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## UNFAIR CONTRACT TERMS IN B2B TRANSACTIONS. THE VIEW FROM A LITHUANIAN PERSPECTIVE

### *PRATICAS CONTRATUAIS ABUSIVAS NAS TRANSAÇÕES ENTRE COMERCIANTES. UMA PERSPETIVA LITUANA*

Aurelija Balčiūnė <sup>1</sup>

**Abstract:** Regulation of unfair terms in contracts between traders (B2B) varies from country to country from hard law to soft law instruments. Starting with Unfair Terms Directive dealing with contracts between traders and consumers (B2C) only, scholars from time to time raise a question whether such or similar protection from unfair terms should be extended to B2B contracts. Some of the domestic laws establishes a consolidated unfairness control applicable despite of the status of the parties. However, in some other countries no such unfairness control for B2B transactions exists. The recent legislative instrument which suggested unfairness control for B2B contracts - Common European Sales Law (CESL) - has been withdrawn. However, expectation that the legal doctrine, as well as national legislation, can benefit from the draft CESL makes us to continue the analysis of the provisions of CESL. This paper contributes to the discussion of other authors related to the regulation of unfair terms in contracts between traders (B2B) from a Lithuanian perspective. For this purpose, the provisions of CESL, PECL, DCFR, and Lithuanian Civil Code are discussed in more detail.

**Keywords:** Unfair contract terms; B2B transactions; Lithuanian perspective.

**Resumo:** A liberdade contratual é entendida como um princípio geral nas relações contratuais entre comerciantes. Apesar de as legislações internas dos Estados também reconhecerem o princípio da autonomia da vontade nas práticas comerciais, varia consideravelmente a extensão com que o princípio é consagrado e as suas possíveis limitações (as quais, entre outras, incluem limitações que respeitam a praticas contratuais abusivas). Alguns sistemas legais ampliam o

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<sup>1</sup> Phd candidate, Vilnius University, Faculty of Law, Department of Private Law, Saulėtekio av. 9 - I block, LT-10222 Vilnius, Tel. (+370 5) 236 61 70. El. paštas: aurelija.ziogaite@tf.vu.lt; aurelija.ziogaite@gmail.com

âmbito de proteção por forma a englobar algumas pequenas e médias empresas quer distinguindo as sociedades às quais o regime das praticas contratuais abusivas é aplicável pela sua dimensão, atividade ou estabelecendo um limite monetário às transações.

**Palavras-chave:** Práticas contratuais abusivas; Transacções entre comerciantes; Perspetiva lituna.

## Introduction.

Freedom of contract is regarded to be a general core principle in international business to business (B2B) contractual relationships<sup>2</sup>. Although domestic legal systems also recognize the principle of freedom of contract in commercial practice, they still vary considerably with regard to the extent of this principle and to its possible limitations<sup>3</sup> (which *inter alia* include limitations with respect to unfair contract terms). Many legal systems broaden the scope of protection so as to encompass certain small and medium size enterprises by either distinguishing the companies to which the unfair terms regime is applicable by their size, activities or by establishing a monetary limit of the transaction<sup>4</sup>. The same also applies to international treaties and soft law instruments which, to some extent, deal with unfair terms in B2B transactions.

So far, the European Union has harmonised the domestic laws in relation to unfair terms in B2C contracts. One of the first documents dealing with unfair terms at the European Union level was the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (also known as the “Unfair Terms Directive”)<sup>5</sup>. However, the Unfair Terms Directive has dealt with unfair terms in contracts between traders and consumers (B2C) only. Later, the Unfair Terms Directive was followed by the Late Payments Directives<sup>6</sup> adopted in 2000 and 2011 respectively. However, these Late Payments Directives have dealt with the contractual terms related to late payments only.

Article 3(3) of the Late Payments Directive 2000 establishes that “Member States shall provide that an agreement on the date for payment or on the

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<sup>2</sup> BRIDGE, M.G. *The International Sale of Goods*. 3d. ed. 2013, 1.28.; BEALE, H. G. et al. eds. *Chitty on Contracts*. 31st ed. 2012, 1-029; FARNSWORTH, E.A. *Contracts*. 4<sup>th</sup> ed. 2004, 23 (4th. ed. 2004). In: SCHWENZER, Ingeborg; WHITEBREAD, Claudio Marti. *International B2B Contracts - Freedom Unchained?* 4 Penn. St. J.L. & Int'l Aff. 33, 2015, p. 34. Available at: <<http://elibrary.law.psu.edu/jlia/vol4/iss1/4>>.

<sup>3</sup> *Ibid.*

<sup>4</sup> See e.g. *Ibid.*

<sup>5</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. O.J. 1993, L 95/29.

<sup>6</sup> Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions. O.J. 2000, L 200 35; Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. O.J. 2011, L 48/1.

consequences of late payment which is not in line with the provisions of paragraphs 1(b) to (d) and 2 either shall not be enforceable or shall give rise to a claim for damages if, when all circumstances of the case, including good commercial practice and the nature of the product, are considered, it is grossly unfair to the creditor. In determining whether an agreement is grossly unfair to the creditor, it will be taken, inter alia, into account whether the debtor has any objective reason to deviate from the provisions of paragraphs 1(b) to (d) and 2. If such an agreement is determined to be grossly unfair, the statutory terms will apply, unless the national courts determine different conditions which are fair". Almost the same provisions in relation to the unfair terms have been transposed into the Late Payments Directive 2011, which has also established the list of circumstances which have to be considered in determining whether a contractual term or a practice is grossly unfair to the creditor, i.e. (a) any gross deviation from good commercial practice, contrary to good faith and fair dealing; (b) the nature of the product or the service; and (c) whether the debtor has any objective reason to deviate from the statutory rate of interest for late payment.

As far as the soft law instruments are concerned, gratitude has to be expressed to PECL<sup>7</sup> and DCFR<sup>8</sup> at least. Article 4:110 (Unfair Terms not Individually Negotiated) PECL deals with unfair contract terms not individually negotiated irrespective of whether the terms in questions are related to B2C or B2B transactions. According to the said article, a party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded.

DCFR differentiates the unfair terms regulation depending on the type of the transaction, i.e. B2C contracts (Article II.-9:403), B2B contracts (Article II.-9:405), and contracts between non-business parties (Article II.-9:404). Where the unfair terms in B2B transactions are concerned, Article II.-9:405 DCFR establishes that "a term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing". Therefore, for the purpose of determining the contractual term to be unfair, at least the following criteria has to be followed:

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<sup>7</sup> Principles of European Contract Law prepared by the Commission of European Contract Law under the chairmanship of Professor Ole Lando. See LANDO, Ole; BEALE, Hugh. *Principles of European Contract Law*. Parts I and II. The Hague: Kluwer Law International, 2000; LANDO, Ole, et al. *Principles of European Contract Law*. Part III. The Hague: Kluwer Law International, 2003.

