 32 Trade Practices Act. The Liberal Professions Act on the other hand only blacklists the unfair contract terms mentioned in the Annex n° 1 of the Directive.

⁸⁴ ECJ judgment of 7 May 2002, C-478/99 - *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147.

which certain parts of the Annex are transposed and others are not, it remains unclear whether this decision applies to them as well, since in those countries there is a danger that the consumer may be misled about his rights.

1st Table: Transposition of the Annex No 1 lit. a-q of the Unfair Contract Terms Directive

Article of Unfair Contract Terms Directive	Black letter rule	Grey letter rule	Annex not transposed
ANNEX No 1a Death or personal injury	AT, ⁸⁵ BE, BG, CZ, DE, ⁸⁶ EE, EL, ES, ⁸⁷ HU, IT, ⁸⁸ LV, LT, LU, PT, ⁸⁹ RO, SL, UK ⁹⁰	CY, FR, IE, NL, PL, ⁹¹ SK	DK, FI, SE, MT ⁹²
ANNEX No 1b	AT, ⁹³ BE, ⁹⁴ BG, CZ, DE, ⁹⁵	CY, FR, ¹⁰² HU, ¹⁰³ IE, ¹⁰⁴ NL,	DK, FI, PT, SE

⁸⁵ See cases OGH 22 February 2001 6 Ob 160/00y; OGH 19 November 2002 4 Ob 179/02f; OGH 7 October 2003 4 Ob 130/03a; OGH 25 April 1995 4 Ob 522/95.

⁸⁶ In contrast to the Directive the German provisions (CC §§ 309 No 7a, 276(3)) require fault/negligence of the user.

⁸⁷ Instead of “death of a consumer or personal injury”, the Spanish rule mentions “damages, death or injuries” („por los daños o por la muerte o lesiones“), without any mention of “personal” or “physical” injury, therefore including non-pecuniary damages or non-material injuries („daño moral“) and patrimonial damages.

⁸⁸ The IT black letter rule applies as well to individually negotiated terms.

⁸⁹ See case STJ 6 May 1993 P. 83348.

⁹⁰ Despite the adoption of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR), the Unfair Contract Terms Act (UCTA) 1977 which is also applicable to B2B contracts and deals mainly with exclusion and limitation clauses, remains in force. Section 2(1) of the UCTA 1977 renders ineffective a contract term which restricts liability for death or personal injury caused by negligence. Moreover, UCTA 1977 sections 10 and 23 make it impossible to use a secondary contract to exclude/restrict liability which could not be excluded/restricted under the main contract. Therefore although the official transposition Act UTCCR 1999 contains solely a grey list identical to that of the Directive, on the basis of the UCTA any restriction of liability for death or personal injury is black-listed (i.e. automatically considered void).

⁹¹ CC Article 385.3 1st indent contains no express mention of death.

⁹² No direct reference – The list under Article 44 of terms that may be unfair is not exhaustive and includes terms which are not listed in the Annex to the EU Directive.

⁹³ OGH 6 September 2001 2 Ob 198/01h; OGH 22 February 2001 6 Ob 160/00y; OGH 19 November 2002 4 Ob 179/02f; OGH 7 October 2003 4 Ob 130/03a; OGH 25 April 1995 4 Ob 522/95.

⁹⁴ The TPA and LPA prohibit in a more detailed manner unfair terms which relate to specific consumer rights as a consequence of total or partial non- or inadequate performance.

⁹⁵ Partly transposed in CC Art. 309 No 7, 309 No 8, 307(2), 475; see case OLG Saarbrücken 29 August 2001 1 U 321/01.

⁹⁶ This clause is transposed through numerous rules in the Consumer Protection Act (Art. 2 of Statute No. 2251-1994).

⁹⁷ The IT black letter rule also applies to individually negotiated terms.

Total or partial non-performance or inadequate performance	EE, EL, ⁹⁶ ES, IT, ⁹⁷ LV, LT, LU, MT, ⁹⁸ NL, ⁹⁹ RO, ¹⁰⁰ SL, UK ¹⁰¹	PL, SK	
ANNEX No 1c Condition whose realisation depends on the seller's own will alone	AT, ¹⁰⁵ BE, BG, CZ EE, ES, LT, LU, MT, SL ¹⁰⁶	CY, ¹⁰⁷ DE, FR, HU, IE, IT, NL, PL, SK, UK	DK, EL, FI, LV, PT, RO ¹⁰⁸ , SE
ANNEX No 1d Permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;	AT, BE, BG, CZ, DE, ¹⁰⁹ EE, ES, LV, LT, LU, MT, RO	CY, FR, DE, HU, IE, IT, NL, PL, SK, UK	DK, EL, FI, PT, SL, SE

⁹⁸ Cf. Qorti Civili Prim' Awla (MT) 13 November 1995 Silvana wife of Raymond Camillerivs. Alfred Pisani noe et; Qorti tal-Kummerc 22 November 1985 Carmelo Grima noe vs Carmel Vella Brincat noe.

⁹⁹ Transposed in a black letter rule (CC Art. 6: 236 c-d) and in a grey letter rule (CC Art. 6: 237 lit. (f)).

¹⁰⁰ Annex lit. h and lit. o of the Law No. 193 of 6 November 2000 on unfair terms in contracts between sellers and consumers.

¹⁰¹ UCTA 1977 Section 3(2) lit. (b) prohibits the use of a contractual term allowing the seller/supplier to perform in a considerably different manner from that which was reasonably expected of him or not to perform at all, respectively. The classification as black letter rule is again based on the UCTA 1977 as already explained above.

¹⁰² Long before the transposition of the Directive the State Council (*Conseil d'État*) had enacted 2 decrees prohibiting particular types of contract terms; some parts of those decrees are still effective. According to Art. 2 of Decree 78-464 of 24 March 1978 in a sales contract any term which restricts the purchaser's rights in case of non-performance is considered void.

¹⁰³ Terms which exclude or limit the legal rights of the consumer are usually regarded as unfair (Art. 2 lit. (h) of the Government Decree 18/1999, II.5.). The right of the consumer to set-off can never be excluded (Art. 1 (1) lit. (f) Government Decree 18/1999, II.5.).

¹⁰⁴ Cf. HC 20 December 2001 Sp. 229 Applicant - The Director of Consumer Affairs.

¹⁰⁵ See case OGH 26 January 1994 9 ObA 361/93.

¹⁰⁶ A vague (inaccurate) transposition: Contract term is unfair if the seller may unilaterally alter the fundamental provisions of the contract.

¹⁰⁷ Instead of referring to "making an agreement binding on the consumer", the domestic provision refers to "excluding the right of a consumer to cancel a contract".

¹⁰⁸ This rule has not been transposed due to the fact that according to Romanian law it is not permissible to provide for a condition whose realisation depends on the debtor's will alone. Such a clause would be null and void.

¹⁰⁹ Transposed in a black letter rule (CC Art. 309 No 5) and in a grey letter rule (CC Art. 308 No 7).

ANNEX No 1e Disproportionately high sum in compensation	AT, BE, ¹¹⁰ BG, CZ, DE, EE, EL, ES, LV, LT, MT, RO, SL	CY, FR, HU, IE, IT, ¹¹¹ NL, PL, PT, ¹¹² SK, UK	DK, FI, LU, SE
ANNEX No 1f Right to dissolve the contract on a discretionary basis and retain the sums paid for services not yet supplied in case of dissolving the contract by the seller	AT, ¹¹³ BE, ¹¹⁴ BG, CZ, DE, ¹¹⁵ EE, EL, ES, HU, LV, LT, LU, RO, SL ¹¹⁶	CY, FR, DE, IE, IT, NL, PL, ¹¹⁷ PT, SK, UK	DK, FI, MT, SE
ANNEX No 1g Termination of a contract of indeterminate duration without reasonable notice	AT, BE (LPA), BG, CZ, EE, EL, ES, HU, LV, LT, RO ¹¹⁸ , SL	CY, FR, IE, IT, NL, PL, PT, ¹¹⁹ SK, UK	BE (TPA), DE, DK, FI, LU, MT, SE
ANNEX No 1h Automatically extending a	AT, ¹²⁰ BE, ¹²¹ BG, CZ, DE, ¹²² EE, EL, ¹²³ ES, LV, LT, LU,	CY, FR, HU, IE, IT, PL, PT, SK, UK	DK, FI, MT, SE

¹¹⁰ CC Art. 1231 gives the court the possibility to reduce the amount of compensation. The provisions of the TPA on unfair contract terms form a 'lex specialis' of the general provisions in the Civil Code; see cases: Hof van Beroep Gent 3 March 2004 Algemeen ziekenhuis Sint-Lucas v.z.w. / I. Bruynooghe; Hof van Beroep Gent 8 October 2003 Immostad b.v.b.a. / Van Ammel G.; Hof van Beroep Gent 4 March 2003 Algemeen Ziekenhuis St-Lucas VZW / R. Jonckheere.

¹¹¹ See Tribunale Ivrea judgment of 11 July 2005.

¹¹² Cf. STJ 6 October 1998 855/98.

¹¹³ See OGH 20 November 2002 5 Ob 266/02g.

¹¹⁴ In this regard it should be noted that the blacklist of the TPA considers a clause unfair if the seller were permitted to retain sums paid by the consumer where the latter decides not to *conclude* the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller where the latter decides not to conclude the contract. Hence, the requirement of reciprocity referred to in the annex was not transposed in the TPA as such.

¹¹⁵ Transposed in a black letter rule (CC Art. 309 No 5) and grey letter rules (CC Art. 308 No 3).

¹¹⁶ A vague transposition: Contract term is unfair if the seller may unilaterally dissolve the contract at any time.

¹¹⁷ Not following the text of the Annex precisely – the Code (indent 14) refers somewhat to clauses where only the consumer is deprived of the right to dissolve or withdraw from the contract. Indent 13 refers to dissolving the contract by either of the parties.

¹¹⁸ Annex lit. t of the Law No. 193 of 6 November 2000 on unfair terms in contracts between sellers and consumers: "...enable the seller to terminate the contract of indeterminate duration without prior notice, except for a valid reason, accepted by the consumer at the date of signature of the contract".

