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# Unfair Terms in the *Acquis* Principles and Draft Common Frame of Reference:

## A Study of the Differences between the Two Closest Members of One Family

### 1. The *acquis* principles and Draft Common Frame of Reference — a question of relationship

The first volume of the Principles of the Existing EC Contract Law was published last summer.<sup>\*1</sup> It contains the first results of the work conducted by the *Acquis* Group, whose purpose is to restate the content of the *acquis communautaire* and to form it into one coherent system of law. The *Acquis* Group is trying to provide a proof that the fragmented sources of the European private law express legal ideas that in many cases can be generalised and then can serve as the basis for a more profound and wider harmonisation of private law in Europe. The work of the *Acquis* Group should be treated as a sort of intellectual experiment concerning the possibility of creation of coherent contract law in Europe.<sup>\*2</sup>

The day of publication of the Draft Common Frame of Reference (DCFR) is also forthcoming.<sup>\*3</sup> This draft has been prepared by the Compilation and Redaction Team — a small group of researchers representing two large research networks, namely the Study Group on a European Civil Code and the *Acquis* Group on Existing EC Contract Law. The majority of the DCFR consists of results of the work conducted by the Study Group, which in the intellectual sense continues the work initiated by the Commission on European Contract Law (the so-called Lando Commission).<sup>\*4</sup> However, certain parts of the DCFR have been entirely reserved for rules

<sup>1</sup> Research Group on the Existing EC Private Law (*Acquis* Group). Principles of the Existing EC Contract Law (*Acquis* Principles). Contract I. Pre-contractual Obligations. Conclusion of Contract. Unfair Terms. Sellier 2007 (hereinafter *acquis* principles).

<sup>2</sup> On the Function of the *acquis* principles see G. Ajani, H. Schulte-Nölke. – *Acquis* principles (Note 1), pp. IX–X; R. Schulze. Die *Acquis* – Grundregeln und der Gemeinsame Referenzrahmen. – *Zeitschrift für Europäisches Privatrecht (ZEuP)* 2007/3, pp. 731–734.

<sup>3</sup> C. von Bar, E. Clive, H. Schulze-Nölke, H. Beal, J. Herre, J. Huet, P. Schlechtriem, M. Storme, S. Swann, A. Veneziano, P. Varul, F. Zoll. – Principles, Definitions and Model Rules on European Private Law. Draft Common Frame of Reference. Sellier 2008 (hereinafter DCFR).

<sup>4</sup> C. von Bar, H. Beal, E. Clive, H. Schulte-Nölke. – DCFR (Note 3), pp. 24–26; C. von Bar. Working Together Toward a Common Frame of Reference. – *Juridica International* 2005 (X), p. 18.

developed by the *Acquis* Group.<sup>5</sup> These are the parts with respect to which the existing *acquis communautaire* has reached a high level of development. The problem of unfair terms is one issue that has been widely elaborated on at the Community level. The Unfair Terms Directive accelerated the private law harmonisation process for the core of contract law.<sup>6</sup>

Although the Compilation and Redaction Team consists of members of both the *Acquis* Group and the Study Group and continues its work on the basis of the texts elaborated by the respective groups, it maintains at least a partial autonomy in the process of incorporation of texts prepared by the groups into the one coherent set of rules in the Draft CFR. Therefore, the texts issued under the auspices of the Study Group or *Acquis* Group are not identical in their text to what is to be finally provided by the Compilation and Redaction Team.<sup>7</sup> In this context, the difference in the methodology applied by the Study Group and *Acquis* Group needs to be emphasised.<sup>8</sup>

In the course of its work, the Study Group is generally continuing the approach adopted by the Lando Commission. Thus, it is trying to formulate the rules on the basis of results obtained in the process of comparative research. Since the individual solutions adopted by the European countries (as well as other legal systems or acts considered during the working process) are quite diverse, the Study Group maintains a lot of freedom in developing the rules and principles. In practice, the Study Group formulates the proposals for the ‘best rules’, taking into account different legal traditions.<sup>9</sup> The methodology adopted by the *Acquis* Group is more formalised, because for the adoption of every so-called ‘black-letter rule’ it requires finding sufficient legitimisation in the existing formal sources of the *acquis communautaire* and in the case law of the European Community.<sup>10</sup> That does not mean, however, that the content of the rule expressed in the *acquis* principles remains the same as in the Community law. In fact, quite often it is the contrary. The generalisation and placement of the rule in a different context necessarily modify the content of the rule itself. It has to be emphasised, however, that the respective rule of the *acquis communautaire* expresses a legal concept or idea that can be applied in a broader scope. In specifying its methodology, the *Acquis* Group has, however, reserved a right to improve the Community law whenever such an initiative does not change the ideology behind the rule.<sup>11</sup>