<sup>8</sup> VON BAR, Christian; CLIVE, Eric; SCHULTKE-NOLKE, Hans. *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Ed.* Munich: Sellier, 2009.

(a) a term in question should form part of standard terms; (b) it should be of such a nature that it would deviate from good commercial practice, contrary to good faith and fair dealing; and (c) such deviation should be gross. Only where the contractual term in question falls within the aforementioned criteria, it might be determined as unfair and eliminated from the contract.

Relatively little time had passed since the adoption of DCFR and the new initiatives regarding a new instrument reached the society. Back in 2010, the Green Paper prepared by the European Commission admitted that although the parties to B2B contracts have an option to choose the applicable law, “businesses do not have the option of a common European Contract Law which could be applied and interpreted uniformly in all the Member States”<sup>9</sup>. In addition, the European Commission stated that “Large companies with strong bargaining power can ensure that their contracts are subject to a particular national law. This may be more difficult for SMEs and therefore raise obstacles to pursuing a uniform commercial policy across the Union, thus preventing businesses from grasping opportunities in the internal market”<sup>10</sup>.

In the view of the above, in 2011 the European Commission published a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law<sup>11</sup> along with Annex I to the Regulation containing the contract law rules (the Common European Sales Law) (CESL), which *inter alia* has included rules on the unfair terms in contracts between traders (B2B). Unfortunately, the proposal was withdrawn in 2014.

In May, 2015, the Commission published its communication on the Digital Single Market Strategy, which *inter alia* addressed the aim to modify CESL by the end of 2015<sup>12</sup> in order to reveal the potential of digital single market. Accordingly, in June, 2015, the European Commission has started consultations with EU citizens and stakeholders regarding contract rules for online purchases of digital content and tangible goods<sup>13</sup>, which *inter alia* included a question whether the

<sup>9</sup> Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses. Brussels, 1.7.2010. COM (2010) 348 final, p. 5-6. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF>>.

<sup>10</sup> *Ibid.* P.7.

<sup>11</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011. COM(2011) 635 final. 2011/0284 (COD). Available at: <[http://ec.europa.eu/justice/contract/files/common\\_sales\\_law/regulation\\_sales\\_law\\_en.pdf](http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf)>; In this context please also see MANKO, Rafal. European Parliamentary Research Service. *Contract law and the Digital Single Market. Towards a New EU Online Consumer Sales Law?*. Members' Research Service, September 2015, PE 568.322, p. 1. Available at: <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/568322/EPRS\\_IDA%282015%29568322\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/568322/EPRS_IDA%282015%29568322_EN.pdf)>.

<sup>12</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions. A Digital Single Market Strategy for Europe. COM/2015/0192 final. Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1447773803386&uri=CELEX:52015DC0192>>.

<sup>13</sup> Please see European Commission. Public consultation on contract rules for online purchases of digital content and tangible goods, 2015. Available at: <<http://ec.europa.eu/justice/newsroom/>>

new initiative should cover business-to-consumers (B2C) transactions only or also business-to-business (B2B) transactions<sup>14</sup>. After the results of the consultation, it has been followed by two proposals for new directives<sup>15</sup>, which not only have not dealt with unfair terms in B2B transactions, but, on the contrary, have left the unfair terms in B2B transactions far behind<sup>16</sup>.

Although, on the one hand, introduction of the proposals for the new directives gives us a clear message that CESL discussion is over, on the other hand, one may not exclude the significance of the discussions and attempts taken in the course of preparation of draft CESL. Since the provisions of CESL have been prepared in the course of great discussions held by legal scholars, practitioners, EU citizens and stakeholders, we may benefit of such instrument at least for debates in relation to improvement of domestic laws, especially where unfair terms in B2B transactions are concerned (since CISG, which presumptively apply to the majority of B2B cross-border sales involving enterprises based in Member States, has no such policing regime for unfair contract terms<sup>17</sup>).

In Lithuania, no publications in relation to the unfair terms in B2B transactions under CESL have been published, whereas the general matters concerning CESL have been analysed by S. Drazdauskas<sup>18</sup>. In other countries, the unfair terms in B2B transactions under CESL have been analysed by many scholars, including Marco B.M. Loos, Martijn W. Hesselink, Ulrich Magnus<sup>19</sup> and many others.

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contract/opinion/150609\_en.htm>.

<sup>14</sup> *Supra*, note 12. See question 7, p. 3.

<sup>15</sup> Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods. COM/2015/0635 final - 2015/0288 (COD). Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015PC0635>>; Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content. COM/2015/0634 final - 2015/0287 (COD). Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015PC0634>>.

<sup>16</sup> Where B2C transactions are concerned, the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM/2015/0635 final - 2015/0288 (COD) indicates that “The proposal will not fully harmonise any rules on unfair terms and therefore will not have any impact on Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts”. In addition, the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM/2015/0634 final - 2015/0287 (COD) tackles two contractual rights (modification and termination of long term contracts), which have been identified as problematic and which are currently only subject to the general clause on the unfairness control in Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>17</sup> MCMEEL, Gerard. Directorate-General for Internal Policies. Policy Department C: Citizens’ Rights and Constitutional Affairs. Legal Affairs. *Unfair Contract Terms Provisions in CESL*. European Parliament, 2012, p. 15. Available at: <<http://www.europarl.europa.eu/studies>>.

<sup>18</sup> DRAZDAUSKAS, Stasys. Bendrosios Europos pirkimo-pardavimo teisės autonominio taikymo Lietuvoje problematika. *Teisė*, 2013, t. 88, p. 119-128.

<sup>19</sup> Žr., pvz., HESSELINK, Martijn W.; LOOS, Marco B.M. Unfair Contract Terms in B2C Contracts. Ad hoc briefing paper for the European Parliament’s Committee on Legal Affairs, May

In the view of the above, firstly, this paper will discuss the provisions of draft CESL dealing with unfair contract terms in B2B transactions in a comparative perspective with DCFR, the provisions of which in relation to unfair terms in B2B transactions are basically transposed to CESL. Secondly, this paper will present a view of unfair terms provisions in B2B transactions from a Lithuanian perspective. Thirdly, a discussion whether domestic laws may benefit from CESL in terms of unfairness control in B2B transactions shall be raised.

### **1. Protection from Unfair Terms in B2B Transactions: CESL.**

As presented in the introductory part, core topic of this paper is Chapter 8 of CESL dealing with unfair contract terms, and, especially, Section 3 of Chapter 8 dedicated to unfair terms in contracts between traders. Therefore, this part of the paper shall discuss the provisions of the Chapter 8 in relation to regulation of unfair terms in B2B transactions.

#### **1.1. Core Provisions: Unfairness Test.**

Article 86 (Meaning of “unfair” in contracts between traders) of Section 3 of Chapter 8 CESL provides for core provisions regulating unfair terms in B2B transactions. The unfairness test given in Article 86 basically corresponds to the wording of Article II. 9:405 DCFR (Meaning of “unfair” in contracts between businesses), which, presumably, has been taken from the Late Payments Directives. In accordance with Article 86 CESL, in a contract between traders, a contract term is unfair for the purposes of this Section only if: (a) it forms part of not individually negotiated terms within the meaning of Article 7; and (b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing. In comparison with the wording of Article II. 9:405 DCFR, the difference arises only where not individually negotiated terms are concerned: Article II. 9:405 DCFR gives preference to the standard terms supplied by one party, whereas Article 86 CESL deals with terms not individually negotiated.