¹¹⁹ See case STJ 23 November 1999 99A796.

¹²⁰ Cf. OGH 25 August 1998 1 Ob 176/98h.

¹²¹ See case Hof van Beroep Gent 3 March 2004 Algemeen ziekenhuis Sint-Lucas v.z.w. / I. Bruynooghe.

¹²² The term „unreasonably early“ in the Directive has been defined by the German legislator as “more than three months prior to the expiration of the initial or tacitly extended period of the contract“.

¹²³ Greece classifies as unfair all clauses, the consequences of which consist of the extension or renewal of the contract for a disproportionately long period of time, if the consumer has not cancelled the contract before a specified point in time. (Art. 2(7) lit. (d) of Statute 2251-1994).

contract of fixed duration	NL, RO, SL		
ANNEX No 1i Irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted	AT, BE, CZ, DE, EE, EL, ¹²⁴ ES, HU, ¹²⁵ IT, ¹²⁶ LV, LT, LU, MT, RO, SL	CY, FR, IE, NL, PL, ¹²⁷ PT, SK, UK	DK, FI, SE
ANNEX No 1j Unilateral alteration of the terms of the contract	AT, BE, BG, CZ, EE, EL, ¹²⁸ ES, LV, LT, LU, ¹²⁹ MT, RO, SL	CY, FR, ¹³⁰ HU, IE, IT, NL, PL, PT, SK, UK	DE, ¹³¹ DK, FI, SE
ANNEX No 1k Unilateral alteration of characteristics of the product or service to be provided	AT, ¹³² BE, ¹³³ BG, CZ, EE, EL, ¹³⁴ LV, LT, LU, MT, PT, RO, SL	CY, FR, DE, HU, IE, IT, NL, PL, ¹³⁵ SK, UK	DK, ES, ¹³⁶ FI, SE

¹²⁴ The requirement to ensure that the consumer has a genuine possibility to become acquainted with the content of the clauses *before the* conclusion of the contract has been recognised in Greek law as a condition, precedent for the incorporation of such terms into the contract.

¹²⁵ See CC Art. 205/B: "Standard contract terms will become part of a contract, only if they have previously been made available to the other party for perusal and if the other party has accepted the terms explicitly or through conduct that implies acceptance."

¹²⁶ The black letter rule also applies to individually negotiated terms.

¹²⁷ The Code refers to terms being merely included in the contract, and not to those, which 'irrevocably bind the consumer'.

¹²⁸ See cases A.P. 16 February 2001 A.P. 296/2001; A.P. 1219/2001; A.P. 4 May 2001 A.P. 1030/2001.

¹²⁹ See case CA Luxembourg 27 February 1996.

¹³⁰ Pursuant to Art. 3 of the Decree 78-464 of 24 March 1978 enacted by the State Council (*Conseil d'État*), a contractual term in a contract for sale, tenancy, services or manufacturing enabling the seller/supplier to unilaterally modify the terms or conditions of the contract is considered void.

¹³¹ Covered by general clause in CC Art. 307(2), sent. 1.

¹³² Cf. OGH 17 April 2002 7 Ob 287/01h.

¹³³ The Trade Practices Act blacklists solely those clauses which allow the unilateral alteration of characteristics which in the eyes of the consumer are *essential* (or under specific circumstances are essential for the product's or service's intended use). The Liberal Professions Act does not contain such limitation.

¹³⁴ Not directly transposed. CC Art. 361 prescribes the principle of party autonomy, according to which every contractual amendment requires a new agreement of both parties. See also case A.P. 4 May 2001 A.P. 1030/2001.

¹³⁵ Instead of 'characteristics' the Code refers to the 'crucial characteristics'.

¹³⁶ But probably encompassed in the broad wording of Additional Disposition number 1 of LGDCU 1984, part I, rule 2 (where rules g, j) and m) of Annex I of the Directive are transposed.

ANNEX No 1l Determination or increase of price	AT, ¹³⁷ BE, ¹³⁸ BG, CZ, DE, EE, ES, EL, ¹³⁹ LV, LT, LU, MT, NL, RO, SL	CY, FR, IE, HU, IT, PL, PT, SK, UK	DK, FI, SE
ANNEX No 1m Right to determine whether the goods or services supplied are in conformity with the contract, or right to interpret any term of the contract;	AT, BE, BG, CZ, EE, EL, ¹⁴⁰ ES, HU, LT, LU, MT, ¹⁴¹ NL, PT, RO, SL	CY, FR, IE, IT, PL, ¹⁴² SK, UK	DE, ¹⁴³ DK, FI, LV, SE
ANNEX No 1n Limiting of commitments undertaken by agents	AT, ¹⁴⁴ BE, BG, CZ, DE, ¹⁴⁵ EE, ES, EL, HU, LV, LT, LU, MT, SL	CY, FR, IE, IT, NL, PL, PT, SK, UK	DK, FI, RO, SE
ANNEX No 1o Obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his	AT, ¹⁴⁶ BE, BG, CZ, EE, EL, ES, HU, LT, LU, MT, NL, PT, SL	CY, DE, FR, IE, IT, PL, SK, UK	DK, FI, LV, SE
ANNEX No 1p Possibility of transferring	AT, ¹⁴⁷ BE, BG, CZ, DE, EE, EL, ES, ¹⁴⁸ HU, LV, LT, LU,	CY, FR, IE, IT, ¹⁵¹ PL, ¹⁵² SK, UK	DK, FI, SE

¹³⁷ See cases OGH 17 November 2004 7 Ob 207/04y; OGH 24 June 2003 4 Ob 73/03v; OGH 17 December 2002 4 Ob 265/02b; OGH 20 November 2002 5 Ob 266/02g; OGH 22 March 2001 4 Ob 28/01y.

¹³⁸ The TPA considers contracts with an open price unfair, when the determination of the price is dependant solely on the seller's will, whereas the Directive (Annex 1) also considers open price contracts unfair when the determination of the price is dependant on other events.

¹³⁹ Greece classifies as unfair all clauses, which without important reason leave the consideration undetermined and do not allow for their determination according to criteria specially provided for in the contract which are also reasonable for the consumer. Also considered unfair are those clauses, which hinder the consumer from rescinding the contract, whereby the increase in price according to the terms of the contract is disproportionate for the consumer (Art. 2(7) cases k and r of Statute 2251-1994).

¹⁴⁰ Only the first indent has been transposed.

¹⁴¹ See case CA Kummerjali 22 January 1992 Mario Bezzinavs Albert Mizzi et noe.

¹⁴² See cases Sąd Antymonopolowy (PL) 30 September 2002 T XVII Amc 47/01 Head of the Office for the Protection of Competition and Consumers, Defendant – Powszechna Kasa.

¹⁴³ Annex No 1m has not been transposed, but CC § 307(2), No 1 can be applied.

¹⁴⁴ See case OGH 28. Apr 1999 3 Ob 246/98t.

¹⁴⁵ Covered by general clause and various specific rules in commercial and insurance law (Art. 307(2) No 1 in conjunction with CC Art. 164(1), CommC Art. 56, Art. 43-47 of the Insurance Contract Act.

¹⁴⁶ See case OGH 23 February 1999 1 Ob 58/98f.

¹⁴⁷ See cases OGH 28 April 1999 3 Ob 246/98t; OGH 4 November 1997 10 Ob 367/97m.

¹⁴⁸ The Spanish rule declares unfair, with different initial wording, "the freedom from liability following transfer of rights and obligations under the contract." Therefore, a mere transfer ("cesión") is not deemed unfair in itself. It is only caught by the rule when it encloses the limitation of liability for that transfer.

¹⁴⁹ See case STJ 6 May 1993 P. 83348.

¹⁵⁰ Possibility of transferring the rights and obligations to a third person, whose name is not specifically mentioned in the contract. The absence of the consumer's consent is not a requirement under the Slovenian Consumer Protection Act.

his rights and obligations under the contract	MT, NL, PT, ¹⁴⁹ RO, SL ¹⁵⁰		
ANNEX No 1q Excluding or hindering the consumer's right to take legal action; restricting the evidence available or imposing a burden of proof.	AT, ¹⁵³ BE, ¹⁵⁴ BG, CZ, DE, EE, EL, ¹⁵⁵ ES, HU, LV, LT, LU, MT, NL, PT, RO, SL	CY, FR, IE, IT, ¹⁵⁶ PL, ¹⁵⁷ SK, UK	DK, FI, SE

2nd Table: Transposition of Annex No 2 of the Unfair Contract Terms Directive

Annex No. 2 of Directive 93/13 establishes certain exceptions with regard to clauses used by suppliers of financial services. The following table indicates whether the member states explicitly made use of these exceptions or whether they provide a higher level of consumer protection by having not transposed Annex No. 2.

Article of Unfair Contract Terms Directive	Annex transposed	Annex not transposed
ANNEX No 2a Exception from No 1g for suppliers of financial services	BE (LPA), BG, CY, CZ, EE, ES, FR, IE, IT, SK, UK	AT, BE (TPA), ¹⁵⁸ DE, DK, EL, ¹⁵⁹ FI, HU, LV, LT, LU, MT, NL, PL, PT, RO, SL, SE
ANNEX No 2b sent. 1	BE, BG, ¹⁶⁰ CY, CZ, EE, ES, FR,	AT, DE, DK, EL, ¹⁶¹ FI, HU, LV,

¹⁵¹ See Tribunale Rome judgment of 18 June 1998 Movimento Federativo Democratico v. A.B.I. e altri.

¹⁵² No mention of the reduction of guarantees for the consumer.

¹⁵³ See case OGH 27 May 2003 1 Ob 244/02t.

¹⁵⁴ Partly transposed since the Trade Practices Act does not prohibit arbitration clauses and only prohibits restriction of evidence but not the heightening of the burden of proof.

¹⁵⁵ See case A.P. 1219/2001.