Even if the Compilation and Redaction Team preparing the final text of the DCFR adopts the rules formulated by the *Acquis* Group, it is not bound by the methodology adopted in the process of creation of the *acquis* principles. Consequently, the Compilation and Redaction Team is free to adjust these rules and harmonise them with the whole system of the DCFR, which can be achieved either by the formulation of a ‘better rule’ than the one provided by the existing *acquis communautaire* or by the ‘correction’ of the results obtained by the *Acquis* Group in the process of comprehension of European Community law. Thus, the rules taken over from the *acquis* principles and then incorporated into the text of the DCFR may differ slightly from the original text.

Both the Study Group and the *Acquis* Group maintain some sort of control over their own texts and those of their counterpart, as well as over the whole process of incorporation of those texts into the DCFR. The coordinators of these two groups may object to some formulations and propose an alternative solution.

In the case of unfair terms, the original text of the *acquis* principles has been modified in the process of incorporation into the DCFR. The question of the rules governing unfair terms has been the subject of vigorous debate within the Compilation and Redaction Team. Therefore, it is possible that the problems concerning the issue of unfair terms will lead to the presentation of alternative drafts of rules, at least with respect to one central point of the criterion of ‘non-negotiation’ as a condition for the unfairness test with regard to consumer contracts.

By applying the methodology of the *Acquis* Group, I would like to analyse in the following part of this paper the differences in the texts of the *acquis* principles and the DCFR. By doing so, I will strive to answer the question of which of the two texts more closely reflects the state of the existing *acquis communautaire*. Moreover, I will try to decide which of the two formulations would better fit into the text of the DCFR — the original text of the *acquis* principles or its version filtered by the DCFR. The same analysis will be applied to the two possible formulations proposed by the DCFR.

<sup>5</sup> G. Ajani, H. Schulte-Nölke. – *Acquis* principles (Note 1), p. X; C. von Bar, H. Beal, E. Clive, H. Schulte-Nölke. – DCFR (Note 3), p. 28.

<sup>6</sup> See S. A. Smith. *Atiyah’s Introduction to the Law of Contract*. Oxford: Clarendon Press 2005, p. 25.

<sup>7</sup> The text of the *acquis* principles is “one of the sources from which the Compilation and Redaction Team has drawn”. See C. von Bar, H. Beale, E. Clive, H. Schulte-Nölke. – DCFR (Note 3), p. 28.

<sup>8</sup> G. Dannemann. – *Acquis* principles (Note 1), p. XXIV.

<sup>9</sup> *Ibid.*

<sup>10</sup> On the methodology of the *Acquis* Group see G. Dannemann. – *Acquis* principles (Note 1), p. XXVIII.

<sup>11</sup> On the critique of the methodology of the *Acquis* Group see N. Jansen, R. Zimmermann. *Grundregeln des bestehenden Gemeinschaftsprivatrechts?* – *Juristen Zeitung* 2007/23, p. 1113 *ff.* My response to this critique will soon be published in *Zeitschrift für Gemeinschaftsprivatrecht* (GPR).

## 2. The Unfair Terms Directive as a major source of formulation of the *acquis* principles on non-negotiated terms

By the adoption of Directive 93/13 on Unfair Terms in Consumer Contracts, the European Community harmonised one of the most controversial areas in the field of contract law. It is not my intention to repeat here the well-known discussion preceding the adoption of the final version of this directive.<sup>\*12</sup> It is, however, important to stress some of the critical arguments made during this debate, which resulted from the differences in European legal traditions. Two main concepts were competing with each other in the origins of the directive. The German tradition was focused on the control of standard terms. The law involved an attempt to determine the limits of the quasi-legislative activity of a business.<sup>\*13</sup> The law on standard terms was not covered in consumer law, and B-to-B transactions were also covered by the fairness test, with only a relaxed level of its control. The French model, in turn, was based on a very different assumption. The starting point in the French system was the idea of protection of the weaker party (labelled as the consumer or non-professional). In this model, it did not matter whether the consumer was able to influence the content of the contract, and the requirement of ‘standardisation’ of the terms (in the sense that they are intended to apply in several transactions) has not been formulated.<sup>\*14</sup>

The proposals to be adopted in the directive more closely resembled the French model. Consumer contracts were supposed to be subject to the control regardless of whether the business used standard terms, and despite the issue of whether the consumer could influence the content of the contract.<sup>\*15</sup> The Unfair Terms Directive of 1993 is the result of a compromise without coherent ideological underpinnings. The directive comprises a sort of mixture, based on both the German and French solutions.<sup>\*16</sup> The core of the German legal notion of standard terms is not entirely meaningless under the directive, but its practical relevance is greatly reduced, because its meaning is reduced to a starting point for the establishment of a presumption that the terms have not been negotiated (article 3 (2), item 3). The directive emphasises also that unfairness is more likely to appear in cases of standard terms (article 3 (1)).