In the view of the above, Article 86 CESL introduces the unfairness test

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2012, PE 462.452, 23 p.; Amsterdam Law School Research Paper No. 2012-68; Centre for the Study of European Contract Law Working Paper Series No. 2012-07. Available at: <<http://ssrn.com/abstract=2083041>>; LOOS, Marco B.M. Incorporation and Unfairness of Standard Contract Terms Under the Proposal for a Common European Sales Law. In: *The Making of European Private Law: Why, How, What, Who*. MOCCIA, Luigi. Munich: sellier european law Publisher GmbH, 2013, p. 191-203; LOOS, Marco B.M. Standard Contract Terms Regulation in the Proposal for a Common European Sales Law. Amsterdam Law School Research Paper No. 2012-65; Zeitschrift für Europäisches Privatrecht 2012(4), p. 776-796; Amsterdam Law School Research Paper No. 2012-65; Centre for the Study of European Contract Law Working Paper Series No. 2012-04. Available at: <<http://ssrn.com/abstract=2081857>>; MAGNUS, Ulrich. CISG vs. CESL. In: *CISG vs. Regional Sales Law Unification*. Munich: sellier european law Publisher GmbH, 2012, p. 97-123.



applicable to B2B transactions. In order to verify the significance of the test and its applicability, below please find the analysis of the components of the test, as well as the analysis of the individual factors which have to be taken into account in order to evaluate the unfairness of the terms in B2B contracts.

#### 1.1.1. Standard Contract Terms vs. Not Individually Negotiated Terms.

As mentioned before, although the wording of CESL and DCFR in the context of unfair terms in B2B transactions mostly coincides, some differences arise in relation to the terms which are subject to the unfairness test. While CESL assigns such test to the “not individually negotiated terms”, DCFR works with “standard contracts terms” only. Therefore, it is important to understand, whether there is a difference between those terms and, if yes, how such difference affects the unfairness test established under CESL.

When discussing the content of not individually negotiated terms, Article 86(1) CESL gives a reference to Article 7 CESL, where not individually negotiated terms are defined as contract terms which have been supplied by one party and the other party has not been able to influence its content. Basically, the same definition of standard terms is provided under DCFR. Article II. 1:109 (Standard terms) DCFR establishes that a “standard term” is a term which has been formulated in advance for several transactions involving different parties and which has not been individually negotiated by the parties, whereas Article II. 1:110 (Terms “not individually negotiated”) DCFR reveals the scope of terms not individually negotiated by indicating that a term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms. In the view of the above, it seems that CESL unfairness test is applied to a broader scope of terms and is not limited to standard terms only, whereas DCFR unfairness test is applicable to standard terms, which have not been individually negotiated (i.e. not only the terms have to be not individually negotiated, but they have to fall within the scope of standard terms as well).

As for the content of not individually negotiated terms, it is also important to understand the structure or procedure in determining whether the contract has been individually negotiated or not. Here we have to express a great gratitude to the authors of CESL and DCFR commentary, where the respective provisions of CESL and DCFR are explained in more detail. Firstly, the wording of Article 7(1) CESL suggests that it applies only to the contractual terms, i.e. the terms that form a part of the contract<sup>20</sup>. In addition, it is important to understand that such test for not individually negotiated terms applies to each and every term of the contract since Article 7(1) CESL particularly deals with the “singular”

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<sup>20</sup> MAZEAUD, Denis; SAUPHANOR-BROUILLAUD. In: SCHULZE, Reiner. *Common European sales law (CESL): commentary*. Baden-Baden: Nomos, 2012, p. 106-107.

of the word “term” and, therefore, when applying the test for not individually negotiated terms each of the terms of the contract should be assessed separately. Secondly, the terms have to be supplied by one party<sup>21</sup>. Thirdly and finally, the other party (which has been provided with such a term) has not been able to influence its content. This third element of the test might give a great headache in the course of its application. In the context of the court proceedings, it is very important to understand how it would be determined whether the party has been able to influence the content of the term or not. One has to admit that in practice hard negotiations regarding the contract to be signed might take place and in some of the case the parties would argue more, whereas in other cases the parties would agree to keep the term of the contract “as is” so as to have more space for negotiations in relation to other terms. In such a case, of course, there might be a dispute whether acceptance of the term means that it has been individually negotiated or not. As it is explained in DCFR commentary, ‘the crucial criterion is whether such real and meaningful negotiations took place’<sup>22</sup>, i.e. when determining whether the party has been able to influence the term or not, it is not only important to prove that real negotiations have taken place, but also the fact that the party has been given with a chance to propose and make amendments to the term in question.

As for other factors, which assist in determining whether the terms have not been individually negotiated, CESL and DCFR provisions mostly coincides and provides for the following rules: (a) where one party supplies a selection of contract terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection; (b) a party who claims that a contract term supplied as part of standard contract terms has since been individually negotiated bears the burden of proving that it has been; (c) in a B2C contract, the trader bears the burden of proving that a contract term supplied by the trader has been individually negotiated; (d) in a B2C contract, contract terms drafted by a third party are considered to have been supplied by the trader, unless the consumer introduced them to the contract. Where B2B transactions are concerned, the rules established under (a) and (b) (respectively under Article 7(2) and Article 7(3)) CESL are of particular importance. Therefore, they shall be discussed in a greater detail below.

As indicated in Article 7(2) CESL, where one party supplies a selection of contract terms to the other party, a term will not be regarded as individually negotiated merely because of the fact that the other party chooses that term from that selection. This provision seems to be established in order to avoid any abuses by the dominant party by trying to escape from application of Article 7(1) CESL. In general, this provision suggests that if a party is furnished with a variety of terms out of which one or several terms have to be chosen, this does not initially

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Supra*, note 7, p. 207.



mean that the terms have been individually negotiated. This is due to the fact that the party is still not given with an opportunity to influence the content of the contractual term and all of these suggested terms may still be drafted in a way which is beneficial to the dominant party. In other words, the possibility to choose from a selection of terms suggested by a dominant party does not necessarily mean that such terms have been individually negotiated.

Furthermore, it is also important to understand the content of Article 7(3) CESL dealing with standard contract terms in the context of individual negotiations. As it is indicated in the respective article, a party who claims that a contract term supplied as part of standard contract terms has been individually negotiated bears the burden of proving that. This rule is of a particular importance since it establishes the rule of the burden of proof in the context of court trial. As established in the said article, a dominant party stating that a standard contract term supplied by it has been negotiated bears the burden of proof. By establishing such a rule, the other party is protected from a situation, where negotiations as regards the standard contract itself takes place, however, no real possibility to make amendments to the term in question exists. In such a case, a party wishing to prove that a standard contract term has been individually negotiated has to evidence that such individual negotiations have taken place and the other party has been able to influence its content, i.e. the burden of proof rests on the dominant party and not the party which had no real bargaining power and which had to accept the unfair term.