¹⁵⁶ Cf. Cass. 29 September 2004 n. 19591/2004 Credito Emiliano S.p.A. v. Pugliese Vincenzo; Cass. 20 August 2004 no. 16336/2004 Soc. Tegola Canadese v. Concato Lida; Cass. 21 June 2004 11487 Vitali v. Assitalia S.p.a.; Cass. 28 November 2003 no. 18290/2003 Gianmarco Achille v. Autoberardi s.r.l.; Cass. 1 October 2003 14669 Abrescia v. Consultur S.r.l.; Cass. 9 December 2002 17475 C. Larato v. Axa Assicurazioni S.p.a. and Isvap.

¹⁵⁷ The reduction of evidence or burden of proof have not been mentioned.

¹⁵⁸ The Trade Practices Act does not contain specific rules on this subject: the general rules of the Code Civil regarding termination of the contract when the other party does not fulfill his obligations apply. In the courts' interpretation of those rules, clauses on the right of termination of the contract without prior notice may be allowed, dependent on the circumstances. TPA Art. 32, No 22 prohibits the termination of a contract because of the introduction of the Euro.

¹⁵⁹ Greek courts have rejected an application of the exception rule to achieve a high level of consumer protection (cf. Polimeles Protodikeio Athinon 1208/98).

¹⁶⁰ The supplier of financial services has to inform the consumer within 7 days, cf. Art. 144(2)(1) of the Law on Consumer Protection.

Exception from No 1j for suppliers of financial services	IE, IT, PT, SK, UK	LT, LU, MT, NL, PL, RO, SL, SE
ANNEX No 2b, sent. 2 Exception from No 1j where the consumer is free to dissolve the contract	BE, ¹⁶² CY, CZ, BG, ¹⁶³ EE, ES, FR, IE, IT, PT, SK, ¹⁶⁴ SL, UK	AT, DE, DK, FI, EL, ¹⁶⁵ HU, LV, LT, LU, MT, NL, PL, RO, SE
ANNEX No 2c Exception from No 1g, No 1j and No 1l in case of products or services where the price is linked to fluctuations in a stock exchange and in case of contracts for the purchase or sale of foreign currency	BE, ¹⁶⁶ BG, CY, ¹⁶⁷ CZ, ES, FR, IE, IT, LT, PT, SK, UK	AT, DE, DK, EE, EL, FI, HU, LV, LU, MT, NL, PL, SL, RO, SE
ANNEX No 2d Exception from No 1l in case of price-indexation clauses	AT, BE, BG, CY, CZ, ES, FR, IE, IT, PT, SK, UK	DK, EE, FI, DE, EL, HU, LV, LT, LU, MT, NL, PL, RO, SL, SE

4. Legal consequences of unfairness

a. Concept of the Unfair Contract Terms Directive

Art. 6(1) of the Directive 93/13:

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.

¹⁶¹ Greek courts have rejected an application of the exception rule of Annex No. 2b to achieve a high level of consumer protection (cf. Efeteio Athinon 6291/2000). See also A.P. 1219/2001.

¹⁶² The exception in the TPA is confined to financial services contracts the price, which is unilaterally changed by the provider.

¹⁶³ The supplier of financial services has to inform the consumer within 3 days, cf. Art. 144(2)(2) of the Law on Consumer Protection.

¹⁶⁴ Reasons for alternation of terms have to be listed in the contract.

¹⁶⁵ Greek courts have rejected an application of the exception rule of Annex No. 2b to achieve a high level of consumer protection (cf. Efeteio Athinon 6291/2000).

¹⁶⁶ Completely transposed in the Liberal Professions Act. Partly transposed in the Trade Practices Act since this act does not exclude contracts for the purchase or sale of foreign currency.

¹⁶⁷ The phrases “financial instruments” as well as “or index or a financial market rate” are omitted in the particular domestic provision.

Art. 6(1) envisages that unfair clauses are not binding, whereas the remainder of the contract is usually preserved.

aa. Non-binding nature of unfair terms

The open wording of the Directive does not clarify how the member states shall establish the form of the non-binding nature. There are several possibilities, e.g.:

- The national legislators can declare the ineffectuality or absolute nullity of an unfair term *ex officio* or provide that the contractual term is regarded as not being written in civil law (fiction of non-existence) and does not give rise to any legal consequences.
- In some member states, however, there also exists the more flexible concept of relative nullity, according to which the unfair term initially remains in force, so long as this suits the contractual partner of the user (i.e. generally the consumer), who alone can unilaterally assert its nullity.
- Other member states follow different concepts of nullity providing that the nullity of a clause can only occur to the advantage of the consumer, whereby the court has jurisdiction to declare the term void on its own motion (so called “protective nullity” – “*nullità di protezione*”).

The ECJ first addressed the legal consequences of unfairness in *Océano*.¹⁶⁸ The case concerned the procedural issue of the reviewability of a jurisdiction clause, disadvantageous to the consumer. In this decision the ECJ held, that

“the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract (...) is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts”.

¹⁶⁸ ECJ judgment of 27 June 2000, Joined Cases C-240/98 to C-244/98 - *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941, para. (29).

In *Cofidis*¹⁶⁹ the ECJ extended the competence to review further and stated that the protection of the consumer precludes *any* national provision which prohibits the national court, on expiry of a limitation period, from finding that a term of the contract is unfair. In contrast to the *Océano* case, the dicta of the ECJ is related not only to the issue of whether the member state court can review its jurisdiction “on its own motion”, but on the nullity of clauses generally. It is therefore to be assumed, that according to the view of the ECJ, national courts must have the power to review the fairness of a clause on their own initiative generally (and not only for the special case of jurisdiction clauses).

In *Mostaza Claro*¹⁷⁰ the court clarified that Art. 6(1)

“is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.”

The concept of absolute nullity is in line with the requirements of the ECJ, whereas the concept of relative nullity as described above does not comply with *Océano*, *Cofidis* and *Mostaza Claro*. Other legal consequences – such as the concept of protective nullity – seem to be in accordance with ECJ case-law, provided that a consumer is protected even if he fails to raise the unfair nature of the term, either because he is unaware of his rights or because he is deterred from enforcing them.

Additionally, *Océano*, *Cofidis* and *Mostaza Claro* raise the question whether national courts are obliged to take evidence on their own initiative. The German and the French versions of the judgments use the expressions “*Befugnis von Amts wegen zu prüfen, ob die Klausel missbräuchlich ist*” and “*pouvoir du juge d’examiner d’office le caractère abusif d’une telle clause*”. Both language versions suggest that, not only does the court decide about the issue on its own initiative but also takes evidence on its own initiative, based on the alleged facts. In contrast, the English language version (“to determine of its own motion”) sounds rather

¹⁶⁹ ECJ judgment of 21 November 2002, C-473/00 - *Cofidis v. Fredout*, [2002] ECR I-10875.

¹⁷⁰ ECJ judgment of 26 October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421, para. (36).

neutral and does not seem to affect the evidence itself. Therefore, it remains unclear whether Art. 6 of Directive 93/13 in conjunction with the concept of effectiveness (*effet utile*) changes the national rules on burden of proof.¹⁷¹

bb. Consequences for the contractual term and the contract as a whole

The possibility of a so-called partial retention, i.e. a preservation of the unfair clause with content which is still permissible, is not mentioned in the Directive. One argument against a partial retention is that the clause would thereby, contrary to the prescription in recital 21 and in Art. 6(1) of Directive 93/13, not be rendered “non-binding” but merely “partly binding”. Additionally, such a possibility would reduce the risk of use of unfair terms from the point of view of the business and thereby run contrary to consumer protection. It nonetheless remains unclear whether a partial retention is admissible.

The whole contract remains binding on both parties, so long as this is possible without the offending clause according to the purpose and legal nature of the contract. The nullity is thus as a rule limited to the unreasonable term. In *Ynos*¹⁷² the ECJ was asked whether the hypothetical consideration of whether the business/user would have concluded the contract without the corresponding term, is to be taken into account in Hungarian law, but as the facts occurred prior to Hungary’s accession to the European Union, the ECJ stated it lacked jurisdiction, without giving an opinion. However, it seems to be fairly clear from the Directive that the contract stays in force, and the trader has to live with the fact that the particular clause is no longer available.

b. Transposition in the Member States

¹⁷¹ Directive 93/13 explicitly allocates the burden of proof only regarding the question whether the term in issue has been individually negotiated, see Art. 3(2), sent. 3. But it is silent with respect to other issues. Cf. *Bruder*, ERPL 2007, 205.

¹⁷² ECJ judgment of 10 January 2006, C-302/04 - *Ynos Kft v. János Varga* [2006] ECR I-00371.

aa. Absolute nullity

When transposing Art. 6(1) of Directive 93/13, many member states have decided to adopt or maintain the concept of absolute nullity. In BULGARIA,¹⁷³ ESTONIA, GERMANY, IRELAND, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA and SPAIN, a contractual term considered unfair will be automatically deemed null and void. In MALTA, FRANCE and LUXEMBOURG, unfair clauses are regarded non-existent or “*non écrites*”, respectively. Apart from the wording and creation of a legal fiction, no significant practical differences between nullity and non-existence can be identified.

bb. Relative nullity

The aforementioned concept of relative nullity can be found in the CZECH REPUBLIC, LATVIA and the NETHERLANDS with different specifications. According to CC Art. 55 in the CZECH REPUBLIC, an unfair term is only relatively ineffectual, i.e. ineffectual only upon assertion thereof by the consumer. According to the LATVIAN Consumer Rights Protection Law Section 6(8), unfair terms included in a contract entered into between a seller or service provider and a consumer shall be declared null and void upon the consumer’s request. As seen, actually, the consumer is the one who needs to initiate particular actions in order to trigger the procedure that could ensure that the Consumer Rights Protection Centre (State Institution) or the court will declare the contractual term in question is unfair. Also in the Netherlands CC Art. 6:233 provides that an unfair term is merely voidable (*vernietigbaar*). As explained above, this legal consequence contradicts the requirements of the ECJ.

cc. Unclear legal situation

In many member states it remains controversial whether or not the domestic provisions can be interpreted in such a way as to provide for relative nullity. In AUSTRIA, it is recognised that the jurisdiction of the relevant court is in principle to be exercised on its own motion. The unfairness of other (substantial) clauses by contrast is in principle not assessed ex officio, but

¹⁷³ In Bulgaria, the general clause and even the transposition of the Annex is applicable also to individually negotiated terms. However, as to the legal consequences Bulgarian law differentiates between individually and not individually negotiated terms: According to Article 146(1) Law on Consumer Protection, which transposes Art. 6(1) of Directive 93/13, terms not individually negotiated are automatically void. In contrast, unfair terms individually negotiated are remedied only by general contract law.

rather only on a plea raised by the consumer. Indeed it is unclear whether the principles from the *Cofidis* case can also apply. As to BELGIUM, prior to the amendments of the Act of 7 December 1998 the clauses listed in the black list of Art. 32 of the Trade Practices Act (TPA) were prohibited and void whereas the clauses which violated the general prohibition on unfair terms of TPA Art. 31 *could* be declared void by the judge. The formulation created the impression that nullity was optional. Now after the amendment in both cases the nullity is compulsory. The TPA has stimulated a discussion on the nature of nullity. In a case concerning an infringement of the general clause of former TPA Art. 31, the CA Mons¹⁷⁴ pointed out that given the relative nullity it did not have the competence to assess the unfair character of terms on its own motion. Then again in a judgment of 3 March 2003 the CA Ghent¹⁷⁵ stated that although most of the provisions on unfair contract terms only concerned private interests, and consequently are sanctioned by relative nullity, there are some provisions which do concern public policy and are therefore sanctioned by absolute nullity. There are also legal scholars who proclaim absolute nullity as a general consequence of unfairness.

