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The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States

EWOUD HONDIUS
Moolengraaff Instituut voor Privatrecht, Utrecht University

1. Introduction

This paper deals with some problems which Member States may face when implementing the European Union's Directive on unfair terms in consumer contracts.[1] The Directive requires Member States to take a number of measures with regard to such terms before December 31 1994. The same obligation applies to the members of the European Free Trade Association which have ratified the Treaty creating a European Economic Space (that is, all members with the exception of Switzerland).[2] For reasons of convenience, I shall refer to all of the countries envisaged above as 'Member States'. Most of them will not have major problems in adapting their legislation to the Directive, since in the seventies and eighties they introduced legislation on unfair contract terms.

Such measures were introduced in the following domestic laws. In Austria by the *Konsumentenschutzgesetz* of March 8, 1979;[3] in Belgium by the *Loi sur les pratiques de commerce et l'information et protection du consommateur* of 1991;[4] in Denmark by the *Markedsringslov* of June 14, 1974;[5] in Finland by Chapter 3 of the Act of January 20, 1978;[6] in France by Articles L-132-1/5 of the *Code de la Consommation*;[7] in Germany by the *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)*;[8] in Greece by the Consumer Protection Act 1991;[9] in Ireland by the Sale of Goods and Supply of Services Act of 1980;[10] in

[1] O.J. L 95, 1993, 29.

[2] See N. REICH, *Europäisches Verbraucherschutzrecht*, Baden-Baden, Nomos, 1993, Nr. 276.

[3] See F. BYDLINSKI in *Festschrift Meier-Hayoz*, 1982, 65 ff.

[4] See E. BALATE, J. STUYCK (eds.), *Pratiques du commerce & Information et Protection du consommateur*, Bruxelles, 1988; J. STUYCK, P. WYTINCK (eds.), *De nieuwe wet handelspraktijken*, Brussel, 1992.

[5] See B. GOMARD, *Revue internationale de droit comparé* 1982, 591-671.

[6] See T. WILHELMSSON, *European Consumer Law Journal* 1992, 77-92.

[7] Formerly the Act 78-23 of January 10, 1978 and January 5, 1988. See J. CALAIS-AULOY, *Droit de la consommation*, third ed., Paris, 1992, 134-149; cf. now the Act 95-96 of February 1, 1995 and its presentation by A. BÉNABENT in the annex to his contribution in this Review.

[8] See M. WOLF, N. HORN & W.F. LINDACHER, *AGB-Gesetz*, 3rd ed., München, C.H. Beck, 1994. For a summary in English see O. SANDROCK, "The Standard Terms Act 1976 of West Germany", 26 *American Journal of Comparative Law* 551 (1978); see also the Referentenentwurf of the Federal Ministry of Justice to implement the diregtive in *VuR (Verbraucher und Recht)* and the comment by N. REICH, "Zur Umsetzung der EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen", *VuR* 1995, 1 ff.

[9] See E. ALEXANDRIDOU, *European Consumer Law Journal* 1992, 20-31.

[10] See my *Unfair terms in consumer contracts*, Utrecht, 1987, 65-67.

Luxembourg by the *Loi relative à la protection juridique du consommateur* of August 25, 1983;[11] in the Netherlands by Articles 6:231-248 Civil Code;[12] in Norway by the Act 47/1972, as amended in 1981;[13] in Portugal by Decree 446/85 of October 25, 1985;[14] in Spain by Art. 10 *Ley general para la defensa de los consumidores y usuarios* of July 19, 1984;[15] in Sweden by the Act 1971:112;[16] in Switzerland by Article 8 *Loi fédérale contre la concurrence déloyale* of December 19, 1986;[17] and in the United Kingdom by the Unfair Contract Terms Act of 1977.[18] Only Italy has fallen behind, given the standards of protection provided by Article 1341, 1342 and 1370 of the Civil Code.[19] Spain considered changing its legislation before the Directive was published.[20]

The legislation referred to above often provides higher standards of consumer protection than the Directive. The Directive does not force Member States to withdraw such legislative measures. It even leaves Member States the freedom to adopt more stringent measures in the future.[21] The 'minimum character'[22] of the Directive does not bring about total harmonisation, as had been called for by business interests. Likewise, consumer groups will be disappointed by the results contained in the Directive. - '*Plus d'un seront déçus par la teneur de la directive*'.[23] In contrast with an earlier draft, the Directive does not deal with individually negotiated contract clauses. Yet, in my view the Directive is important.[24] It is the first measure of its kind which goes to the heart of contract law, and therefore may be regarded as an important step towards Europeanisation of contract law.[25] In this regard, the Directive is comparable to the 1985 Directive on product liability. This Directive has also been criticised both by producers and consumers, for not bringing about total harmonisation; even though

[11] See C. HOFFMANN in: *Revue internationale de droit comparé* 1982, 851-886.