In the view of the above, one may conclude that application of the unfairness test to the terms not individually negotiated gives a broader scope of control in comparison with application of such test to standard terms. This is due to the fact that, in order for a contract term to be considered as standard contract term, not only it has to be not individually negotiated, but also it has to be formulated in advance for several transactions involving different parties. This reduces a number of terms that are subject to the unfairness test. Where the terms not individually negotiated are concerned, the unfairness test could be applied to a broader scope of terms which have not been subject to real individual negotiations.

#### 1.1.2. Gross Deviation vs. Significant Imbalance.

Whereas Article 83 (Meaning of “unfair” in contracts between a trader and a consumer) CESL dealing with unfair terms in B2C transactions, as well as Article II. 9:403 (Meaning of “unfair” in contracts between a business and a consumer) and II. 9:404 (Meaning of “unfair” in contracts between non-business parties) gives significance to the not individually negotiated contractual term which causes a *significant imbalance* in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing, Article 86 CESL dealing with unfair terms in B2B transactions establishes a higher benchmark for unfair terms – the use of such unfair terms

should *grossly deviate* from good (customary)<sup>23</sup> commercial practice, contrary to good faith and fair dealing. Therefore, it is important to understand how the difference between “gross deviation” and “significant imbalance” interplays in the context of the unfairness test. This standard is derived from Article 3(3) Late Payment Directive<sup>24</sup>.

Although it is rather evident that the standard of “gross deviation” somehow differs from the standard of “significant imbalance” and should be treated as a stricter yardstick, it is not clear how this standard should be interpreted in practice. Neither CESL, nor DCFR provides for any clear interpretation of such standard. It suggests that this is an evaluative factor merely, which means that only the parties and the court having a case at hand could evaluate whether there is a gross deviation or not. Therefore, a mere provision of a definition of “gross deviation” would not only be ineffective, but also would raise more questions rather than give answers. In the view of the above, one may conclude that “gross deviation” should be established *ad hoc* taking into account all the circumstances concerning the case in question.

### 1.1.3. Good Commercial Practice.

It should be stressed from the outset that the original “good commercial practice” criterion established under the draft CESL was amended by the European Parliament in 2014 by introducing “customary commercial practice”<sup>25</sup>. However, it is not clear how such amendment changes the general concept. At some point, good commercial practice should become customary and *vice versa* customary commercial practice in most of the cases should be considered as the good commercial practice (but, of course, not necessarily). Therefore, it suggests that the respective amendment of the European Parliament should not dramatically change interpretation of this criterion for the unfairness test.

Unfortunately, neither DCFR, nor CESL provides for a definition of “good commercial practice” or “customary commercial practice”. As it is stated in preamble 13 of CESL, in B2B transactions good commercial practice (after the amendment of the European Parliament – “customary commercial practice”) in the specific situation concerned should be a relevant factor in this context. Although, on the one hand, the courts should independently evaluate and decide whether the terms grossly deviate from good (customary) commercial practice, a some kind of standpoint for such interpretation is missing. On the other hand,

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<sup>23</sup> To be explained later in this paper.

<sup>24</sup> *Supra*, note 7, p. 671.

<sup>25</sup> European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM (2011) 0635 – C7-0329/2011 – 2011/0284(COD)) (Ordinary legislative procedure: first reading). Available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0159+0+DOC+XML+V0//EN>>.

the same as with gross deviation, it evidently shows that the meaning of good (customary) commercial practice should be established *ad hoc* taking into account all prevailing circumstances.

#### 1.1.4. Good Faith and Fair Dealing.

The criterion of good faith and fair dealing basically determines the agreement made between the Member States of the European Union to accept the common principle of good faith and fair dealing in terms of unfairness control. When analysing this principle, one of the first questions, which arises in relation to the meaning of such principle, is related with the content of such principle, i.e. the court analysing the contractual term that is subject to the unfairness control has to understand the content of good faith and fair dealing. Without having a clear and unified understanding of the meaning of this principle, the court might spend too much time for searching of the meaning of good faith and fair dealing and forgetting or devoting not enough time to the main subject matter of the case, i.e. whether the contractual term is unfair or not.

When discussing the content of this principle, the provisions of CESL have to be analysed in greater detail. Article 2 CESL establishes a duty to act in accordance with good faith and fair dealing, as well as consequences in case of breach of such duty – limitation of remedies or application of liability. Accordingly, Article 2(2) CESL establishes that a breach of the respective duty to act in accordance with good faith and fair dealing may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party<sup>26</sup>. In addition, it has to be noted that Article 2 also reveals the importance of this principle of good faith and fair dealing by indicating that the parties “may not exclude the application of this Article or derogate from or vary its effects”<sup>27</sup>, i.e. the principle of good faith and fair dealing is considered as an important principle, the application of which cannot be excluded or eliminated.

Article 2(b) of the Proposal<sup>28</sup> reveals the content of the definition of good faith and fair dealing. This principle means a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question. Here we come to a question whether such definition is sufficient enough so as to ensure that the court considering the

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<sup>26</sup> However, it should be noted that, upon the amendment 83 of the European Parliament, Article 2(2) CESL has been amended by excluding liability provisions and establishing that the breach of such duty “shall not give rise directly to remedies for non-performance of an obligation”. For further information please see European Parliament legislative resolution of 26 February 2014. *Supra*, note 24.

<sup>27</sup> The same rule is also applicable with Chapter 8 dealing with unfair terms.

<sup>28</sup> “Proposal” means the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.

case could determine whether the contractual term in question is contrary to the principle of good faith and fair dealing. It seems that application of this principle requires accurate understanding of what the standard of honesty, openness and consideration for the interests of the other party means and how it should be interpreted. For instance, DCFR, the provisions of which basically corresponds to the provisions of CESL, “honesty” defines in its “normal meaning” and considers that “cheating is contrary to good faith and fair dealing”<sup>29</sup>. When defining “openness”, DCFR commentary links it with the principle of transparency in the conduct of the person<sup>30</sup>. Finally, where the interests of the other party are concerned, DCFR commentary does not require giving preference to the other party’s interests. On the contrary, “a basic level of consideration should be normally required”<sup>31</sup>.

It should be noted that after the first consideration of the European Parliament, the draft CESL has followed a similar approach as DCFR by indicating that “good faith and fair dealing means a standard of conduct characterised by honesty, openness and, *in so far as may be appropriate, reasonable* consideration for the interests of the other party to the transaction or relationship in question”<sup>32</sup>. In other words, the obligation to consider the interests of the other party has been limited by establishing that it is subject to consideration only “in so far as may be appropriate”. Although such amendment may be considered as a step forward, such amendment may raise additional questions – how this standard of “in so far as may be appropriate” should be interpreted and how does this change the control mechanism. It seems that in such a way CESL suggests that there is no obligation to give preference to the other party’s interests and it is more related with the process of evaluation or consideration of the other party’s interests.