In CYPRUS, the transposition law copies the Directive, thereby stating that an unfair term shall not bind the consumer. In POLAND, Art. 385.1(1) of the Civil Code stipulates that “prohibited contractual clauses” do not bind the consumer and no absolute nullity is expressly provided. Therefore, it remains controversial in both countries whether or not the domestic provisions can be interpreted in such a way as to provide for relative nullity.

According to Art. 2(8) of the GREEK Consumer Protection Act (Law 2251/1994), the supplier cannot claim nullity of the contract as a whole if one or more terms are unfair and therefore considered void. Some authors regard this provision as an argument for relative nullity, others argue that due to the public law character of the provisions and the lack of an explicit claim for damages of use of unfair terms then solely absolute nullity would match the intention of the domestic legislator. In HUNGARY, the legislator changed the consequences of unfairness in 2006, however, without clarifying whether the consumer can influence the validity of the term in question. Art. 209a(2) of the Hungarian Civil Code provides that unfair clauses in consumer contracts are void. On the other hand CC Art. 209a(2), one sentence later, states

¹⁷⁴ CA Mons, judgment of 29 March 1999, *Journal des Tribunaux* 1999, 604.

¹⁷⁵ Hof van Beroep Gent, judgment of 3 March 2003, *Algemeen Ziekenhuis St-Lucas VZW/R. Jonckheere*, *Tijdschrift voor Gentse rechtspraak* 2003, 162.

that the unfairness of a clause can only be *asserted* to the advantage of the consumer. In ITALY, the new Consumer Code changed the legal consequences of the use of unfair terms by introducing the concept of protective nullity (*nullità di protezione*) in Art. 36(3). This provides that nullity of a clause can only occur to the advantage of the consumer, whereby the court has jurisdiction to declare the term void on its own motion (Art. 36(3): “*La nullità opera soltanto a vantaggio del consumatore e può essere rilevata d’ufficio dal giudice*”). Against this background it remains unclear in Hungary and Italy whether, according to the present state of the law, the court can also declare nullity if the consumer expressly wishes to be bound by the clause.

As explained above, the concept of protective nullity seems to be in accordance with ECJ case-law, provided that a consumer is protected, even if he fails to raise the unfair nature of the term, either because he is unaware of his rights or because he is deterred from enforcing them. In other words *Océano*, *Cofidis* and *Mostaza Claro* do not completely outlaw the consumer’s decision whether nullity of the unfair term will serve his interest.

dd. Alteration, amendment and adjustments of terms and contracts

The Nordic countries DENMARK, FINLAND and SWEDEN traditionally apply a more flexible approach based on the vast usage of general clauses. The Courts are entitled not only to declare an unfair term null and void, but also to alter, amend and adjust the particular term, other terms or the entire contract, thereby taking into account circumstances that have arisen after the contract was entered into. Although there is no relative nullity in the strict sense, this discretionary power allows the Courts to decide in the interests of the consumer. In the course of the implementation of the Directive, DENMARK introduced a special provision enabling the consumer to demand that the remaining part of the contract is upheld without any amendment if it is possible.¹⁷⁶ Similarly in PORTUGAL, the consumer may choose to keep the contract itself in force, in accordance with the principle of conservation. Under LITHUANIAN Law, the consumer is entitled to apply to court for invalidation or alteration of any unfair term.¹⁷⁷ In MALTA, the Director of Consumer Affairs of his own initiative or at the request of a “qualifying body”, may issue a compliance order on any person requiring that person to delete

¹⁷⁶ Article 38c(1) referring to the general clause Art. 36(1) of the Formation of Contracts Act.

¹⁷⁷ Vid. Art. 12(1) of the Law on Consumer Protection; CC Art. 6.188(6).

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or alter a term if the Director considers the term to be unfair to consumers. The Director may also require the incorporation of terms in a consumer contract if he considers that this is necessary “for the better information of consumers, or for preventing a significant imbalance between the rights and obligations of the parties, and this to the benefit of consumers” (Art. 94(1) lit. (a) of the Consumer Affairs Act).

ee. Splitting terms into a valid and unfair part

The question whether it is admissible – if possible – to split a contract term into a valid and an unfair part i.e. to reduce an unfair term to its legally permitted core, has been regulated and discussed only in a few member states. In SLOVAKIA, the Civil Code establishes partial nullity of the contract, thus it is possible to split a contractual term into valid and void parts, in order to keep the valid parts. In ESTONIA, Art. 39(2), sent. 2 of the Law of Obligation Act states that if a term can be divided into several independent parts and one of them is void, the other parts remain valid. Similarly, under Art. 3:42 of the DUTCH Civil Code a contractual, invalid (annulled) term can be legally replaced by a contractual term that would have been agreed on by the parties. In AUSTRIA and the UNITED KINGDOM (see above) the legitimacy of such a “reduction” of an unfair term is still being controversially discussed in legal literature, whereas in GERMANY it is acknowledged case law¹⁷⁸ and established in legal literature that a reduction is inadmissible for it would stimulate the use of unfair terms and weaken consumer protection. The latter legal attitude also applies to GREECE.

ff. Consequences for the contract as a whole

As far as the consequences for the contract as a whole are concerned, virtually all member states followed the prescriptions of the Directive upholding the entire contract if it is capable of a continuing existence without the unfair terms. Minor differences relate to the exact legal techniques applied. Some countries achieve the result via general contract law while others have inserted a specific provision in the relevant Act or Chapter dealing with unfair contract terms. Because of their more flexible approach as described above, FINLAND and SWEDEN have not explicitly regulated the consequences for the contract. Under ESTONIAN Law the remaining part of the contract is valid unless the party supplying the term proves that the party

¹⁷⁸ BGHZ 114, 342; BGHZ 120, 122 and NJW 2000, 1110.

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would not have entered into the contract without the standard term which is void or deemed not to be part of the contract. The same hypothetical assumption can be found in SLOVENIA.

c. Compensation and/or punitive damages

The Directive does not prescribe any further sanctions for the use of unfair terms such as damages, fines and criminal penalties. Nevertheless, a number of member states in using the minimum harmonisation (Art. 8 of the Directive 93/13) have provided for compensation for the use of unfair contract terms. In BELGIUM, BULGARIA, CZECH REPUBLIC, ESTONIA, HUNGARY, GERMANY, ITALY, LATVIA, LITHUANIA, MALTA, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN and UNITED KINGDOM damages/compensation is available under general civil law/contract law (via breach of a contractual duty, tort or related concepts). Punitive damages, however, cannot be imposed under civil law in the member states, indeed there may be such provisions in competition law which are not examined within this study.

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V. Requirement of transparency according to Art. 5

The requirement of transparency laid down in Art. 5 of Directive 93/13 constitutes – alongside the control of unfair terms in Art. 3 – the second primary pillar of Directive 93/13. The principle of transparency is an essential part of the European information model and is closely related to the other consumer-protecting information requirements prescribed by Community law.¹⁷⁹

1. Drafting of terms in plain and intelligible language

a. Requirements of the Unfair Contract Terms Directive

According to Art. 5, sent. 1 of Directive 93/13 terms must always be drafted in plain, intelligible language. Recital 20 additionally makes clear, that the consumer should be given a genuine opportunity to examine all the terms.

The criteria “plain” and “intelligible” complement each other and are difficult to distinguish. Contractual terms are “plainly” drafted, when no ambiguities, misunderstandings or doubts exist in relation to the content of the terms. A contractual clause is “intelligible”, when the consumer can understand the essential substance of the rules.

The general view is that the requirements of “plain and intelligible” drafting encompass both formal as well as substantive criteria: In terms of *formal requirements* the user has to ensure the drafting style of the terms is such that the consumer can comprehend the essential rights and duties. This is unlikely to be the case when the outward appearance of the document makes it difficult to get an overview of the terms or recognise a structure (e.g. frequent cross-referencing), is printed in a type face that is difficult to read or is disproportionately long in relation to the significance of the transaction. Furthermore, there is a *substantive, linguistic*

¹⁷⁹ See on this point, Part 3 D. of this study as well as *Grundmann/Kerber/Weatherill*, Party Autonomy and Information; *Schulze/Ebers/Grigoleit*, Information Requirements and Formation of Contract in the Acquis communautaire; *Howells/Janssen/Schulze*, Information Rights and Obligations.

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aspect to the requirement of plain, intelligible language. In this respect technical jargon, long convoluted sentences or imprecise, fragmentary statements are to be avoided as far as possible. To some extent it is furthermore inferred from the requirement of transparency, that terms must be drafted in comprehensible language from the consumer's point of view.

b. Transposition of Art. 5, sent. 1 in the Member States

The vast majority of member states, including the most recent new member states Bulgaria and Romania, have transposed Art. 5, sent. 1 word for word. After the ECJ in its judgment C-144/99¹⁸⁰, clarified that, to implement the principle of transparency in full, "it is essential that the legal position under national law is sufficiently precise and clear that individuals are made fully aware of their rights" and that "even where the settled case-law of a member state interprets the provisions of national law in a manner deemed to satisfy the requirements of a Directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty", the principle of transparency was explicitly anchored in DUTCH and GERMAN law.