[12] See the English (and French) translation by P.P.C. HAANAPPEL, E. MACKAAY, *New Netherlands Civil Code/Patrimonial Law (Property, Obligations and Special Contracts)*, Deventer/Boston, 1990. On the Code see B. WESSELS, "Civil Code Revision in the Netherlands: System, Contents and Future", 41 *Netherlands International Law Review* 163-199 (1994).

[13] See T. WILHELMSSON, op.cit. (note 6).

[14] See D. MALLMANN, *Recht der Internationalen Wirtschaft* 1987, 111-114.

[15] See M. COCA PAYERAS, S. DIAZ ALABART, J. TORNOS MAS, L.H. CLAVERIA GOSALBEZ & E. MALARET I GARCIA, in R. Bercovitz Rodríguez-Cano, J. Salas Hernández (eds.), *Comentarios a la Ley general para la defensa de los consumidores y usuarios*, Madrid, 1992, 223-353.

[16] See T. WILHELMSSON, op.cit.

[17] See B. STAUDER, *European Consumer Law Journal* 1991, 138-153.

[18] See R. LOWE, G. WOODROFFE, *Consumer Law and Practice*, 3rd ed., London, 1991, 126-146. I have only mentioned the most important legislation.

[19] See G. ALPA and M. BESSONE (eds.), *I contratti standard nel diritto interno e comunitario*, Torino, 1991; G. PATTI, S. PATTI, *Responsabilità precontrattuale e contratti standard*, Milano, 1993.

[20] As to the Anteproyecto of the Spanish Ministry of Justice see R. BERCOVITZ RODRIGUEZ-CANO, "La Reforma del Derecho de la Contratacion en Espana", in *Congreso Internacional sobre la Reforma del Derecho Contractual y la Protección de los Consumidores*, Zaragoza, 1993, 237, 244.

[21] Art. 8: 'Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer'.

[22] See K. MORTELMANS, "Minimum Harmonization and Consumer Law", *European Consumer Law Journal* 1988, 1-18.

[23] J. HUET, "Propos amers sur la directive du 5 avril 1993 relative aux clauses abusives", *La semaine juridique (JCP)* 1994.1.309.

[24] E. HONDIUS, "EC Directive on Unfair Terms in Consumer Contracts: Towards a European Law of Contract", (1994) 7 *Journal of Contract Law* 34-52. This paper is partially based on that article.

[25] See J. TAUPITZ, *Europäische Privatrechtsvereinheitlichung heute und morgen*, Tübingen, 1993, with further references on 73-87.

it seeks a more intense level of harmonisation than minimum standards.[26] However, it has been argued that EC law has become a key influence on the development of tort law, which will force the courts, the legal professions and academics in European countries to closely study developments on the European level and in all Member States. The product liability Directive may therefore serve as a catalyst in developing a truly European body of law.[27]

In this paper I will attempt to present the issues which Member States may be obliged to confront when implementing the Directive. I shall first look at the Directive's scope of application (Part 2) and its terminology and definitions (Part 3). I shall then deal with the general fairness test (Part 4) and the black list (Part 5). Other provisions include those on interpretation and procedure (Part 6). Sanctions will be dealt with in Part 7. The consequences of the Directive will briefly be dealt with in Part 8. I shall then place the subject in a wider context by looking into the possibility of drafting a European Civil Code, the Unfair Contract Directive serving as its precursor (Part 9). I shall end with some conclusions (Part 10).

2. Scope of Application

Three issues are usually raised when legislatures discuss bills on unfair contract terms. Should the scope of application be limited to consumer contracts? Should it be limited to standard contract terms? Should contract models drafted by notaries and other 'neutral' persons be covered by legislative intervention?