Individual terms drafted with the intention of narrow application to a particular contract are also subjected to the fairness test (article 3 (1)). However, the terms that have been negotiated are excluded from the control procedure. The Unfair Terms Directive forms a part of consumer law. The other parties may not invoke the fairness test on the basis of the directive.<sup>\*17</sup>

## 3. The fairness test in B-to-B transactions according to the *acquis communautaire*

The idea of also applying the fairness test to B-to-B transactions is inherent in European Community law, although it finds a quite limited scope of application. According to article 3 (3) of the Late Payment Directive, certain agreements derogating the rules on the consequences of delayed payment should not be invoked or should entitle the creditor to damages if under consideration of all circumstances of the case and good commercial practices they are ‘grossly unfair’ to the creditor. This test does not depend on the use of standard terms or ‘non-negotiation’ of the terms. The directive proves, however, that Community law does not hesitate to also apply the fairness test to pure commercial transactions.<sup>\*18</sup>

<sup>12</sup> See, for example, T. Wilhelmsson. Standard Form Conditions. – A. S. Hartkamp et al. Towards a European Civil Code. Kluwer International 2004, p. 434.

<sup>13</sup> See F. Ranieri. Europäisches Obligationenrecht. Springer 2003, pp. 168–170; H.-W. Micklitz. Verbraucherschutz in den Grundregeln des Europäischen Vertragsrechts. – Die Zeitschrift für Vergleichende Rechtswissenschaft (ZVglRWiss) 2004/103, p. 98; H.-W. Micklitz. The Principles of European Contract Law and the Protection of the Weaker Party. – Journal of Consumer Policy 2004/27, p. 349.

<sup>14</sup> J. Calais-Auloy, F. Steinmetz. Droit de la consommation. Dalloz 2006, p. 204; F. Ranieri (Note 13), pp. 171–172.

<sup>15</sup> T. Wilhelmsson (Note 12), p. 434.

<sup>16</sup> F. Ranieri (Note 13), p. 183. Cf. T. Wilhelmsson (Note 12), p. 434.

<sup>17</sup> See also K. Riesenhuber. System und Prinzipien des Europäischen Vertragsrechts. Berlin: De Gruyter Recht 2003, pp. 427–428.

<sup>18</sup> T. Pfeiffer, M. Ebers. – *Acquis* principles (Note 1), p. 234, article 6:301, No. 1.

## 4. Unfair terms in the *acquis* principles

The structure of the *acquis* principles on unfair terms is at variance with the structure of the Unfair Terms Directive. It resembles more closely the original concept of the German *AGB Gesetz* (currently incorporated into the German Civil Code) than the structure of the directive. Thus, the *acquis* principles provide for the three traditional tools of incidental control of the terms: inclusion in the contract (article 6:201), interpretation of the concept of *contra proferentem* (article 6:203), and the fairness test (articles 6:301–6:306). The directive does not contain distinct provisions on incorporation (inclusion) of the terms in the contract.<sup>\*19</sup> The body of the directive contains some provisions on the transparency of the terms, and the annex to the directive sets forth some provisions related to the consumer's possibility of being acquainted with the content of the terms. The general requirement of transparency is regulated with the aid of the interpretation rule of the directive (article 5), and the provision governing the consequences of the lack of possibility to learn about the terms in No. 1, Lit. 'i' of the annex.<sup>\*20</sup> The later provision shows the tendency of the European lawmaker to treat the question of the possibility of acquaintance with the content of terms on the level of the fairness test and not on the level of the formation of contract or incorporation of the standard terms. The *acquis* principles put the question of the consumer being acquainted with the terms on the level of incorporation into a contract.<sup>\*21</sup> The set of contract terms that should be regarded as unfair is implicit in article 6:305, and it does not contain any equivalent to No. 1, Lit. 'i' of the directive's annex. However, article 6:302 of Chapter 6, section 3 of the *acquis* principles — also the section regulating the validity of terms (which means mostly the regulation of the fairness test) — requires the communication of not individually negotiated terms in 'plain, intelligible' language.