By contrast Art. 5, sent. 1 of Directive 93/13 was not explicitly transposed in the CZECH REPUBLIC, ESTONIA, GREECE, HUNGARY, LUXEMBOURG and in SLOVAKIA. These countries do of course have rules on the incorporation and/or interpretation of pre-formulated terms, in the context of which the issue of whether the clause is formulated in plain, intelligible language also has a role to play. Whether this sufficiently accommodates the requirements of the ECJ is doubtful however, since in those countries the danger exists that consumers and consumer associations do not know that they can take actions against clauses which lack transparency. The difficulty in transposing the requirement of transparency exists above all in the qualification in Art. 5, sent. 1 of Directive 93/13, that the requirement of transparency only applies in the case of contracts where all or certain terms are in *writing*. This formulation stands in contradiction to the recitals of the Directive: Apart from the fact that recital 20 does not contain any such limitation, it is expressly emphasised in recital 11, that consumers bound by an oral contract should be granted the same level of protection as consumers bound by a

¹⁸⁰ ECJ judgment of 10 May 2001, C-144/99 - *Commission v Kingdom of the Netherlands* [2001] ECR I-03541, para. (17); ECJ judgment of 7 May 2002, C-478/99 - *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147, para. (18) and ECJ judgment of 9 September 2004, C-70/03 - *Commission v. Kingdom of Spain* [2004] ECR I-0799, para. (15).

written contract. This inconsistency cast doubt on the applicability of the transparency principle in those member states, which – for example BELGIUM – included this qualification.

c. Interpretation of the requirement of transparency in the Member States

The issue of whether a term is formulated in plain and intelligible language is assessed by reference to how it is understood. Directive 93/13 does not contain any clear guidelines in this regard. It is also unclear, whether and to what extent the benchmark of the average consumer who is reasonably well informed and reasonably observant and circumspect, developed in the ECJ's case law on the fundamental freedoms and interpreting directives of trade practices law,¹⁸¹ also applies in the context of control of unfair terms.

In this regard it is not surprising that the various benchmarks of the consumer in the individual member states (a detailed exposition of which is beyond the scope of this study) deviate considerably from one another.

Clear differences in practice are above all evident in the extent to which legal terminology is permissible. In the UNITED KINGDOM, there is a clear tendency towards the fact that clauses must always be formulated in everyday layman's terms. In the guidance on unfair terms in consumer contracts issued by the Office of Fair Trading it is laid down that expressions such as "indemnity" must always be avoided, since such references can have onerous implications of which consumers are likely to be unaware.¹⁸² In place thereof terms like "pay damages" are preferred. In GERMANY, by contrast, case law in this respect is more generous, but the BGH is however ready and keen to emphasise in a number of judgments, that the duty of the user to formulate the content of the clause clearly and intelligibly only exists within the bounds of what is actually possible. Should various kinds of legal and factual difficulties exist for the drafter, the terms shall nonetheless be binding even if the other party has to make a certain effort in order to understand them rather than being able to understand immediately.¹⁸³

¹⁸¹ See also recital 18 of the Directive 2005/29.

¹⁸² See 19.5 and 19.7 of the guidance, available at <http://www.of.t.gov.uk/Business/Legal/UTCC/guidance.htm>.

¹⁸³ BGH NJW 1998, 3114.

Uncertainties in the application of the requirement of transparency also relate to the extent to which the principle of transparency must reflect the individual prevailing circumstances at the time of conclusion of the contract. This concerns not only the general problem of whether the particular consumer in question is better or less informed than the average consumer, but also the issue of whether clauses lacking transparency can be “healed” by making specific reference to them. In GERMANY, case law assumes that an objective lack of transparency in an individual case can be overcome if the user informs the customer (which may even be only orally, dependent upon the circumstances).¹⁸⁴ Whether this interpretation is compatible with the Directive appears doubtful, as the Directive aims not only at transparency in the individual case, but also at the guarantee of the internal market through comparability of contractual conditions of domestic and foreign providers (market transparency). Contractual documents must therefore in principle be intelligible in themselves and not only after specific reference by the user upon conclusion of the contract.

2. Consequences of lack of transparency

a. Requirements of the Unfair Contract Terms Directive

The wording of the Directive does not specify the legal consequences that apply where the transparency requirement has been breached in the individual case. The sole legal consequence of failure to fulfil the requirement of transparency to be explicitly provided is the interpretation rule in Art. 5, sent. 2 of Directive 93/13. This interpretation rule, however, only applies to clauses not drafted in plain language and which are capable of interpretation. However, the legal consequences for plain, but unintelligible clauses are not regulated (an example would be where, due to legal terminology or insufficient command of the language in which the terms are drafted, the clause is unintelligible to the consumer).

Accordingly there are widely differing views on the legal consequences of a breach of the transparency imperative. Some assume that the member states are free to decide on the legal consequences. However, others see the requirement of transparency, by reference to recital

¹⁸⁴ BGH WM 1997, 518 with further references.

20, as a condition for the incorporation of terms. Finally there is the view that clauses which lack transparency are to be assessed according to Art. 3. If one follows this latter view, it is furthermore doubtful, whether lack of transparency *per se* results in the term being rendered unfair or non-binding according to Art. 3(1) in conjunction with Art. 6(1) of Directive 93/13 or whether there is a further condition in that the content of the clause is disadvantageous, i.e. causes a considerable and unjustified imbalance in the contractual rights and obligations contrary to the principle of good faith.

In this aspect the judgment of the ECJ in *Cofidis*¹⁸⁵ has not brought any clarification. The case under dispute concerned an offer of credit with the words “Free application for money reserve” in large letters on the front, while the references to the contractual interest rate and a penalty clause were in small print on the reverse. The *Tribunal d’instance Vienne* was of the opinion, that “the financial clauses lack legibility”, which was likely to mislead the consumer. Accordingly, the conclusion was reached that “the financial clauses may be regarded as unfair”. The ECJ by contrast explained that¹⁸⁶

“To fall within the scope of the Directive, however, those terms must satisfy the conditions set out in Art. 3(1) of the Directive 93/13, that is, they must not have been individually negotiated and must, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Although the national court has not provided any information on the latter point, it cannot be excluded that that condition is satisfied.”

However, with this judgment the ECJ is giving an opinion only in relation to the admissibility of the complaint and not to the fundamental question of which legal consequences lack of transparency gives rise to.

¹⁸⁵ ECJ judgment of 21 November 2002, C-473/00 - *Cofidis v. Fredout*, [2002] ECR I-10875.

¹⁸⁶ ECJ judgment of 21 November 2002, C-473/00 - *Cofidis v. Fredout*, [2002] ECR I-10875, para. (23).

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b. Transposition of the *contra proferentem* rule in the Member States

The interpretation rule laid down in Art. 5, sent. 2 of Directive 93/13, according to which any doubt on the meaning of a clause is always to be resolved in the manner most favourable to the consumer, has been transposed by all member states, including Bulgaria and Romania

The implementation of the requirements of the Directive in ESTONIA however seems problematic. According to Art. 39(1), sent. 2 of the Law of Obligations Act, “in the case of doubt, standard terms shall be interpreted to the detriment of the party supplying the standard terms.” Directive 93/13 however goes beyond a mere interpretation to the detriment of the user, in that it requires not only an interpretation favourable to the consumer, but an interpretation “most” favourable to the consumer.

In AUSTRIA, unclear contract terms are ineffectual according to Art. 6(3) of the Consumer Protection Act. This rule has resulted in certain confusion, as some authors assume that clauses lacking transparency are to be assessed according to this rule alone, so that the consumer cannot rely on the *contra-proferentem* rule in CC Art. 915, 2nd alternative. The majority view, by contrast, holds that the consumer, even in the case of mere lack of transparency, can rely on an interpretation favourable to him.

According to Art. 5, sent. 3 of Directive 93/13 the *contra proferentem* rule applies only in individual proceedings, not in collective actions. This should prevent the rule on interpretation from allowing parties to evade orders to cease and desist using particular terms by simply stating that the clause cannot be regarded as unfair when interpreted in favour of the consumer. SPAIN has as yet not transposed Art. 5, sent. 3, but is required to do so according to the judgment of the ECJ in C-70/03.¹⁸⁷

¹⁸⁷ ECJ judgment of 9 September 2004, C-70/03 - *Commission v. Kingdom o Spain* [2004] ECR I-0799 (paras 16-22); see Part 2 C.II.23.

c. Further legal consequences according to Member State law

aa. Non-incorporation of terms which lack transparency

In many member states, the transparency of a clause can only be assessed within a review of incorporation of terms. The review of incorporation of terms is based upon the notion that a contractual clause can in principle only become part of the contract through a legally binding declaration of consent by the other party. The aim and purpose of the review of incorporation of terms is to establish minimum conditions for a valid, legally binding declaration of consent. Accordingly, most cases of review of incorporation of terms only apply formal requirements of transparency with a “broad brush approach”, in which it is assessed whether the consumer, in general terms, had the opportunity of becoming acquainted with the clause or could have reckoned with its true content. As a rule, only especially clear-cut cases of lack of transparency attract any sanction, i.e. when even a minimal measure of intelligibility, certainty or readability is lacking.

bb. Assessment of transparency within a content review

An assessment of transparency within a content review by contrast occurs in very few member states: Besides the aforementioned rule in AUSTRIA (*ante*), GERMAN law, since the modernisation of the law of obligations, provides in CC Art. 307(1), sent. 2 that an unreasonable disadvantage may also result from the fact that the provision is not clear and comprehensible. This should make clear that, in the context of a content’s review, clauses lacking transparency are *per se* regarded as non-binding, without an additional criterion of unreasonable disadvantage to the contractual partner. Legal consequences of a breach of the transparency imperative therefore include not only an interpretation favourable to the consumer and non-incorporation into the contract, but also the ineffectuality of the clause within the content review. In relation to this point the German BGH has clarified that a clause declared unfair according to CC Art. 307(1) (Art. 6(1) of Directive 93/13) cannot be replaced by one with identical content.¹⁸⁸ As Directive 93/13 contains no rules on how to replace non-binding terms, then it is – according to the BGH – for the national law to decide by means of judicial interpretation, how to fill a gap in a contract if the removal of a non-binding term without substitution thereof would cause inequity. If the customer, in reliance on the binding

¹⁸⁸ BGH, 12 October 2005 IV ZR 162/03.

nature of the non-binding clause suffers financial loss, then, according to German case law, he additionally has the possibility of a claim for damages in an action for breach of pre-contractual duty of care culpa in contrahendo.

cc. Unclear legal situations

The state of the law remains unclear in ITALY. Whereas some authors assume that lack of transparency implies nullity *per se*, for some commentators the infringements of the principle of transparency must be evaluated under Art. 36(2) lit. (c) of the Consumer Code (binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract).