As for the first issue, the history of the Directive has quite naturally led to the exclusion of purely commercial contracts. The Directive is the product of the EC Consumer Protection Programme.[28] This restriction to consumer contracts should, however, be deplored. Not only consumer contracts contain unfair terms; commercial contracts may feature the same failing. When small businesspersons are involved, their position is not always much better than that of consumers. It is to be hoped that the Directive will be supplemented in this respect in the near future. In the meantime, it has been proposed in both Germany and the United Kingdom[29] that the Directive should be implemented in specific consumer protection statutes, while leaving unchanged existing legislation on unfair contract terms. This suggestion is equally objectionable.

The question as to whether or not the Directive's scope of application should be restricted to standard form contracts has played an important role in its legislative history. The original proposal for a Directive covered all unfair contract terms. But

[26] See G. HOWELLS, *Comparative Product Liability*, Aldershot, 1993.

[27] See my paper on "The Impact of the Product Liability Directive on Legal Development and Consumer Protection in Western Europe", 4 *Canterbury Law Review* 34-51 (1989).

[28] Only the European Parliament's Commission for Consumer Affairs has argued for extension of the Directive's scope of application beyond consumer transactions.

[29] As to Germany see P. HOMMELHOFF, K.-U. WIEDEMANN, "AGB gegenüber Kaufleuten und unausgehandelte Klauseln in Verbraucherverträgen", *Zeitschrift für Wirtschaftsrecht (ZIP)* 1993, 562, 570 ff.; *contra*, for fear of a break with 'die Einheit des Zivilrechts': M. HABERSACK, D. KLEINDIEK, K.-U. WIEDENMANN, "Die EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen und das künftige AGB-Gesetz", *ZIP-Report* 1993, 1670, 1675. In the UK such a proposed was recently adopted: The Unfair Terms in Consumer Contracts Regulations 1994, *Statutory Instruments* 1994, No. 315 g.

after pressure from German officials and other interested groups,[30] the scope of application was limited to a more restricted category of contractual terms. Article 3 (1) covers only terms which have not been individually negotiated and paragraph two reinforces the same point.[31]

This approach has the advantage that the black list of clauses deemed to be unfair could be considerably extended. On the other hand, if the list had also applied to individual terms, it would have been necessary to radically reduce its substance, given that many clauses can only be considered as unfair when the consumer is taken unaware. Later in this article I shall address the question as to whether or not countries with legislation on standard contract terms are under an obligation to adapt such measures to the new formula.

With regard to the scope of application of the Directive, some Member States face particular problems. For example, the United Kingdom will have to consider whether the scope of application of the Unfair Contract Terms Act sufficiently covers terms other than exemption clauses.[32] Italy faces the problem that general conditions regulating state enterprises, which are often governed by standard form contracts, are included in the Directive.[33]

Finally, there is the question of whether or not contract models which have been drafted by notaries and other 'neutral' persons or bodies are covered by the legislation. In countries such as Germany and the Netherlands this question has led to a lively debate, usually with the outcome that such contract models are deemed to fall beyond the proper boundaries of government regulation. Such assertions are usually based on textual arguments: the German and Dutch Acts are limited to 'users' (Dutch: *gebruikers*), who 'put forward' (German: *stellen*[34]) the contract terms. The Directive seems to cover such models.

3. Terminology and Definitions

The terminology employed in the Directive will not present major problems to Member States. With the exception of Italy, and perhaps Iceland, all have introduced the notion of 'consumer' into their legislation.

From the perspective of smaller language groupings in the Community, the terminology employed in the Directive may attract criticism. This brings us to the point that in the case of EC Directives, it is usually wise to study not only the text in one's

[30] See the criticism of the original proposal by H.E. BRANDNER, P. ULMER, "EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträge", *Betriebs-Berater* 1991, 701-709 (English translation in 28 *Common Market Law Review* 647-662 (1991)).

[31] Art. 3 section 2 reads: 'A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract'. This definition is broader than that of the *AGB-Gesetz*.

[32] UK courts take a very broad view of what constitutes an exemption clause, even extending this to set-off clauses: *Stewart Gill Ltd v Horatio Myer & Co Ltd*, [1992] 2 *All ER* 257.

[33] Art. 2 (c) of the Directive.