The *acquis* principles follow more closely the German model in the area of the personal scope of application of the contract term test. The 'inclusion' part goes even further by applying incorporation control despite the personal qualification of the user and the client (article 6:201). Thus, in German law, professional clients are at least *de jure* deprived of the privilege of this test.<sup>\*22</sup>

Generally, where the fairness test is used, all groups of possible users and clients are included in the system.<sup>\*23</sup> However, the different groups of contracting parties have to be distinguished. A general clause establishing the conditions for determining the unfairness of the conditions (article 6:301) applies for C-to-C and B-to-C transactions. For B-to-B transactions it applies only through the standard of article 6:301, which sets forth an additional criterion, that of 'gross deviation' from good commercial practice. The two lists of forbidden clauses (the blacklist — with only one position — of article 6:304 and the grey list of article 6:305) constitute an exemplification and concretisation of the general clause, but only with respect to B-to-C transactions.

The *acquis* principles follow the solution of the directive quite closely with regard to the subject matter of the control procedure. The inclusion and fairness tests apply only in cases of non-negotiated terms.<sup>\*24</sup> The meaning of the notion of standard terms is reduced as it is in the directive. It is only of relevance for the burden of proof of the negotiation of terms (article 6:101 (4)) as well as in relation to the 'battle of the forms' governed by the 'grey-letter rule' of article 6:204.

## 5. Unfair terms in DCFR

The rules on non-negotiated or unfair terms in the DCFR do, in fact, have a different structure. In the *acquis* principles, these rules are gathered in one chapter (Chapter 6), whereas in the DCFR they are spread throughout the different parts of Book II (Contracts and Other Juridical Acts). The rule on battle of forms is included in the chapter on formation of a contract (Chapter 4) in its article II.–4:209; the rule on interpretation of non-negotiated terms is situated in Chapter 8, which is devoted to the interpretation of a contract (article II.–8:103) and priority of negotiated terms (article II.–8:104); and rules on the incorporation of the standard terms into a contract are presented in Chapter 9, on the content and effects of the contract (article II.–9:103). The latter chapter also provides rules concerning the fairness test (the whole of section 4).

The major differences between the *acquis* principles and the DCFR centre on the three aspects of the fairness test. The first central issue is the criterion of 'non-negotiation'. Article 9:403 includes a long and elaborate

<sup>19</sup> *Ibid.*, p. 222, article 6:201, No. 4.

<sup>20</sup> T. Wilhelmsson (Note 12), p. 437.

<sup>21</sup> ACQP article 6:201 (1). T. Pfeiffer, M. Ebers. – *Acquis* principles (Note 1), p. 223, No. 10.

<sup>22</sup> H. Schulze-Nölke. – R. Schulze. Bürgerliches Gesetzbuch. Handkommentar. Nomos 2007, p. 363, § 305, No. 11. See § 310 (1) of the German Civil Code.

<sup>23</sup> N. Jansen, R. Zimmermann (Note 11), p. 1116.

<sup>24</sup> Supportive for this approach N. Jansen, R. Zimmermann (Note 11), p. 1116.

definition of the expression ‘not individually negotiated’. This definition is designed to make it more difficult for users who are attempting to circumvent the fairness test through presentation of the terms as negotiated when, in fact, the client was not really able to influence the clauses. Nevertheless, one of the alternatives presented in article II.–9:404 abandons the criterion of non-negotiation as a condition in the fairness test in consumer contracts entirely.

There is also a difference in the treatment of various personal configurations between the *acquis* principles and DCFR. The DCFR provides for three different standards for the fairness test, to be applied for different configurations of the parties — article II.–9:404 defines the meaning of unfairness in B-to-C contracts; article II.–9:405 in C-to-C contracts; and article II.–9:406 in B-to-B contracts. Above all, it is a difference in the drafting style that probably makes the text of the DCFR more readily comprehensible. However, the differences in drafting style at the same time hide the essential differences in substance that pertain to both C-to-C and B-to-B contracts. In such cases, the fairness test of the DCFR encompasses only the standard terms. The individual terms are not subjected to the fairness test, even if they are ‘non-negotiated’. Article II–9:405 and 9:406 surprisingly do not formulate the requirement of non-negotiation, although the use of standard terms does not exclude the fact of ‘negotiation’ with the client.

The third main difference relates to the issue of evaluation of the non-acquaintance of the client with the terms. However, the DCFR previews also the test of effective incorporation, which requires the user at least to undertake reasonable steps aimed at drawing the other party’s attention to them, before or when the contract is concluded (article II.–9:103 (1)). A party in violation of this requirement is subject to sanctions in the event of lack of clear, effective inclusion of the terms in the contract. In the consumer law of the DCFR, this situation is differently regulated, however. In the case of B-to-C contracts, the question of the lack of the consumer’s real opportunity to be aware of the terms’ content has to be evaluated as one of the factors that must be considered in the process of assessing the unfairness of these terms (article 9:408). This means that lack of the possibility of being acquainted with the terms on the part of the consumer does not lead inevitably to the invalidity of the terms or to lack of their incorporation. This is definitely one of the factors that can be decisive in cases of ambiguity concerning the fairness of the terms in question. The judge may assess as fair terms that the consumer could not have been aware of, but only if other circumstances of the case so allow.