In LATVIA, although the legal consequences are not regulated in the Consumer Protection Act, general norms of civil law could be nevertheless applied, particularly Art. 1506 of the Law of Obligations stating that absolutely disreputable and unintelligible and also contradictory terms shall not be interpreted at all, but deemed null and void.

In MALTA, there are no express rules on the consequences of a lack of transparency for individual cases. However under general civil law rules, if the lack of transparency is such as to amount to fraud or bad faith on the part of a party to the contract, then that contract may be annulled by the choice of the other party. Moreover, the Director of Consumer Affairs in accordance with his powers under Art. 94 of the Consumer Affairs Act may issue a compliance order under that article if he considers that the term used is unfair to consumers and is in breach of Art. 47 which requires that terms in a consumer contract are written in plain and intelligible language “which can be understood by the consumers to whom the contract is directed.”

For the non observance of the principle of transparency ROMANIAN Law 193/2000 provides in Art. 1(2) that in case of doubt on the meaning of a clause, these shall be interpreted in favour of the consumer. Also, Art. 14 of the aforesaid law provides that consumers prejudiced by contracts concluded with the breach of the provisions of the law (including the breach of the transparency principle), have the right to file claims before the courts of law in accordance with the provisions of the CC and the code of civil procedure. Therefore, it seems that the

Romanian legislator chose not to regulate the consequences for breach of the transparency requirement in individual actions. It rests with the courts to apply the transparency principle and relevant sanctions in case of breach thereof.

The legal consequences in SPAIN are also unclear, as the principle of transparency has been transposed into two different Laws with different consequences. Art. 10(1)(a) of the Law 26/1984 of July 19 on Consumer Protection prescribes very generally the principle of transparency, without laying down specific consequences. In Art. 5(5) of the Law 7/1998 (standard terms) the consequences of lack of transparency are by contrast positively regulated within two articles. These have been criticised in academia because the respective sanctions partly contradict each other: In Art. 7(2) the sanction against standard terms that are “illegible, ambiguous, obscure and incomprehensible” is non-incorporation into the contract, whereas Art. 8 declares standard terms that infringe any rule of this Law null and void (i.e. including the principle of transparency). Both laws can be applied simultaneously, when an unfair term in contracts concluded with consumers is at the same time a standard term. Case law, in a pragmatic (but not clarifying) approach, tends to use any of the cited norms to achieve a fair outcome in favour of the consumer; frequently through declaring the term null and void.

In the UNITED KINGDOM, it is unclear whether a term is capable of being found to be unfair *principally* or *solely* because it is not transparent, but the Law Commission and the Scottish Law Commission recommend in their final report on unfair contract terms that it should be possible for a contract term to be found to be unfair principally or solely because it is not transparent.¹⁸⁹

3. Conclusions

The requirements of Directive 93/13 in respect of the imperative of transparency have been transposed in most of the member states (with the exception of the CZECH REPUBLIC, ESTONIA, GREECE, HUNGARY, LUXEMBOURG and SLOVAKIA). It is doubtful whether a breach of the transparency imperative is sufficiently and effectively sanctioned. As Directive 93/13 contains no explicit guidelines on this point, the vast majority of member states have also

¹⁸⁹ See the final report of the Law Commission and the Scottish Law Commission on unfair terms in contracts, LAW COM No. 292/SCOT LAW COM No. 199, para. 3098-3102.

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declined to regulate the consequences for breach of the transparency requirement in individual actions. In a reform of Directive 93/13 the Community legislator should clearly lay down the legal consequences.

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VI. Collective proceedings according to Art. 7(2)

1. Overview

According to Art. 7(1) of Directive 93/13, member states shall ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. The Directive largely leaves the choice of means to the member states which must be put in place. Community law aims to accommodate appropriately the existing systems which had already developed in the member states even before Directive 93/13 came into force. Art. 7(2) of Directive 93/13 thus only provides in general terms, that

“the means (...) shall include provisions whereby persons or organizations, 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.”

This rule is supplemented by Directive 98/27 on injunctions for the protection of consumer interests (see esp. Annex 7 to the Directive).¹⁹⁰

All member states provide for collective court procedures, by which the use or recommendation of unfair terms in legal agreements shall be prohibited. In a number of member states, the emphasis is on administrative proceedings (see 2.), in almost all member states it is furthermore possible to pursue collective court actions against unfair clauses (3.).

Some member states, e.g. FRANCE and SLOVAKIA, make additional provisions for criminal proceedings to prohibit unfair terms. It appears however, that such kinds of proceedings play a subordinate role in practice, so a more detailed examination is not required here. In MALTA, where a person does not abide with a compliance order issued by the Director of Consumer

¹⁹⁰ On the transposition of this Directive cf. the report in this study, Part 2 G.

Affairs, then such non-compliance is considered a criminal offence and punishable as such. However, it has been suggested that these consequences should be re-evaluated and substituted by a more effective regime of administrative fines since the initiation of criminal proceedings is invariably time-consuming and the burden of proof in such instances is that required in criminal cases – namely of proving beyond reasonable doubt.

Alongside the aforementioned collective proceedings, in respect of certain types of contracts, especially financial services contracts in the banking and insurance sector as well as dealings in stocks and shares, many member states make provision for specific monitoring by industry regulators governed by public law. The use and recommendation of unfair terms can in relevant cases be additionally regulated through antitrust measures. Since such proceedings only concern specialised questions, their relevant characteristics will not be addressed more closely either.

2. Administrative control of unfair terms

a. The role of public bodies in the Member States

Many member states use an administrative law based system for monitoring contract terms. These systems are characterised by the dominant position of public bodies responsible for protecting the collective interests of consumers. Such bodies exist especially in the Nordic countries (DENMARK, FINLAND, SWEDEN) with the Consumer Ombudsman, in BULGARIA with the Commission on Consumer Protection as well as institutions in charge of licensing certain trading activities, commissions for the reconciliation of disagreements between traders and consumers and regional commissions, in CYPRUS with the Director of Competition and Consumers' Protection Service, in ESTONIA with the Consumer Protection Board, in HUNGARY with the General Inspectorate for Consumer Protection, in IRELAND with the Director of Consumer Affairs,¹⁹¹ in LATVIA with the Consumer Rights Protection Centre, in LITHUANIA with the National Consumers' Rights Protection Board, in MALTA with the Director of Consumer Affairs, in POLAND with the Director of the Office for the Protection of Competition and Consumers, in ROMANIA with the Office for Consumer Protection, in

¹⁹¹ On 24 August 2006, a new draft legislation, the Consumer Protection (National Consumer Agency) Bill, has been announced which will, inter alia, replace the office of Director of Consumer Affairs with a new administrative body, the National Consumer Agency.

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SLOVAKIA with the Slovak Trade Inspectorate as well as in the UNITED KINGDOM with the Office of Fair Trading.

Administrative elements can also be found in other countries, which admittedly do not have an extensive system of public control of contract terms, but administrative bodies do however at least have standing to apply for injunctions in court, e.g. in BELGIUM (Minister of Economic Affairs), PORTUGAL (Public Prosecutor) and SPAIN (National Consumer Institute and the corresponding bodies or entities of the Autonomous Communities and their local authorities dealing with consumer protection; Public Prosecutor or Attorney General).

In BELGIUM, the King is empowered to impose or prohibit by Royal Decree certain clauses applicable to certain commercial sectors or to specific products or services.¹⁹² In FRANCE, a special administrative body, the “*Commission des clauses abusives*” has the power to issue statements on terms contained in standard contracts, but those statements are not legally binding.¹⁹³ In ITALY, the National Council of Consumers and Users (“*Consiglio Nazionale dei Consumatori e degli Utenti – CNCU*”) represents the consumers’ and users’ associations nationwide. The Council is attached to the Ministry for Production Activities and its main duties are those of expressing opinions, where requested, on preliminary draft legislation produced by the Government or draft legislation produced by the members of parliament and on draft regulations that affect the rights and interests of consumers and users. In addition to its advisory function vis-à-vis the Parliament (at hearings), and vis-à-vis the Government (consultation sessions), the CNCU participates in other regular consultation processes with other authorities and bodies by being a signatory to memorandums of understanding as well as by attending hearings on specific topics. In POLAND, PORTUGAL and SPAIN, the Standard Terms Register contains a list of clauses which are declared as unfair; the register has binding effects for administrative authorities, e.g. registrars.

b. Investigatory powers of public bodies

The administrative law’s power to monitor terms differs considerably between the member states. In many member states, the competence of the public bodies far exceed the ability to

¹⁹² See Part 2 C.II.2.