[34] See F.A. BULTMANN, "Änderungen des AGBG aufgrund der Richtlinie über mißbräuchliche Klauseln?", *VuR* 1994, 137, at 139.

own language, but also the texts in those languages which are available and understandable to the reader. A closer scrutiny of, for example, the Dutch, French and Italian texts illustrates that what in the English version of Article 3 (2) is called a 'pre-formulated standard contract', is referred to as '*toetredingsovereenkomst*', '*contrat d'adhésion*' or '*contratto di adesione*'. In France the notion of an adhesion contract plays only a minor role in legal writing.[35]

In most countries, the notion of 'a contractual term which has not been individually negotiated' (Article 3 (1)) is well known, although usually under different wording (such as '*Allgemeine Geschäftsbedingungen*' in Germany). There is a difference between the two notions, and the question may be raised regarding whether or not countries such as Austria, Germany and the Netherlands will have to adopt the broader EC definition. One view is that they should.[36] I do not agree. Since a directive does leave some freedom to Member States regarding their implementation, it is my opinion that these States have a valid argument not to change their definitions. This argument, as put forward in Germany by Wolf[37] but opposed by Heinrichs,[38] is that although non-standardised pre-formulated contracts fall outside the scope of the *AGB-Gesetz*, they do fall under § 242 *BGB*, and are indeed subject to review in practice.

It is important to examine the meaning of the concept of 'consumer'.[39] This definition raises the question as to whether or not activities which are alien to one's business or profession are covered by the Directive.[40] The use of the word 'purposes' would perhaps lead one to expect that they do. However, in the *Pinto* case, the European Court of Justice gave a very restrictive interpretation of the notion of 'consumer'[41]. Because of the rule that national law must be interpreted in conformity with directives, and in turn with relevant control justice decisions,[42] this case is directly relevant for the meaning of the concept of 'consumer' in domestic law. The Pinto case dealt with the doorstep directive, which contains a slightly different definition of 'consumer',

[35] J. GHESTIN, *Traité de droit civil. La formation du contrat*, 3rd ed. Paris 1993, Nrs. 94-98.

[36] Among others by P. ULMER, "Zur Anpassung des AGB-Gesetzes an die EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen", *Europäische Zeitschrift für Wirtschaftsrecht* 1993, 337, at 346.

[37] M. WOLF, N. HORN & W.F. LINDACHER, op. cit. (note 8), 1912-1913.

[38] H. HEINRICHS, "Die EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen", *Neue Juristische Wochenschrift* 1993, 1817, 1819.

[39] Art. 2 (b) defines a consumer in the following terms: 'any natural person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'.

[40] In several Member States, the courts have extended protection to small businesspersons for activities which are only incidental to their business - see *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd*, [1988] 1 *WLR* 321 and Cour de cassation 6 January 1993, *JCP* 27 January 1993 (Actualités) protecting a farmer buying a fire extinguisher on the reasoning that this is not an 'activité qui lui donnerait les compétences pour apprécier l'opportunité de cet achat comme il pouvait le faire pour les achats de matériel agricole'.

[41] Case C-361/89 *Patricia di Pinto* [1991] E.C.R. I, 1189: 'le critère d'application de la protection réside dans le lien qui unit les transactions faisant l'objet du démarchage à l'activité professionnelle du commerçant: celui-ci ne peut prétendre à l'application de la directive que si l'opération pour laquelle il est démarché excède le cadre de ses activités professionnelles. Parmi les actes accomplis dans le cadre de ces activités professionnelles, l'article 2, rédigé en des termes généraux, ne permet pas d'établir une distinction entre les actes de pratique courante et ceux qui présentent un caractère exceptionnel'.

[42] See Case 106/89 *Marleasing* [1990] E.C.R. I; 4135.

but the differences are so small as to be negligible.[43] The only defence left to those in favour of the broader notion of 'consumer' lies in distinguishing, on the basis of the Court's arguments,[44] between transactions which concern the sale of property by a vendor or supplier, and other activities alien to one's business or profession.

Finally, it should be observed that the Directive also covers oral terms. The rules concerning this matter differ among the Member States. All, however, will be obliged to adopt their definition of standard contracts, so that they apply to oral agreements.

4. The Unfairness Concept

Article 3 of the Directive provides that a contractual term 'shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.