#### 1.1.5. Individual Factors.

In accordance with Article 86(2) CESL, when assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to: (a) the nature of what is to be provided under the contract; (b) the circumstances prevailing during the conclusion of the contract; (c) the other contract terms; and (d) the terms of any other contract on which the contract depends. Contrary to the unfairness test applicable to the contractual terms in B2C transactions, where the B2B contractual terms are concerned, Article 86(2) CESL eliminates two criteria: (a) whether the trader complied with the duty of transparency set out in Article 82; (b) whether it is of such a surprising nature that the consumer could not have expected the proposed term<sup>33</sup>.

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<sup>29</sup> *Supra*, note 7, p. 89.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> See amendment 37.

<sup>33</sup> This criterion has been established upon the amendment of the European Parliament.

Systemic analysis of Articles 86(2) and 82 CESL suggests that a requirement to ensure transparency is eliminated from B2B transactions, i.e. a requirement that the contractual terms are drafted and communicated in plain, clear and intelligible language. It should be noted that the duty of transparency had a slightly different wording before the amendment of the European Parliament, i.e. the obligation to ensure the duty of transparency in respect of the terms not individually negotiated had been established before the amendment, after the amendment of the European Parliament the duty of transparency was extended to all contractual terms. Furthermore, in addition to the requirement of plain and intelligible language, the requirement of clear drafting and communication has been introduced.

Another criterion, which has been eliminated, is related with the assessment of whether the contractual term is of such a surprising nature that the consumer could not have expected the proposed term. As mentioned before, this criterion has been established only after the amendment of the European Parliament. However, non-application of this criterion to unfair terms in B2B transactions cannot be justified by simply arguing that consumers have to be considered as weaker parties in comparison with the traders. Since no content of this criterion is established, one may conclude that it may be significant for both – B2C and B2B transactions. This is especially due to the fact that even Lithuanian law establishes a protection mechanism from surprising standard conditions of contracts. As it will be explained later, Article 6.186 of the Civil Code of the Republic of Lithuania<sup>34</sup>, which basically repeats the provisions of Article 2.20 (1994 ed.; 2.1.20 – 2004 and 2010 ed.) of UNIDROIT Principles of International Commercial Contracts<sup>35</sup>, defines the surprising standard contract term as a term that the other party could not reasonably expect to be included in the contract. This article also provides for consequences in case of existence of such terms in the contracts – such surprising standard contractual terms shall not be effective. It is even said that this Article is applicable to commercial contracts only<sup>36</sup>, whereas B2C contracts enjoy the protection established under the other articles of the Lithuanian Civil Code. In other words, this criterion may be applied to B2B contracts and no sufficient reason for not agreeing with such a position exists. The existence of the surprising terms may be detrimental not only to consumers, but also to businesses. Therefore, protection from surprising terms (even if

<sup>34</sup> Lietuvos Respublikos civilinis kodeksas. Valstybės žinios, 2000-09-06, Nr. 74-2262.

<sup>35</sup> For further information see UNIDROIT Principles of International Commercial Contracts 1994. Available at: <<http://www.unidroit.org/english/principles/contracts/principles1994/1994fulltext-english.pdf>>. UNIDROIT Principles of International Commercial Contracts 2004. Available at: <<http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>>. UNIDROIT Principles of International Commercial Contracts 2010. Available at: <<http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>>.

<sup>36</sup> MIKELĖNAS, Valentinas. *Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė I*. Vilnius: Justitia, 2003, p. 235.

stricter requirements are established) should be guaranteed for both transactions (either B2C or B2B). However, CESL has taken another approach and does not establish that, when assessing the unfairness of a contract term, regard is to be had to whether it is of such a surprising nature that the consumer could not have expected the proposed term. This decision is to be assessed critically.

When continuing the discussion of the criteria (circumstances) which have to be taken into account when assessing the unfairness of the contractual term, it is also important to assess the nature of what is to be provided under the contract and the circumstances prevailing during the conclusion of the contract. In general, this should mean that the unfairness of the contractual term depends on the goods, digital content or services to be delivered upon the contract. If such circumstances are to be considered as ancillary, i.e. does not have a great impact or has no impact on the nature of what is to be provided under the contract and related circumstances, it is less likely that such contractual terms shall be considered as unfair and vice versa – if such contractual terms are closely related to the nature of the contract, the unfairness test has to be applied very carefully.

Furthermore, the circumstances prevailing during the conclusion of the contract may be also relevant in assessing the unfairness of the contractual term. For instance, if the trader proves that the contract has been provided to the client for acknowledgment far before conclusion of the contract and such client had been provided with a possibility not only to discuss each contractual term, but also to have real negotiations over such term, this may be considered important in proving the contractual term to be fair. And *vice versa*, if it is determined that the client has not been provided with a real possibility to get acquainted with the terms of the contract, it may be construed as an important circumstance in proving the unfairness of the contractual term.

In addition to the aforementioned criteria (circumstances), it is also important to assess the other contract terms and the terms of any other contract on which the contract depends. It should be noted that usually the contractual terms are interconnected and even several contractual terms may deal with the same situation, question or matter. Thus, the content of other contractual terms may be important in determining the unfairness of other contractual terms. For instance, if one of the contractual terms has been individually negotiated, but negotiations as regards another term have been kept silent (although such term basically repeats the other term, which has been individually negotiated), this may be considered important in proving that the contractual term is fair. Furthermore, in practice, it is common that the parties conclude not one, but several interconnected agreements. The content of such interconnected agreements may also be important in determining the unfairness of the term in question.

In the view of the above, one may conclude that one or several criteria (circumstances) may be important in assessing or proving the (un)fairness of the contractual term. Therefore, the unfairness test cannot be applied in isolation



from other circumstances, which may be considered important.

After having a thorough consideration of CESL provisions regulating unfairness control in B2B transactions, one may conclude that CESL presents an advanced legislation with respect to unfairness control in B2B transactions. However, of course, one may not exclude some questions or ambiguities in relation to its application, which may be solved *ad hoc* during the court proceedings. As a ready-made product, CESL could offer great benefits to the national legislators in terms of updating national laws. Even if not transposing (copying) certain provisions of CESL, national legislators could at least have some discussions or considerations whether there is a need for introduction of such provisions into national laws.

## **2. Protection from Unfair Terms in B2B Transactions at the National Level: a Lithuanian Example.**

In general, all EU Members states can be divided into two groups in terms of content review of business to business contracts, i.e. (a) Members States, where the content of B2B contracts is subject to the unfairness review; (b) Members States, where the content of B2B contracts is not subject to the unfairness review<sup>37</sup>. Lithuania falls within the group of Members States, where the content of B2B contracts, to some extent, is subject to the unfairness review. Below please find a brief review of Lithuanian legislation in relation to the unfairness review of the content of B2B contracts.