¹⁹³ See Part 2 C.II.8.

bring an action in court. Moreover, through special legal provisions, the public bodies generally have a duty to investigate a complaint or examine whether a term is unfair on their own initiative. This corresponds with the power in many member states for the public body to demand that traders submit the relevant documents and information.

c. Negotiation and guidelines

On this basis many public bodies work towards reasonable contractual conditions through negotiation. This procedure is above all characteristic in DENMARK, FINLAND and SWEDEN as well as in the UNITED KINGDOM: In the NORDIC STATES, according to the principle of negotiation, the Consumer Ombudsman shall endeavour by negotiation to induce persons carrying on a trade or business to act in accordance with the principles of good trade practices. One of the ways in which the Consumer Ombudsman may try to influence business is by issuing guidelines within specified areas on the basis of negotiations with the relevant business and consumer organisations. In the UNITED KINGDOM, any complaints about unfair terms are usually resolved through negotiation with the trader concerned. The Office of Fair Trading, in particular, has been very active in approaching traders about terms which may be unfair and has successfully persuaded them to change their terms. It regularly publishes an “Unfair Contract Terms” Bulletin in which it provides details of the terms it has dealt with in this way.¹⁹⁴

In BELGIUM, the legislator created a Commission on Unfair Contract Terms in 1993. It is an advisory organ that not only makes recommendations about clauses in contracts between businesses and consumers but also may give advice upon request and has the competence to submit proposals to the Minister of Economic Affairs. On a regular basis the Commission’s advice has been obtained by Ministers on a number of diverse subjects. The reports holding the Commission’s recommendations may be consulted on the internet.¹⁹⁵ The Commission can act on its own initiative, or at the request of the competent minister, a consumer organisation or an association of traders.

¹⁹⁴ See <http://www.of.t.gov.uk/News/Publications/Leaflet+Ordering.htm>.

¹⁹⁵ See <http://mineco.fgov.be>.

d. Power of public bodies to issue orders

In some member states, the powers of the public bodies are particularly extensive. They encompass not only the right to litigate in court, but also the power to issue a compliance order.

In DENMARK, the Consumer Ombudsman may issue orders in respect of conduct which is in clear contravention of the Marketing Practices Act and cannot be changed by negotiation. The party against whom an order is made may demand that the Consumer Ombudsman ensures that the order is brought before the courts. Non-observance of a prohibition or injunction imposed by a court/Ombudsman is punishable by a fine or imprisonment of up to four months. In SWEDEN, where negotiations fail in cases of lesser significance, the Ombudsman may likewise make a prohibitory order. If a prohibition is not observed or if the case is one of significant public interest, then the Ombudsman can apply for an injunction before the Market Court. Similar to this, in FINLAND, the Consumer Ombudsman may impose an injunction in cases that are not of significant importance. The injunction becomes void in case the addressee objects to the injunction within 8 days. The Consumer Ombudsman may also impose a conditional fine, but the Market Court decides whether or not it is payable.

In ESTONIA, supervisory authorities engaging in consumer protection may issue a precept in which it demands that the offence desists and, if possible, that the initial situation is restored; the precept shall set out the penalty fine to be imposed upon failure to comply with the precept; contestation of a precept does not release the trader from the obligation to comply unless the court decides otherwise. The upper limit for a penalty payment is 10 000 kroons.

According to BULGARIAN law, the chairperson of the Commission of Consumer Protection has the right issue individual administrative acts, penal decrees and impose forceful administrative measures and authorise officials to issue penal decrees (Art. 165(4) No. 6 Law on Consumer Protection).

In HUNGARY, the General Inspectorate for Consumer Protection is empowered by the Consumer Protection Act to make an order to remedy the unlawful situation and prohibit the continuance of such conduct and impose a financial penalty (consumer protection fine). If the

conduct of the user simultaneously constitutes unfair trading practice, the competition authority can also prohibit the use of standard terms and impose a fine.

In LATVIA, the Consumer Rights Protection Centre can require businesses to make changes in draft contracts and prohibit further use of unfair or ambiguous contract terms, both in respect of draft contracts and in contracts which have already been entered into. The requirements set and instructions given by officials of the Consumer Rights Protection Centre are binding on the business. If a violation of consumer rights has been found, which affects individual or group consumer interests (consumer association interests) and which may cause harm or loss to particular consumer rights, the Consumer Rights Protection Centre is entitled (1) to make an order requiring a business to cease the violation, and to perform specific activities to rectify the impact thereof and imposing a time limit for implementation of such measures and (2) to publish the decision taken either fully or partially in the official Gazette of the Government of Latvia.

In MALTA, the Director of Consumer Affairs, either of his own initiative or at the request of a ‘qualifying body’, may issue a compliance order on any person requiring: (1) the deletion or alteration of terms in consumer contracts which the Director considers to be unfair to consumers, and/or (2) the incorporation of terms in consumer contracts which the Director considers to be necessary to ensure that consumers are better informed or to counter a significant imbalance between the rights and obligations of the parties, and this to the benefit of consumers, and/or (3) require a person to comply with any measures specified in the order to ensure compliance. The trader against whom such an order is made then has the right to contest such an order before the Court of Magistrate (Civil Jurisdiction). If the order is not contested, or unsuccessfully contested by the trader and accordingly confirmed by the Court, and the trader notwithstanding fails to abide by the order, then the failure to comply is considered as a criminal offence.¹⁹⁶

In POLAND, the Director of the Office for the Protection of Competition and Consumers likewise has the right to issue an injunction and set a fine for non-compliance. A precondition for such a measure, however, is that not only is the individual interest of a particular consumer affected, but that the general consumer interest so requires.

¹⁹⁶ See *supra*, Part 2 C.VI.1.

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In SLOVAKIA, consumers have the right to file a complaint to the public control and market surveillance authority (Slovak Trade Inspectorate). The Slovak Trade Inspectorate is a state administrative body subordinate to the Slovak Ministry for the Economy. The Public Control and Market Surveillance Authority is empowered to impose financial penalties for infringements, but it can not intervene in decision-making about rights and duties of contracting parties. Only the court has authority to make a decision.

3. Judicial review of unfair terms

Court proceedings for prohibiting unfair clauses also vary across the member states.

a. Types of actions in the Member States

As a minimum standard almost all member states allow injunctions against persons who use or recommend unfair clauses. By and large it is also possible to obtain an interlocutory/interim injunction where urgent action is required.

An injunction generally aims to ensure that the business ceases the infringement and does not engage in similar conduct in the future. Most member states also provide for all or part of the relevant decision of the court or of a corrective announcement to be published, with the aim of terminating any continued effects of the use of the unfair term in question.

Alongside injunctions some member states also allow actions for damages: In FRANCE, consumer associations have a right to collective damages where a misfeasance by a user of standard terms has caused damage to the collective consumer interest (Art. L. 422 et seq. of the Consumer Code). In GREECE also, consumer associations can bring actions for damages. The quantum of damages is determined by the court, taking account of the circumstances of the case and especially the intensity of the unlawful conduct, the size of the respondent company, its annual turnover and the necessity of a general or specific precedent. This sum is made available for the public benefit. In BULGARIA, consumer associations are able to claim damages inflicted upon the collective interests of consumers. The adjudicating court defines

the amount *ex aequo et bono*. Besides, when at least two consumers have suffered individual damages, the consumer associations may lodge a claim before the court on their behalf for compensation of the damages provided that they have been authorized in writing, with special power of the attorney to the legal representation in the proceedings. In HUNGARY, if the consumer protection authorities issue an *actio popularis* pursuant to Art. 39 of the Consumer Protection Act, the infringer is required to compensate the consumer in accordance with the judgment; this is however without prejudice to the right of the consumer to bring an action according to the general civil law.

In SPAIN, consumer associations have the right to claim damages under Art. 12 of the Law 7/1998 on standard terms in contracts. Moreover, the Spanish Civil Procedure Act 1/2000 allows consumer associations to claim damages on behalf of unidentified classes of consumers.

In so far as the use of unfair terms also represents a breach of fair trading provisions, in certain circumstances additional sanctions can apply in the member states: Thus for instance, in GERMANY, according to the Act against Unfair Competition of 2004, competitors are entitled to claim damages, if the violating party has acted negligently. According to Art. 10 of the Act against Unfair Competition 2004, there is the further possibility of claiming restitution for the profits that a violating party has wilfully achieved by injuring a multitude of customers.

In ITALY, a new proposal of 26 June 2006 plans to introduce into the Consumer Code a provision providing that consumer associations are entitled to recover damages on behalf of one or more consumers.

Also in ROMANIA consumer associations may take legal action on behalf of their own.¹⁹⁷ According to Romanian law 193/2000, the sanction provided against persons who use or recommend unfair clauses consists of fines. In accordance with the general procedural rules it is also possible to obtain an interlocutory/interim injunction where urgent action is required and also for damages under the general rules of the CC.

¹⁹⁷ Article 37(h) Government Ordinance 21/1992 in conjunction with Art. 2(d) Government Decision 1553/2004.

b. Standing to apply for an injunction

The persons who may bring an action varies between the member states. Those member states which primarily prescribe administrative forms of control (see 2.), also give standing to the relevant public bodies.

Furthermore, consumer associations in all member states have standing to bring collective proceedings. The exceptions are two member states: The LITHUANIAN implementing provisions do not provide that private organisations can employ appropriate and effective means to prevent the continued use of such terms. Only individual consumers whose interests have been infringed are entitled to apply to the board (see above) or to bring an action in an individual proceeding. In MALTA, under Art. 94 of the Consumer Affairs Act, a “qualifying body” (i.e. a registered consumer association and any other body whether constituted in Malta or otherwise as the Minister may, after consulting the Consumer Affairs Council, designate by notice in the Gazette) can only file a written application to the Director to issue a compliance order. According to Art. 95, it shall be at the discretion of the Director whether or not to issue a compliance order after a written request by a qualifying body has been made to him. If the Director decides not to issue a compliance order after an application has been made to him by a qualifying body, he shall, within seven days from the date of his decision, notify, in writing, the qualifying body and the persons against whom the compliance order was requested of his decision stating his reasons therefore. A qualifying body may, within fifteen days from the date of service of the decision of the Director not to issue a compliance order, bring an action before the Court of Magistrate (civil jurisdiction) for an order requiring the Director to make a compliance order. If one assumes, that the member states are obliged by Art. 7(2) of Directive 93/13, to provide consumer associations with standing to bring collective proceedings against the user of unfair terms, then in LITHUANIA and MALTA, an infringement of the Directive can be affirmed, since in both countries consumer associations do not have a right to proceed *directly* against the user of the clause.