A comparison with the original wording teaches us that the new formula combines two criteria which were set out in the earlier draft. According to the Explanatory Memorandum: 'in making an assessment of good faith, particular regard shall be had to the strength of the bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; (...)'.

Contract terms will probably have to be subjected to the test whether or not they are at variance with statutory law. Domestic legislation will certainly not fall beneath the Directive's standards if legislators do not require a 'significant' imbalance but a mere imbalance. This was the solution employed in the 1976 Resolution on Unfair Contract Terms of the Council of Europe, and the approach favoured by the European Consumer Law Group.

Some commentators, and in particular those from common law and Nordic backgrounds, argue that the reasonableness test is far from clear.[45] This raises the interesting question of just how clear EC legislative drafting should be. From the point of view of the common law tradition in particular, it is well known that statutes must be constructed very carefully. In civil law countries, on the other hand, the general code provisions on good faith tend to be used quite independently from their precise wording. Thus the good faith clauses of the French Civil Code and its equivalent in the old Dutch Code, have been applied in widely different ways, even though they contain exactly the same wording. Likewise, the Dutch and German good faith provisions, although worded differently, have been applied in very similar ways.

[43] K.J.M. MORTELMANS, *Tijdschrift voor Consumentenrecht* 1991, 185, 192.

[44] 'Il y a tout lieu de croire en effet qu'un commerçant, normalement avisé, connaît la valeur de son fonds et celle de chacun des actes que nécessite sa vente, de sorte que, s'il s'engage, ce ne saurait être de manière inconsidérée et sous le seul effet de la surprise'.

[45] R. BROWNSWORD, G. HOWELLS, T. WILHELMSSON, "The EC Unfair Contract Terms Directive and Welfarism", in R. Brownsword, G. Howells & T. Wilhelmsson (eds.), *Welfarism in Contract Law*, Aldershot, 1994, 275-301.

[46] 'Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language'.

Article 4 (2) excludes the main subject matter of the contract from the fairness test.[46] This is a well known exclusion in several jurisdictions, such as Germany and the Netherlands. It was designed to insulate the price agreed on by the parties from judicial review (*iustum pretium*[47]). The preamble clarifies the operation of this rule, by naming insurance coverage as an example of an issue falling within the main subject matter of the contract, and which is thus exempt from control under the Directive.[48]

It is clear from all of this that the Directive lays down a fairness test which provides less protection than measures currently prevailing in the Member States. Implementation of this part of the Directive should therefore pose few problems for national legislative bodies.

5. The Black List

Contemporary legislation on unfair terms in contracts will often feature a list of measures which aim at providing concrete meaning to prohibitions[49]. The Directive also contains such a list, but its status is far from clear[50]. In an earlier proposal the list was presented as 'mandatory'. But according to the Commission, it was impossible to reach agreement among Member States regarding the composition of the list.[51] In any case, the Commission has expressed the view that the agreement ultimately concluded is 'nonetheless a useful indication for judges, national authorities and economic agents, and will help to specify the general criteria set out in Article 3 of the Directive'.

The list is surely useful. For example subparagraph (a) deals with a category of exemption clauses: those concerning death and personal injury. Under Article 6:237 (f) of the Dutch Civil Code the seller or supplier may rebut the presumption that his exemption clause is unfair. Subparagraph (a) now makes it virtually impossible for a seller or supplier to rely on this defence. Some courts have already held that exemption clauses such as those envisaged in subparagraph (a) are null and void and this view has been approved by French authors in particular.[52] The Directive strengthens the legitimacy of such developments.

[47] According to C. MARTINEZ DE AGUIRRE, "Transcendenzia del Principio de Proteccion a los Consumidores en el Derecho de Obligaciones", in *Congreso Internacional sobre la Reforma del Derecho Contractual y la Protección de los Consumidores*, Zaragoza 1993, 305, 332, this principle is still valid in Catalan and Navarran law. See also the thesis on this subject of M. MARTIN CASALS.

[48] This is apparently not understood by P. DUFFY, "Unfair contract terms and the E.C. Draft Directive", *Journal of Business Law* 1993, 67-79 who argues that the Preamble on this point says something which the text of the Directive does not touch upon.