### **2.1. Relevant Provisions of Lithuanian Civil Code.**

Contrary to what is established under PECL, DCFR or CESL in relation to the unfairness control in B2B transactions, Lithuanian law does not establish a straight forward provision prohibiting unfair terms in B2B transactions. However, Lithuanian Civil Code establishes certain provisions which, to some extent, assists in eliminating unfair terms in B2B contracts. However, it should be noted that Lithuanian unfairness review is not limited to B2B contracts only. The provisions to be discussed below are applicable despite of the status of the parties to the contract (i.e. no difference is made depending on the fact whether one or both or even none of the parties are businesses<sup>38</sup>).

In accordance with the Lithuanian Civil Code, the following provisions, to some extent, deal with the unfairness control of the contracts: Article 1.5 (Application of the Criteria of Justice, Reasonableness and Good Faith); Articles 1.78-1.96 (Voidability of Transactions); Articles 6.185-6.186 (Surprising Standard

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<sup>37</sup> For further information please see *supra*, note 7, p. 671-674.

<sup>38</sup> Furthermore, please also note that additional legislation is established with respect to unfair terms in contracts between traders and consumers.

Conditions of Contracts); Articles 6.193-6.195 (Interpretation of Contracts); Article 6.211 (Conditions Excluding Liability); Article 6.228 (Gross Disparity of Parties); and Articles 6.73 and 6.258 (Reduction of Penalties). While Articles 1.5, 1.78-1.96, 6.193-6.195, and Articles 6.73 and 6.258 deal with general provisions in relation to compliance of the contracts with general principles (justice, reasonableness, and good faith), standard control of contracts (which may lead to voidability of transactions), interpretation of contracts (a contract must be interpreted in accordance with good faith taking into account the real intentions of the parties; in the event of doubt over conditions of a contract, contract terms shall be interpreted against the contracting party that has suggested thereof, and in favour of the party that accepted those conditions; etc.), control of unfair penalties (penalties may be reduced by the court when they are unreasonably excessive or if the creditor has benefited from the partial performance of the obligation), Articles 6.185-6.186, 6.211, and 6.228 provide for a some kind of the unfairness control.

In accordance with Article 6.186(1), no surprising term contained in a standard term contract, i.e. such term which the other party could not reasonably expect to be included in the contract, shall be effective. In addition Article 6.186(3) establishes that a party who enters into a contract of adhesion where the standard terms are drawn up by the other party shall have the right to claim for termination or modification of that contract in the event where, even though the standard terms 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 civil liability of the party who prepared the standard terms, 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. Therefore, it is evident that Article 6.186(1) establishes a control mechanism for surprising contractual provisions in the standard contract and Article 6.186(3) establishes a general control mechanism for standard contracts, where the other party joins the contract upon adhesion to its terms (i.e. without the possibility of amending the terms of the contract). In the latter case, the aggrieved party may request termination or amendment of a contract, where it is proved that such contract: (a) exclude the party's rights and possibilities that are commonly granted in a contract of that particular class; (b) exclude or limit civil liability of the party who prepared the standard conditions; or (c) 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. However, such control mechanism for standard contracts is limited to the criteria established therein and does not establish an "umbrella" control mechanism for unfair terms which would be considered as invalid (as it is established under PECL, DCFR or CESL). On the contrary, establishment of such terms would only entitle the parties to apply to the court asking for termination or amendment of the contract, which, at least in Lithuania, is rather reluctant to intrude into the freedom of contract and amending the contractual terms.

Furthermore, Article 6.211 sets out that the contract terms which limit or exclude a party's liability for non-performance of an obligation, or which permit to effectuate performance in a substantially different manner from what the other party reasonably expected, shall not be valid if such conditions, taking in regard the nature of the contract and other circumstances, are unfair. Therefore, Article 6.211 of the Lithuanian Civil Code establishes an unfairness control mechanism for contract terms which limit or exclude the liability for non-performance of the obligations under the contract. Other provisions, which do not exclude or limit liability for non-performance of the obligations under the contract, are not subject to the unfairness review and, thus, could not be invalidated using the control mechanism established under Article 6.211.

Finally, Article 6.228 of the Lithuanian Civil Code establishes that a party may refuse from the contract or a separate condition thereof if at the time of the conclusion of the contract, the contract or its condition unjustifiably gives the other party excessive advantage. In such cases, among other circumstances, regard must also be paid to the fact that one party has taken unfair advantage of the other's dependent position, or of the other party's economic difficulties, urgent needs, or of the latter's economic weakness, lack of information or experience, his inadvertence or inexperience in negotiations; regard shall also be taken of the nature and purpose of the contract. In addition, upon the request of the aggrieved party, a court may revise the contract or its provision and adapt them respectively in order to make the contract or its separate provision meet the requirements of fairness and reasonable standards of fair dealing practices. Therefore, Article 6.228 establishes the control mechanism from gross disparity of the parties. Although such mechanism contributes to the unfairness control by entitling the aggrieved party to request elimination or amendment of the contract or its provision creating gross disparity, such control does not create the overall unfairness review of the content of the contract, i.e. only where it is evident that such contract provisions create gross disparity, they may be eliminated from the contract or respectively amended. On the other hand, one may not exclude that even if the contract terms directly do not unjustifiably give excessive advantage to the other party, they may still be unfair.

In the view of the above, one may conclude that Lithuanian legislation is rather fragmented in terms of unfairness control. While some of the legal provisions assists in eliminating or amending contractual terms containing some kind of unfairness, no "umbrella" or consolidated legislation incorporating the overall mechanism for unfairness control in B2B transactions exists (whereas such unfairness control in terms of B2C transactions is finely established and used in practice). Although not all countries establish such overall control mechanism, one may not exclude that the general legal environment might benefit from such mechanism, especially where it is intended to make the market effective, as shall be explained later.

## 2.2. Can we benefit from CESL?

It should be stressed from the outset that a number of Members States within the European Union establishes a review mechanism of the content of B2B contract terms. However, such level of review differs country by country. While Lithuania has a fragmented legislation with respect to unfair terms in B2B transactions, some other countries enjoy a broader level of protection. For instance, Nordic countries establish a mechanism for review of contractual terms despite of whether a B2C or a B2B contract is concerned (differences arise only in determining the unfair terms in B2B transactions since stricter rules are applicable in order to recognize the term to be unfair)<sup>39</sup>. On the other hand, other countries apply similar rules as Lithuania and establish a content review of standard terms only (e.g. Estonia, Germany, Portugal, Austria, Hungary, the Netherlands, and Slovenia<sup>40</sup>).