In all other countries, by contrast, the right of consumer associations to litigate has been introduced, even though in some countries (IRELAND und UNITED KINGDOM), there was some delay in doing so.¹⁹⁸ Alongside consumer associations, many countries have also extended the

¹⁹⁸ See relevant country reports under Part 2 C.II.12 and 25.

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right to seek injunctions against unfair clauses to trade and professional associations. Such types of claim exist above all in AUSTRIA, BELGIUM, GERMANY, GREECE, HUNGARY, ITALY, NETHERLANDS, POLAND, PORTUGAL, SLOVENIA and SPAIN.

Finally, in some member states, the right has been conferred on an individual consumer to seek an injunction, most notably in POLAND.

c. Effects of collective actions: Relativity of *res judicata*

Court or administrative decisions in the context of collective proceedings are in the vast majority of member states only binding on the businesses who are party to the case. The decision has no effect on other businesses who use identical terms. In derogation from these principles though, the relativity of court decisions has been eroded in some member states: In POLAND, a legally binding decision, which prohibits the use of unfair terms, is published in the economic and court journal and entered into a register. With the registration the judgment acquires, according to Art. 479⁴³ of the civil procedure rules, *erga omnes* effect – a legal consequence, although this is questionable on principles of constitutional law in Poland. Court decisions, which, in HUNGARY, according to CC Art. 209/B are handed down in relation to the *actio popularis*, likewise have *erga omnes* effect; only contracts, which have already been fulfilled before the action was lodged, are excluded. In SLOVENIA, only a sustaining judgment has a general *erga omnes* effect, such that any person may refer to a final judgment by which certain contracts, individual provisions of those contracts or the general terms and conditions of business incorporated in those contracts were declared null and void. However, a judgment of refusal only affects the parties concerned and does not prevent a new action in respect to the same claim. In SPAIN, the Law on Standard Terms¹⁹⁹ in contracts did originally prescribe in Art. 20 a rule according to which decisions of the Supreme Court have precedent value; this rule however was repealed and not replaced with the new civil procedure rules (Law 1/2000).²⁰⁰

Decisions in collective proceedings are generally confined to the cases that have arisen before them. But if the legal effect of a court judgment is restricted to the clause in question in its

¹⁹⁹ Law 7/1998 of April 13 on Standard Terms in Contracts.

²⁰⁰ The Law 1/2000 on civil procedure now states in Art. 221.2 that in case of successful injunction, the judgment shall indicate “whether it will produce procedural effects not limited to the parties in the procedure”.

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particular wording, then the judgment does not prohibit the user of the clause from replacing the term in question with other terms that are just as unfair but that are not covered by the judgment.

Some member states have introduced safeguards for this very eventuality in the interests of consumer protection: In the UNITED KINGDOM, according to UTCCR Art. 12(4) an “injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term which has a similar effect, used or recommended for use by any person.” Similarly, in CYPRUS, injunctions can be filed against more than one seller or supplier of the same or different business domain who uses or recommends for general use, the same or similar contract terms. Accordingly, in these countries, provision is made to prevent businesses from circumventing the judgment by replacing the offending term by terms that have a similar effect.

It must finally be borne in mind that the associated disadvantages to the consumer of the principle of relativity of *res judicata* can be *de facto* avoided if public bodies, on the basis of a relevant judgment, proceed against other businesses and thus extend the effect of the judgment far beyond the particular proceedings.

4. Conclusions

The implementation of Directive 93/13 has not led to an approximation of enforcement mechanisms in the member states. Completely different systems of collective forms of action continue to exist, which place varying emphasis on administrative measures or collective court proceedings by consumer associations or other persons who have the right to make a claim. With the accession of the ten new member states administrative proceedings have assumed greater significance in the European Community. This may be above all attributable to the fact that in the former communist-socialist countries, now as then, only a few private consumer organisations exist, which in turn increases the need for administrative control.

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VII. Practical impact of the Unfair Contract Terms Directive

1. Impact on the level of consumer protection

The practical effects of Directive 93/13 have been differently assessed by national rapporteurs. In some of the “old” member states, and, above all, in the Nordic States (DENMARK, FINLAND, SWEDEN) and also in AUSTRIA, GERMANY and PORTUGAL, it has been stressed that the Directive has not led to any noticeable increase in the level of consumer protection, since, in these countries, there was already far reaching legislation in place prior to transposition of the Directive and the (minimal) changes brought about by the Directives primarily consisted of inserting provisions in order to avoid possible gaps. For FRANCE, LUXEMBOURG and the NETHERLANDS it has been emphasised how difficult it is to assess the effects of the Directive, as an established system of monitoring terms already existed and very few changes were carried out as a result of the Directive. The transposition and application of the Directive in BELGIUM is subject to considerable criticism because of the great number of sector-specific Acts which each contained a number of unfair clauses which made it very difficult for legal practitioners to gain an overview of the rules applicable and also, more generally, because it undermines the coherence of the law. In IRELAND, there is only one court case involving the Regulations and so it is arguable that their impact to date has been minimal. However, there is consistent evidence of soft enforcement by the Office of Director of Consumer Affairs, which each year reports of amendments to contractual terms, following dialogue with relevant interested parties. These relate to, for example, mobile ‘phone contracts, airline ticket contracts, car hire contracts, house alarm contracts and buildings’ insurance contracts. For the UNITED KINGDOM it has been stressed that consumers have clearly benefited by being able to challenge a greater range of terms than has previously been the case. Also for GREECE, ITALY and SPAIN it is accepted that the level of consumer protection has been improved, even though in the case of Spain it is emphasised, that this is attributable not only to the Directive, but also because a new comprehensive regulation on standard terms (beyond the scope of the Directive) was approved.

The situation is different in the ten new member states. As all of the newly acceded States had no comparable system of monitoring terms in place prior to transposition of the Directive, many rapporteurs have emphasised, that the new rules concerning unfair contractual terms have undoubtedly been beneficial, even though many also point out that the practical effects cannot yet be assessed, as hardly any case law exists and no national reports have recently been made. The introduction of the list of unfair terms has simplified the application of law in BULGARIA.

A fundamental problem that is seen in many member states, especially in BELGIUM, POLAND and MALTA, is that many traders have problems complying with the law on unfair terms. According to a recently conducted investigation by the POLISH Office for the Protection of Competition and Consumers, that above all concentrated on the business practices of organisers of tourist events und language schools, around 95% of the examined brochures, leaflets and contracts used by the ‘organisers’ contained prohibited clauses.

According to reports of the ROMANIAN National Authority for Consumer Protection at this stage, after the implementation process of the relevant directives in the field of consumer protection, a development of the activity of control of compliance with their terms is conducted. As such, it has been reported that an important scope of the activity of the aforementioned administrative body is to develop the process of informing and educating the consumers as regards their rights in this field. Also, intensive activity of verifying the contracts concluded between traders and consumers has been reported. At this early stage after the implementation process of the directives in the field of consumer protection in Romania it is difficult to asses the practical impact on the level in this field. At least it can be argued that important progress has been made.

Finally, many correspondents complain that the limited success of the unfair terms provisions is caused by the ignorance of the consumers in the first place, and maybe also that of their lawyers. Another explanation might be that these lawyers prefer to combat unfair contract terms on the basis of the well-known concepts of general contract law with which they are more familiar, but – as emphasised by the Belgian Rapporteur – there is no evidence to support this statement.

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2. Additional burdens or costs for traders

In those countries which prior to transposition of Directive 93/13 did not have a comparable system for monitoring contract terms, i.e. especially in the new member states, it is partly assumed that traders have incurred additional burdens and costs as a result of the implementation of this Directive in that their business dealings may have to be cancelled as a result of imposing a term that is considered unfair under the current legislation but which was not regulated under the previous legal system. However, for other countries it is stated that traders do not incur additional burdens because of the lack of awareness among the business community of the applicable provisions and a lack of pro-active enforcement.

3. Particular difficulties with transposing the Unfair Contract Terms Directive

The transposition of Directive 93/13 has evoked a series of problems in the member states, which are in part attributable to the fact that the legal orders of the member states have been confronted with unfamiliar rules and concepts (this concerns, for example, the concept of “good faith”, alien to the common law system and therefore causing uncertainty as to its meaning), but also partly due to an inconsistent legislative technique in transposition.

So, for example, in BELGIUM, the law on Unfair Terms is regulated in both the Trade Practices Act and (for freelancers) in the Liberal Professions Act. This separate treatment of contracts concluded by practitioners of liberal professions was criticised, not only because of the adoption of a separate Act but most of all because of discrepancies between both Acts. Such inconsistencies are also present in SPANISH law. When a contract with standard terms is concluded with consumers, both the Law on General Consumer Protection and the Law on Standard Terms in contracts apply, with the indicated conflict of consequences. In IRELAND, it has been noted that there may be an incompatibility between the Unfair Terms in Consumer Contracts Regulation and the rules on exclusion clauses under the sale of goods legislation. Under sale of goods legislation, a clause which excludes/limits liability for breach of the statutory implied terms is void – completely prohibited. Whereas, if such a clause passes the ‘fairness’ test, it would appear to be enforceable under the Regulations. It is assumed that the consumer would be protected by the superior protection in this regard, i.e. the sales legislation. In CYPRUS, the same kind of difficulties exist, since the Sales of Goods Law renders null and void any term excluding or rendering ineffective any of the statutory implied

terms whereas the Unfair Terms in Consumer Contracts Regulation requires that such a term should pass the unfairness test and, if it fails to do so, then it will not be binding on the consumer. In the UNITED KINGDOM, as the UTCCR are now almost a “cut-and-paste” implementation of the Directive, there are no shortcomings in that sense. However, the retention of the parallel regime in UCTA 1977 has caused some confusion, and affected legal certainty. The Law Commission and Scottish Law Commission in February 2005 therefore published a draft Unfair Terms in Contracts Bill and proposed in its final report to clarify and unify the legislation on unfair terms presently contained in UCTA 1977 and UTCCR 1999.²⁰¹

²⁰¹ See the final report of the Law Commission and the Scottish Law Commission on unfair terms in contracts, LAW COM No. 292/SCOT LAW COM No. 199.

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