[49] Trade and industry often see such lists as unwanted patronising - see UNICE, in ALPA, BESSONE (eds.), op. cit. note 19, 220, 223. The Scandinavian countries consider lists to be useless, given that their system focuses on control by the Consumer Ombudsmen - see T. WILHELMSSON, *European Consumer Law Journal* 1992, 77, 87 note 48, who uses the argument - proven false in Germany - that a black list may be interpreted *a contrario*, thus leading to the result that clauses just outside the list's scope of application will not be held to be unfair.

[50] Article 3 (3) refers to it in the following words: 'The Annex shall contain an indicative and non-exhaustive list of terms which may be regarded as unfair'.

[51] In 1976, the Council of Europe did arrive at a list in its Resolution on Unfair Terms in Consumer Contracts and an Appropriate Method of Control, Resolution (76) 47.

[52] HUET, "Propos ames...", op.cit. note 23, at 3.

Another example may be taken from subparagraph (q), the final item on the European list. It blacklists clauses requiring consumers to take disputes to arbitration which are not subject to legal regulation. Such clauses are permitted by Article 6:236 (n) of the Dutch Civil Code, which was the object of a heavy battle between the lobbies working for and against arbitration. The pro-arbitration lobby won, but the blacklisting of arbitration clauses which do not allow consumers to choose between arbitration tribunals and courts of law may well influence the tendency of the Dutch judiciary to find arbitration clauses unfair under their Code.[53]

A solution adopted in several European jurisdictions has been to adopt both a black list and a grey list (see for example Austria, Germany and the Netherlands). However, this approach was not employed in the Directive. Nevertheless several clauses provide the judiciary with some discretion, by using terms such as 'inappropriately' (b), 'disproportionately high' (e), 'reasonable' (g), 'unreasonably early' (h), 'without a valid reason' (j and k), 'too high' (l) and 'unduly' (q). Further a number of clauses become blacklisted if the right which they accord the seller or supplier is not extended to the consumer. Examples of such rules are to be found in subparagraphs (c), (d), (f 1) and (o).

Finally, an example of Brussels lobbying can be observed in the exemption from subparagraphs (g), (j) and (l) for financial services which appears in the Annex.

As far as implementation by Member States is concerned, it would seem that the low demands made by the Directive mean that direct action is not required.[54] However, the requirement to interpret national measures in conformity with Community law may force national courts to take account of the manner in which other countries deal with issues addressed in the Directive.

6. Interpretation; Plain Language

In all countries, a traditional means of frustrating the inclusion of unfair contract terms in contracts is the *contra proferentem* rule: unclear terms shall be interpreted against the party who has drafted them. The second sentence of Article 5 (2) explicitly lays down this rule.[55] It will not apply, however, in collective actions as described in Article 7 (2). The object of this exception is not to offer consumers less protection. On the contrary, since the *contra proferentem* method will usually result in a construction which is more advantageous to consumers; in abstract proceedings doubtful clauses could be saved and would survive for years on end.[56] It therefore appears better to employ a *pro proferentem* method in these proceedings or at least a neutral approach.

The first sentence of Article 5 provides as follows. 'In the case of contracts where

[53] *Botman v Van Haaster, Hoge Raad* 23 March 1990, *Nederlandse Jurisprudentie* 1991, Nr. 214 (annotated by H.J. SNIJDERS).

[54] H. HEINRICHS, "Die EG-Richtlinie", op.cit. note 38, at 1822.

[55] 'Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail'.

[56] R.H.C. JONGENEEL, *De Wet algemene voorwaarden en het AGB-Gesetz*, thesis, Deventer, 1991, 162.

all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language'.

This is an important innovation. It has probably been inspired by the development in German case-law of a transparency requirement ('*Transparenzgebot*')[57] and perhaps also by the 'plain language' movement in some English speaking countries.[58] Another source of inspiration may have been Article 10 (1) (a) of the *Ley general para la defensa de consumidores y usuarios*, which requires general conditions of contracts to have '*Concreción, claridad y sencillez en la redacción, con posibilidad de compresión directa, sin reenvíos a textos o documentos que no se faciliten previa o simultáneamente a la conclusión del contrato, y a los que, en todo caso, deberá hacerse referencia expresa en el documento contractual*'.