## 6. The question of the different structure of rules on unfair terms in the *acquis* principles and DCFR

The question of structure can be reduced to a pure drafting issue. However, it can also be explained by the differences in the entire concept between the *acquis* principles and DCFR. Book II of the DCFR encompasses the whole matter of contract law, whereas the scope of the *acquis* principles is limited by the content of the *acquis communautaire* — therefore, the *acquis* principles do not build a comprehensive system of contract law. To some extent, the *acquis* principles mirror also the structure of Community law, which tends to be more problem-oriented, rather than following the traditional ‘pandectic’ structure. Therefore, unfair terms are seen as posing one coherent problem, which can be presented as a unified whole in any of various ways. The DCFR follows the more traditional construction of contract law, and, in consequence, the different fragments of the unfair terms matter have been allocated to the respective areas of various matters of contract law, like formation, interpretation, or content of a contract. The different manner of presentation may also be seen as not purely confined to the drafting issue. The *acquis* principles by presenting the problem of non-negotiated terms as a separate issue emphasise the exceptionality and autonomy of the legal problem arising from the phenomenon of the contract concluded in the situation of imbalance of bargaining power. It shows the relationship with the phenomenon of standard terms as a separate legal category and a distinct legal concept. In such a system, the ‘non-negotiation’ of the terms (in the meaning of lack of real possibility of such negotiation on the part of the weaker party) constitutes ideological justification of the special interest devoted to this category by the legislator. In the style of presentation applied in the DCFR, the meaning of the legal category for non-negotiated terms is hardly reduced. If the proposal of giving up the requirement of non-negotiation in consumer contracts as a condition for the fairness test were to be maintained, it would be difficult to find a common name for the issue under discussion. The notion of unfair terms covers the problem with the different, non-homogenous categories. The concept of abuse of power by the user of standard terms (in the majority of cases) would be reduced to the question of protection of one party in the ‘normal’ world of contractual relationships.

## 7. The problem of standard terms and the requirement of ‘non-negotiation’

As was already mentioned above, the structure of the *acquis* principles emphasises more strongly the peculiarity of the problem with ‘non-negotiated terms’ than does the DCFR. To some extent, however, the idea of standard terms as a special legal category is preserved more fully in the text of the DCFR, since in B-to-B and C-to-C transactions a term may be unfair only if it is a standard term. In both cases, the ambiguity of the *acquis communautaire* in relation to the ideological underpinnings of the unfair terms law is further perpetuated in the *acquis* principles and DCFR. The *acquis* principles are an attempt to unify as far as possible the system of control of unfair terms. There is a conceptual gap between the conception of limiting the user’s freedom of creation of standard terms and the conception of protection of the weaker party. The idea of limiting the freedom of the user of standard terms does not require taking into account the status of the other party. The control of standard terms finds its justification in the possibility of abuse of the fact that the client is prevented from being acquainted with the standard terms on account of the irrational increase in the transaction costs that he or she might be forced to bear. However, in the majority of transactions, nothing ‘wrong’ happens — the obligations are performed according to the contract. The client usually behaves rationally, without even undertaking an effort to become acquainted with the standard terms, even if they are delivered to him or her in sufficient time before conclusion of the contract. The economic argument concerning high transaction costs to be borne by the client is valid despite the client’s qualification as a consumer or as a professional.<sup>\*25</sup> It can justify a system that is not focused only on consumer protection. The *acquis communautaire* does not, however, follow this path. For the Unfair Terms Directive the notion of ‘standard terms’ plays a less significant role, and it has been largely replaced with the notion of non-negotiated terms. The ideology behind the material on ‘non-negotiated terms’ obviously cannot be the same as that behind the language on ‘standard terms’. In cases of ‘non-negotiated’ terms, the problem of high transaction costs for one party is not present as in the case of standard terms. In cases involving non-negotiated terms, which are standard terms, the argument concerning transaction costs applies, whereas it does not matter at all in cases of individual contracts, where the transaction costs are usually higher for the proponent of the terms, who does not benefit from the number of contracts concluded that use these terms. Therefore, there is not merely one justification for the system of control adopted in the Unfair Terms Directive. It is a mix of the two concepts — those of abuse of standard terms and of the weaker party’s protection. The idea of the protection of the weaker party, specified in the case of the Unfair Terms Directive as the consumer, justifies the system of control in consideration of the typical features of the weaker party — in the most typical case, this party is intellectually and economically of fewer resources than the other party.<sup>\*26</sup> In such a case, the typical instrument assumed in the mechanism of freedom of contract — according to which each party is potentially able to secure and enforce its reasonable interests and any lack of this happening is due to this party’s negligence or application of the wrong strategy — cannot work. Accordingly, this is an area of said party’s self-responsibility. The criterion of non-negotiation seems to be in line with this assumption. If the ‘weaker party’ is not able to negotiate with its counterpart, it cannot be ‘self-responsible’. The other party must take care of the ‘reasonable interests’ of its counterpart. If a contract term has been ‘negotiated’ by the parties, in such a case the ‘weaker party’ has to prove the ability to enforce its own interests, which should result in its own ‘self-responsibility’. In such cases, the mechanism of exclusion of control is fully justified.<sup>\*27</sup>