In the view of the above, a question whether there is a need for a consolidated or “umbrella” legislation with respect to unfair terms in B2B transactions arises. And then we come to the discussion of a freedom of a contract. One may not exclude that a freedom of contract is a core element in B2B relations, especially where an international trade is concerned. However, does this principle of freedom of contract eliminates any possibility of limitation of such principle, where a greater good is concerned? Some even say that “judicial intervention into contracts does not interfere with freedom of contract in general. On condition of not infringing public law rules, the parties remain free to agree in a contract what they want as long as they do not rely on the state’s coercive power by going to court. A judicial fairness test is part of the state’s assessment (usually by the courts) on whether to enforce a ‘private’ contract. <...> there might be some limits in so far as the state is not bound to enforce very unfair contracts”<sup>41</sup>. On the one hand, in a perfect world all parties should enjoy the same rights to influence the content of the contract. However, theory and practice are different. Although both parties should enjoy the same bargaining power, in practice the bargaining power usually belongs to a dominant party (which might dominate over the relationship between the parties due to many reasons, e.g. unique product, lack of availability of the product in the market, good market price, etc.). This inequality in B2B relationship does not necessarily have to be considered as a bad thing. However, this also suggests that certain control mechanism against gross disparity, excessive disadvantage and other related matters should be established.

Here we come to a greater question whether a fragmented legislation (e.g. in Lithuania) is sufficient enough for the purpose of controlling gross disparity, taking excessive advantage or other related matters. On the one hand, protection

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<sup>39</sup> *Supra*, note 7, p. 671.

<sup>40</sup> *Ibid.*

<sup>41</sup> SCHULTE-NÖLKE, Hans. No Market for ‘Lemons’: On the Reasons for a Judicial Unfairness Test for B2B Contracts. *European Review of Private Law*, 2-2015, p. 202.

from unfair terms somehow works as a control mechanism for “bullies”. However, such mechanism could also mean an unnecessary intrusion into the contractual relations between the parties. Where two values are concerned, it is always difficult to decide which of the values overcome one another and the purpose of this paper is not to take one or another side.

With regard to a weaker party protection, a question always arises whether any of the business parties could be considered as a weaker party which requires protection. Where consumers are concerned, there is no (or little) doubt that they can be assigned to a weaker party. However, does this also concern business parties (even if such party is SME)? And here we come to a greater question whether SMEs need any specific mechanism for their protection despite the fact that they are so called “professional” parties. Many legal systems broaden the scope of protection from unfair terms by applying it not only to B2C transactions, but also encompassing certain transactions which involve small and medium size companies<sup>42</sup>. On the other hand, other legal systems distinguish the protection level based on the size of the company<sup>43</sup>. However, is this a correct approach?

Many debates regarding protection of SMEs from unfair contractual terms have taken place over the recent years<sup>44</sup>. However, none of them could undoubtedly give us an answer whether SMEs should enjoy a greater protection. On the one hand, as mentioned before, an argument for protection of a weaker party is always brought into the picture. The classical view is that the review of unfair terms is a form of weaker party protection<sup>45</sup>. This is more or less related

<sup>42</sup> *Supra*, note 1, p. 36

<sup>43</sup> *Supra*, note 1, p. 36

<sup>44</sup> HESSELINK, Martijn W. SMEs in European Contract Law: Background Note for the European Parliament on the Position of Small and Medium-Sized Enterprises (SMEs) in a Future Common Frame of Reference (CFR) and in the Review of the Consumer Law Acquis (July 5, 2007). Centre for the Study of European Contract Law Working Paper No. 2007/03. Available at SSRN: <<https://ssrn.com/abstract=1030301>> or <<http://dx.doi.org/10.2139/ssrn.1030301>>; HESSELINK, Martijn W. Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive (June 8, 2009). European Review of Private Law, Vol. 18, No. 18, pp. 57-102, 2010; Centre for the Study of European Contract Law Working Paper Series No. 2009/06. Available at SSRN: <<https://ssrn.com/abstract=1416126>>; HESSELINK, Martijn W. Unfair Terms in Contracts between Businesses (2011). Towards a European Contract Law, pp. 131-148, J. Stuyck & R. Schulze, eds., Sellier European Law Publishers, 2011; Centre for the Study of European Contract Law Working Paper Series No. 2011-07; Amsterdam Law School Research Paper No. 2011-11. Available at SSRN: <<https://ssrn.com/abstract=1871130>>; OSTROW, Ellen. “For the Purposes of This Regulation ... : Denying Protection to the Small Business Through the Application of the CESL.” American University International Law Review 29 no. 1 (2013): 255-286; EILERT, Beatrice. Consumers and SMEs under the CESL - on the search for the reasons for the different scopes of Protection. Available at: <<http://dare.uva.nl/cgi/arno/show.cgi?fid=489796>>; BEALE, Hugh. A Common European Sales Law (CESL) for Business-to-Business Contracts: Pros and Cons. Available at: <[http://www.ajk.elte.hu/file/Annales\\_2012\\_08\\_Hugh.pdf](http://www.ajk.elte.hu/file/Annales_2012_08_Hugh.pdf)>; etc.

<sup>45</sup> HESSELINK, Martijn W. Unfair Terms in Contracts between Businesses (2011). Towards a European Contract Law, pp. 131-148, J. Stuyck & R. Schulze, eds., Sellier European Law Publishers, 2011; Centre for the Study of European Contract Law Working Paper Series No. 2011-07; Amsterdam Law

with unequal bargaining power. Standard term contracts are “contracts of adhesion” which are offered to the customer on a take-it-or-leave-it basis<sup>46</sup>. Since the economic power of the seller prohibits any meaningful negotiation of these terms, which are simply dictated by the seller, they are bound to be extremely one-sided, in favour of the seller<sup>47</sup>. Some of the scholars say that SMEs often also lack specific expertise, experience, information and bargaining power, in a way very similar to consumers<sup>48</sup>. It is undisputed that certain SMEs in certain contracts are in a vulnerable situation which is very similar to that of consumers<sup>49</sup>. Indeed, this may be true especially where start-ups are concerned<sup>50</sup>. However, others say that it is hard to believe that the main purpose of the unfairness test is related to the protection of weaker parties (in this case weaker business entities)<sup>51</sup>, this might be construed rather a side effect and not the main purpose<sup>52</sup>.

Information asymmetry argument may also play an important role in answering to the question whether SMEs need a special protection. As for consumers, a certain information asymmetry may arise in contractual relations. On the one hand, SME as a type of a company should operate as a professional. However, this does not exclude actual situation, where in many cases SME, as a weaker party, operates with less information than the other party. This is especially true when sole traders or small businesses make a purchase that is atypical but nonetheless necessary for their business, for example an estate agent who purchases and alarm system for his office<sup>53</sup>. The French *Cour de cassation* held that in such a case an entrepreneur was in ‘*le même état d’ignorance*

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School Research Paper No. 2011-11. Available at SSRN: <<https://ssrn.com/abstract=1871130>>, p. 2.

<sup>46</sup> KESSLER, Friedrich. Contracts of adhesion - some thoughts about freedom of contract. 43 Colum. L. Rev. (1943) 629. For a recent statement, see MICKLITZ, Hans-W.; REICH, Norbert; ROTT, Peter. Understanding EU Consumer-Law. Antwerpen: Intersentia, 2009, ch 3 (Micklitz), 122.