It could be argued that the first sentence of Article 5 demands implementation by an enactment of this nature. Even in countries such as Germany, where the Supreme Court has developed the transparency principle mentioned above, it has been contended that the rule should be codified.[59]

7. Sanctions

At what point in the development of contractual relations should the problem of unfair terms be addressed? This is a heavily debated question. According to some, a problem arises once an enterprise invokes an unfair contract term. In the view of others, a problem arises as soon as such a term has been incorporated into a contract. In the former opinion adequate protection is provided by a court decision disapplying the offending term. However, according to the latter view, unfair terms should be struck out or prevented from being incorporated before a conflict has arisen; and this is the approach which appears in the Directive.[60]

Article 7 (2) provides a further indication of the scope of the protection provided by the Directive.[61] This provision will require countries such as Ireland and the United Kingdom to introduce group actions, in accordance with the example set by their continental partners. However, the Directive does not provide for the establishment

[57] See N. REICH, "Le principe de la transparence des clauses limitatives relatives au contenu des prestations dans le droit allemand des conditions générales des contrats", in J. Ghestin (ed.), *Les clauses limitatives ou exonératoires de responsabilité en Europe*, Paris 1990, 77-93.

[58] See Ontario Ministry of Consumer and Commercial Relations, *A Consultation Draft of the Consumer and Business Practices Code* (Toronto 1990), and the papers on this Draft by M.G. BAER, R.J. WOOD & N. L'HEUREUX in 21 *Canadian Business Law Journal* 254-305 (1992).

[59] H.W. MICKLITZ, "AGB-Gesetz und die EG-Richtlinie über mißbräuchliche Vertragsklauseln in Verbraucherverträgen", *Zeitschrift für Europäisches Privatrecht* 1993, 522, 533.

[60] 'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers'.

[61] The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

of a European Consumer Ombudsman, as had been requested by the European Parliament's Commission for Consumer Affairs.[62]

In the Netherlands doubts have been raised on the conformity of the Civil Code's sanction of avoidance of unfair contract terms with the Directive. It has been argued that avoidance requires a consumer to act, whereas the Directive does not. In my view this is not correct. Avoidance under Dutch law may be exercised with ease. No formality is required by law and it is enough, for example, to declare that a contract term is not binding (Article 49 Book 3 Civil Code). It would seem that it is for the Dutch authorities to choose the legal instrument best equipped to convey the Directive's message to Dutch citizens.

8. Consequences of the Directive

Firstly, the Directive obviously casts duties on national legislatures. National Parliaments have been aware that the Directive was being formulated for quite some time, and existing legislation in most countries can be easily adopted.

Countries such as Ireland, the Nordic states, Switzerland and the United Kingdom will have to decide what to do with the black list. Ireland and the United Kingdom will be obliged to introduce group actions. The United Kingdom seems to be particularly averse to such forms of litigation. In a consultation document of the Department of Trade and Industry, it was stated bluntly that: 'UK law at present contains no general provision for representative actions: only a party to a contract may sue under that contract'.[63] This statement has been subject to criticism, as has the Department's proposal to implement the Directive by passing regulations under the European Communities Act 1972, rather than amending the Unfair Contract Terms Act 1977.[64] In other jurisdictions, the idea of implementation by enacting a separate statute has also been rejected.[65]

The Netherlands will have to codify the *contra proferentem* and 'plain language' rules. Along with some other countries, it will also have to adapt its definition of 'standard contract terms' to include oral terms.[66] The impact of the Directive will be felt most strongly in Italy, which was the first EC Member State to legislate on unfair contract terms. At one time the Italian legislation was the most advanced in Europe, but it is now somewhat archaic, at least with regard to regulation of standard form contracts. The Directive will also have indirect effects. One such effect is that the

[62] See A. DAVIS, "The Amended Proposal for an EEC Directive on Unfair Contract Terms in Consumer Contracts", *European Consumer Law Journal* 1992, 65, 72.

[63] Department of Trade and Industry, *Implementation of the EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC)*, A Consultation Document, London, October 1993.

[64] R. BRAGG, "Implementation of the E.C. Directive on Unfair Terms in Consumer Contracts/The Department of Trade and Industry Consultation Document", [1994] *Consumer Law Journal* 29-38; but see note 29 *supra*.

[65] H.W. MICKLITZ, "AGB-Gesetz und die EG-Richtlinie...", op. cit. note 59, at 533.