The use of standard terms does not exclude *ex definitione* an assumption that the terms have been ‘negotiated’. It is, rather, an exceptional case in which the client could have a real opportunity to influence the content of the terms.<sup>\*28</sup>

The system adopted in the *acquis* principles follows the ‘mixed’ ideology of the Unfair Terms Directive. This ‘mixed’ ideology has, however, been extended also to C-to-C and B-to-B transactions. For C-to-C and B-to-B transactions, the DCFR is also following this path. There is, however, one significant difference between the two texts. As I have already mentioned, the DCFR confined the control in these two cases to applying only if the proponent uses standard terms. There is strong justification for the approach adopted in the *acquis* principles. Article 3 (3) of the Late Payment Directive does not require the substantively limited fairness test, according to which the clause in question is part of the standard terms. This argument applies, however, in both ways. The Late Payment Directive does not require **also** that the term in question have been negotiated. In the text of the *acquis* principles, the B-to-B and C-to-C fairness test requires non-negotiation. The DCFR, by contrast, does not express in the cases of C-to-C and B-to-B contracts a requirement of non-negotiation. Therefore, it creates an impression that not every piece of the puzzle has found its proper place.

<sup>25</sup> H. Kötz, H.-B. Schäfer. *Iudex oeconomicus*. Mohr Siebeck 2003, p. 193.

<sup>26</sup> See H. Kötz, H.-B. Schäfer (Note 25), pp. 191–192.

<sup>27</sup> See M. Wolf. *Rechtsgeschäftliche Entscheidungsfreiheit und vertraglicher Interessenausgleich*. Tübingen: J.C.B. Mohr (Paul Siebeck) 1970, p. 62.

<sup>28</sup> For German law see H. Schulte-Nölke. – R. Schulze (Note 22), p. 362, § 305 No. 8.

The concept of the DCFR with regard to the treatment of standard terms seems to be more consistent. For B-to-B and C-to-C transactions, it follows the idea of the limitation of the freedom of standard terms' use. The use of standard terms is sufficient to justify legislative intervention to prevent abuse, whose possibility of occurrence has increased as a consequence of the structure of the transaction costs. It is probably a weakness of the DCFR not to add the requirement of non-negotiation to article II.–9:405 and 406. This could be easily corrected by means of interpretation work, however.

The problem of carrying such a solution over into the text of the *acquis* principles is, nonetheless, connected with the lack of sufficient justification in the existing *acquis communautaire*. The basis for expanding the system of control into the B-to-B area (and probably with a sort of *a fortiori* argument into the C-to-C area) is not very strong, but perhaps it is sufficient according to the self-imposed methodology of the *Acquis* Group.<sup>\*29</sup> The mentioned article 3 (3) of the Late Payment Directive has a narrow scope of application. However, it provides proof that the idea of the fairness control has been accepted in Community law also with reference to B-to-B transactions. Furthermore, article 3 (3) of the Late Payment Directive lays down the criteria for judging unfairness of terms. For this reason, both the *acquis* principles and the DCFR use in their respective provisions the criterion of deviation from good commercial practices.<sup>\*30</sup> The test of article 3 (3) finds its application also to negotiated terms. The *Acquis* Group was concerned that preservation of the consistency of its own draft will also require application of the non-negotiation test to B-to-B transactions. It would be entirely not inconsistent to have the requirement of non-negotiation apply for B-to-C contracts but not for B-to-B transactions. The key question that might arise in this respect is whether it would not be reasonable to abandon the requirement of non-negotiation entirely. The answer is rather negative in tone, because in B-to-B transactions this would mean an unjustified limitation of freedom of contract. Probably the *Acquis* Group should apply the fairness test in B-to-B and C-to-C transactions only to standard terms. This solution would, however, require an argument that article 3 (3) of the Late Payment Directive justifies the concept of the fairness test in B-to-B transactions, but its broadening requires confinement of the scope of its application to standard terms only.