<sup>47</sup> *Supra*, note 43, p. 2.

<sup>48</sup> HESSELINK, Martijn W. SMEs in European Contract Law: Background Note for the European Parliament on the Position of Small and Medium-Sized Enterprises (SMEs) in a Future Common Frame of Reference (CFR) and in the Review of the Consumer Law Acquis (July 5, 2007). Centre for the Study of European Contract Law Working Paper No. 2007/03. Available at SSRN: <<https://ssrn.com/abstract=1030301>> or <<http://dx.doi.org/10.2139/ssrn.1030301>>, p. 14.

<sup>49</sup> *Ibid*, p. 15.

<sup>50</sup> E.g. imagine a newly established IT company managed by 3 young entrepreneurs at early 20. In most of the cases such entrepreneurs may be in the lack of contractual experience. Thus, even if they are given with a chance to negotiate, they might negotiate not necessarily in relation to the major terms of the transaction which poses a great risk not only due to a lack of legal knowledge, but also due to a lack of contractual experience. This may also be relevant to other SMEs.

<sup>51</sup> EIDENMUELLER, Faust, *et al.* Towards a Revision of the Consumer-Acquis, 48. *Common Market Law Review*, 2011, p. (1077) 1087.

<sup>52</sup> *Supra*, note 39, p. 208.

<sup>53</sup> HESSELINK, Martijn W. Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive (June 8, 2009). *European Review of Private Law*, Vol. 18, No. 18, pp. 57-102, 2010; Centre for the Study of European Contract Law Working Paper Series No. 2009/06. Available at SSRN: <<https://ssrn.com/abstract=1416126>>, p. 34.



*que n'importe quel autre consommateur*<sup>54</sup>. A question here arises whether SME operating in a completely different sector should take for responsibility for decisions taken being in lack of information. In general cases, we would say - "yes". However, if it operates in a completely different sector, does this really mean that it should make a separate investigation of alarm systems or any other products which are not directly related with its business? Most probably not. Therefore, in such cases a question whether SMEs deserve a special protection is brought up.

Another aspect of information asymmetry is related with the procedure of preparation of the contract itself. We all understand that usually the standard term contracts are drafted by one party and supplied to another party. This basically means that one party has invested time and has incurred costs in relation to the preparation of the contract. This leads to a better knowledge and understanding of such contractual terms prepared by the party supplying them. On the other hand, a party who has been provided with such contractual terms has less information about the contractual terms and their interaction with each other. Therefore, certain information asymmetry exists. Protection from unfair terms basically deals with such information asymmetry by giving a party who has been supplied with the terms a possibility to accept such standard contract terms without reading them<sup>55</sup> (and reading only the contract terms which do not fall within the unfairness test). In such a way, the market would be more effective since smaller companies, being sure that unfairness test could eliminate unfair terms, would be able to spend less time in analysing the contractual terms. This might speed up the market.

In addition, distributive justice argument also comes up when discussion with respect to protection of SMEs is carried out. It is said that protection against unfair terms might contribute to fairer distribution of resources. However, if a distributive justice question is brought into the picture, does it really mean that SME could be comparable with the consumer in terms of being *socially* weak. Somehow this distributive justice argument seems to be rather remote in relation to protection of SMEs. The same could be said with respect to paternalism and other related arguments<sup>56</sup>.

Finally, the protection of "market"<sup>57</sup> comes into the picture. One the one hand, market failure argument is used<sup>58</sup>. On the other hand, it is argued that there is a need for "acceptance of (certain) contract terms without reading and negotiating"<sup>59</sup>. As with information asymmetry, the businesses might get

<sup>54</sup> Cass. civ. I, 28 April 1987, D. 1988, 1, Note Delebecque.

<sup>55</sup> *Supra*, note 39, p. 209.

<sup>56</sup> For further information please see *supra*, note 43, p. 5-10.

<sup>57</sup> For further information please see *supra*, note 39, p. 209-210.

<sup>58</sup> Where market failure argument is used, it is stated that "judicial intervention compensates market failure resulting from the lack of competition in the market of terms". See *supra*, note 39, p. 210.

<sup>59</sup> *Supra*, note 39, p. 206.

more effective, spend less time and incur less costs if they are given with an opportunity to skip the reading of most of the contractual terms (save for the main subject matter of the contract, price and other terms which do not fall within the unfairness test). By applying the judicial unfairness control, a party supplying contractual terms would be less interested in including unfair terms since it would be aware of the possibility of judicial intervention. In such a case, even if the party supplying the contract passed through other barriers established under domestic law (such as barriers related with gross disparity, surprising standard terms, and terms excluding liability, as established under Lithuanian law), it would still need to supply fair terms to the other party since the final step - unfairness test - could be applied.

In the view of the above, one may conclude that unfairness control in B2B transactions has its own pros and cons. Nobody can exclude that a principle of freedom of contract plays one of the most important roles in B2B transactions. In each and every case where a regulation limiting the freedom of contract is concerned it is always important to evaluate whether such regulation does not form an unnecessary intrusion. Only where the national legislator decides that there is a greater good to be protected, it may conclude that such control of unfairness in B2B transactions has to be established. Finally, where it is decided to amend the national legislation by limiting unfair terms in B2B transactions, it has to be assessed whether such control should be applicable to all B2B transactions (as it was suggested under DCFR) or it should be limited to cases, where SMEs are concerned (as it was suggested under CESL).

### **Conclusions.**

1. Regulation of unfair terms in contracts between traders varies from country to country from hard law to soft law instruments. Although the recent legislative instrument, which suggested unfairness control for B2B contracts – CESL, has been withdrawn, this does not preclude national legislator enjoying benefits of the instrument drafted and negotiated between various scholars, politicians, and stakeholders. CESL presents an advanced legislation with respect to unfairness control in B2B transactions. Therefore, national legislators might at least take into consideration the benefits of a ready-made product.

2. A principle of freedom of contract plays one of the most important roles in B2B transactions. Therefore, in each and every case, where a regulation limiting the freedom of contract is concerned, it is always important to evaluate whether such regulation will not form an unnecessary intrusion. Only where the national legislator decides that there is a greater good to be protected, it may conclude that such control of unfairness in B2B transactions has to be established.

3. Lithuanian legislation is rather fragmented in terms of unfairness control. While some of the legal provisions assists in eliminating or amending contractual terms containing some kind of unfairness, no “umbrella” or consolidated

legislation incorporating the overall mechanism for unfairness control in B2B transactions exists.

4. One may not exclude that the general legal environment might benefit from unfairness control mechanism in B2B transactions. By applying the judicial unfairness control, a party supplying contractual terms would be less interested in including unfair terms since it would be aware of the possibility of judicial intervention. In such a case, even if the party supplying the contract passed through other barriers established under domestic law, it would still need to supply fair terms to the other party since the final step - unfairness test - could be applied.

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