The central battleground concerns the conditions surrounding 'non-negotiation' in consumer contracts. The *acquis* principles follow the Unfair Terms Directive. The Compilation and Redaction Team have, in this respect, received very different instructions from the Study Group and *Acquis* Group. The Study Group would like to give up this requirement entirely, whereas the *Acquis* Group wish to maintain it in the text of the DCFR.

Above I have discussed the initial French and German position that served as the basis for the Unfair Terms Directive. However, also the results of the work of the English Law Commission on the unfair terms law are of special importance for the future development of unfair terms law. The existing requirement of non-negotiation has been called into question.<sup>\*31</sup> The reasons for this are probably more sophisticated than simple desire for expansion of the weaker party's protection. Probably two from among these multiple and diverse reasons are of extreme relevance for the future debate on the 'best' approach to unfair terms. One of the reasons for abandoning the requirement of non-negotiation is a very practical one — namely, there is very limited possibility to prove that negotiations were carried out and the consumer was not deprived of influence on the content of the contract. The application of this criterion does not, however, change much in practice, since there is a presumption of the non-negotiated nature of the terms (in the case of the directive, only for standard terms). In cases of individual contracts, the burden of proof usually rests with the consumer.<sup>\*32</sup> This proof is very hard to establish, since it is highly difficult to determine what kind of circumstances should be proved. This increases the level of legal uncertainty. What only appears to be negotiation can also be used by the business to mislead the consumer about his or her rights with regard to a challenge of the assumed unfairness of the terms. It may also happen that the representative of the business is authorised to undertake some negotiations with the client while the actual scope allowed for such negotiations cannot lead to results that do not violate the interests of the consumer in an unfair way. The second reason may have a theoretical background deep in English common law. The idea of reviewing contractual terms is strictly related to the level of acceptance of certain terms by the relevant party. The level of the client's awareness concerning the content of the contract directly influences its fairness. The influence that the client has exercised on the content of the clause concerned is considered to be part of the fairness test.<sup>\*33</sup> The waiving of the requirement of non-

<sup>29</sup> See T. Pfeiffer, M. Ebers. – *Acquis* principles (Note 1), pp. 234–235. Article 6:301, No. 2–3; Cf. N. Jansen, R. Zimmermann (Note 11), p. 1116.

<sup>30</sup> T. Pfeiffer, M. Ebers. – *Acquis* principles (Note 1), p. 234. Article 6:301, No. 2. Critique on the criterion of the "deviation from the good commercial practices in the context of the non-negotiated terms": N. Jansen, R. Zimmermann (Note 11), p. 1120.

<sup>31</sup> The Law Commission and the Scottish Law Commission (Law Com No. 292) (Scot Law Com No. 199). Unfair Terms in Contracts. 2005, pp. 31–32.

<sup>32</sup> Article 3 (2) first sentence of the Unfair Terms Directive.

<sup>33</sup> See the Law Commission and the Scottish Law Commission (Law Com No. 292) (Scot Law Com No. 199). Unfair Terms in Contracts. 2005, p. 31 (impact of the negotiation on the reasonableness test), p. 32 (impact of the advice on the fairness test). See also R. Brownsword. Contract Law. Themes for the Twenty-First Century. Oxford University Press 2006, p. 91; M. H. Whincup. Contract Law and Practice. Kluwer International 2006, p. 214, No. 7.4. See, however, S. A. Smith (Note 6), pp. 308–313.

negotiation as is possible under English law would be in line with the traditional system of that country.<sup>34</sup> However, the motivation behind such a proposition is probably different from what is seen in the French law. In the latter system, the question of negotiation does not matter so much, although it would probably also be considered to some extent in the frame of the 'good faith' test. By contrast, here the fairness test is focused on the substantive content of the contract.

In the already existing *acquis communautaire* there are some traces allowing one to state that the fairness test encompasses not only the substantive content of the contract but also procedural elements concerning the formation of a contract. The most significant examples are provided in article 4 (2) of the Unfair Terms Directive as well as in the already mentioned No. 1, Lit. 'i' of the annex to that directive. The first of these provisions specifies that the terms concerning the main objects of contracts may be subjected to the fairness test only if the term in question is non-transparent. The above-mentioned No. 1, Lit. 'i' of the annex to the directive seeks to ban those terms of which the consumer could not learn prior to the conclusion of the contract. As regards the terms governing the main objects of the contract, there is lack of clarity as to whether the lack of transparency equates to unfairness of these terms, or whether it simply allows or opens the possibility for application of the fairness test. Furthermore, there is still a possibility that the lack of transparency needs to be assessed as just one of the factors influencing fairness, among many other 'substantive' factors.

It is possible to trace a somehow circular development. In the first phase of the development of the 'law of unfair terms', the problem was seen mostly at the level of the formation of the contract and the validity of the client's consent. The extended use of the *in dubio contra proferentem* rule was a bridge from the 'formation of contract' approach to the 'substantive test' approach. The substantive test approach was focused on the fairness of the contract. This test was independent from the problem of the client's awareness and consent. There are some signs that the circle may have closed — proceeding from the substantive test to the formation test approach.

It is highly possible that between the French approach and the new English (or English Law Commission's) approach exists a fundamental difference. The French approach, encompassing also negotiated consumer contracts, is focused on the content of the contract and its substantive fairness. The English approach, presenting the analogical formulation, applies a liberal assumption. The fairness test consisting in taking into account the real possibility of the client's influence on the content of the contract is an attempt to verify the 'quality' of the consumer's consent to the contractual terms. If the 'quality' of the consent is high, then even substantively 'unfair' term should not be declared as such.

The decision the Compilation and Redaction Team of the academic DCFR is going to take does not reflect the old struggle between the French and German approaches that has influenced the Unfair Terms Directive. This was the debate between the different concepts of the substantive fairness test, although with a different understanding of the freedom of contract. Now the debate that is going to be initiated concerns the development of Continental unfair terms law as a whole and will definitely concern the issue of whether the idea of the substantive test should be maintained in the unfair terms law or whether the right time has come for a renaissance of the formation test idea. Moreover, it is also possible that inclusion of negotiated contracts under the fairness test would lead to very different developments: in England (and probably even in other European common-law countries) of the formation test, as distinct from the rest of Europe's substantive test.

## 8. The next step?

Both the *acquis* principles and the DCFR are not fully comprehensive with regard to the matter of unfair terms. Furthermore, both texts reflect the existing ambiguity of Community law. This ambiguity, which is probably clear to every member of each of the research groups participating in the creation of the DCFR, also reflects, however, the difficulties in obtaining progress. The Unfair Terms Directive has probably harmonised the laws of the Member States only on the surface of their respective contract laws. The real differences, extending quite deeply into the basic understanding of the function of contract law, remain, however, and in consequence cause further difficulties that cannot be easily removed. This is not a flaw of both texts, though, since they do not constitute the codes but only the systems of reference. In the areas regulated by Community private law, both the *acquis* principles and the DCFR have proposed a more coherent set of rules than that existing under the current law. Yet neither can we ignore completely the different legal traditions that exist in Europe, which are reflected, in turn, in the national laws on standard terms. The apparently similar laws of the different countries conceal the quite far-reaching differences that do, in fact, exist. Therefore, there is still a place for improvements in this respect.

<sup>34</sup> See, however, Unfair Contract Terms Act from 1977 and Unfair Terms in Consumer Contracts Regulation from 1994, restated 1999 – M. H. Whincup (Note 33), pp. 219 *ff.*

The *Acquis* Group once again needs to pose the question of article 3 (3) of the Late Payment Directive. Is it due to the lack of coherence of the Community law-maker that the fairness test of this provision does not require 'non-negotiation' (and does not confine the fairness test to standard terms)? Would it make any sense that the B-to-C test be confined to non-negotiated terms and in B-to-B transactions it be open for negotiated clauses as well? At first sight, such a solution appears completely absurd. However, in reality it may not be as absurd as one might suppose. This solution could have some sense if the fairness test applicable to negotiated terms were understood in the 'English' and not in the 'French' way. If the test used were to concern mostly 'formation of the contract' (combining the ability to negotiate the terms as well as the allowed level of fairness — procedural fairness) and not involve a substantive fairness test, the system may become consistent. Therefore, the corresponding language should be drafted differently in order to avoid the impression of a badly reversed hierarchy of values that could lead to the impression that terms in B-to-B transaction are subjected to more intense judicial control than those in consumer cases. Subjecting B-to-B transactions to consideration of negotiated terms and not allowing this for B-to-C transactions would be a result not of lack of consistency but of the very different theories underpinning the systems of control. This would remove the axiological conflict between the Unfair Terms Directive and Late Payment Directive. The DCFR, whose final version is nearly ready, should not try to go this new and risky route; instead, it should follow the latest version of the *acquis* principles, because at some point it may be reasonable to undertake innovative experiments that very probably are, in fact, well justified by the state of the existing *acquis communautaire*, which in this respect may even prove to be the right one. However, it will be extremely difficult to draft the rules in a way that will clearly show the readers and users of the *acquis* principles the difference in approach as discussed above.