[66] But according to M.H. WISSINK, "Algemene voorwaarden en de richtlijn oneerlijke bedingen", *Bedrijfsjuridische berichten* 1995, 1, at 3, the Dutch government is of the opinion that the Dutch law is not in need of reform. Wissink points out that the Code's general good faith clause may always be applied.

Commission for European Contract Law (the Lando Commission) has adopted a provision concerning commercial contracts which closely copies the Directive.

A novel aspect of the Directive is that Article 10 (2) requires Member States to make references to the Directive in implementing measures.[67] In the long run, however, the obligation of courts, and indeed lawyers, in the Member States to interpret domestic legislation in conformity with Directives is more important. Such interpretation will have to take the case law of the Court of Justice into account.[68] This brings us to a final question. What are the prospects for European unification of contract law, or even civil law in general? This question will be explored in the following two paragraphs.

9. Towards the Development of a European Private Law?[69]

Will future directives cause similar implementation difficulties? In order to answer this question, we should first look at the prospects for the promulgation of further directives in the area of civil or contract law. The Directive on unfair terms in consumer contracts raises the interesting question of whether or not Europe is heading towards the development of a uniform civil code. The introduction of measures similar to the Directive on Unfair Terms in Consumer Contracts has not always been uncontroversial. For example, the constitutional validity of the directive on product liability was doubted by some politicians at the time it was passed.[70] The Single Act and especially the Treaty of Maastricht have put an end to such doubts, but Maastricht has raised a new issue: is civil law not something to be left to Member States under the principle of subsidiarity?[71] Further criticisms can also be raised. Not everyone, even when convinced of their constitutional validity, is attracted by the quality of EC directives. The draft directive on liability for services has been criticised on this count from every side; by academics,[72] producers and consumers[73]. These questions raise the issue of whether or not the EC should contemplate the gradual build up of a corpus of civil law. So far, the emphasis has been placed on public law, but several of the prerequisites for the development of a body of European civil law already exist. The European Court of Justice has shown itself to be highly competent. For example it has brought European Administrative law into operation from scratch, which in turn has influenced the development of

[67] Compare J.S. WATSON, *Tijdschrift voor Consumentenrecht* 1991, 25-26.

[68] KOLPINGHUIS, *Jur.* 1987, 3969.

[69] The following is to a large degree based on my introductory chapter to A.S. HARTKAMP et al. (eds.), *Towards a European Civil Code*, Dordrecht/Nijmegen, 1994 and on my Editorial, 1 *ERPL* 1–9 (1993).

[70] See G. HOWELLS, *Comparative Product Liability*, Aldershot, 1993, 20 ff.

[71] See Giscard d'Estaing, A-3-163/90 of 22 June 1990, B of 4 July 1990, note 20, B-3-1298-1300/92, B-3-1360-63/92.

[72] E. DEUTSCH, J. TAUPITZ (eds.), *Haftung der Dienstleistungsberufe - natürliche Vielfalt und europäische Vereinheitlichung*, Heidelberg, 1993; S. LITTBARSKI (ed.), *Entwurf einer Richtlinie über die Haftung bei Dienstleistungen*, Köln 1992.

[73] For example, the European Consumer Law Group, a network of consumer advocates was highly critical of the draft.

national law.[74] A European bar already exists. What is lacking is consensus over the direction which this development should take. Should not consensus be achieved at least with regard to the framework in which future civil law directives will operate? Such a framework might eventually be provided by a European Civil Code.

This issue raises several interesting questions. First there is the problem already referred to above: is there a constitutional basis for a European Civil Code in the Treaty of Rome, as amended by the Treaty of Maastricht? Second, is codification of the law, more specifically of civil or private law, a worthwhile idea? And finally, is this feasible on a European level? Elsewhere I have argued that common and civil law are indeed too far apart at present to allow for the prosecution of this objective. However, in ten or twenty years time this may be different. The difficulty seems to be that the systems provide diverse problems, not only where solutions to common problems are concerned, but also regarding the formulation of these problems and the concepts employed. But this is not always the case. The Common law jurisdictions in the Community, England, Wales, and Ireland, are largely similar. The same applies to the civil law countries such as France, Belgium, Luxembourg and to Denmark, Finland, Sweden and the European Economic Space country Norway. An example of close cooperation between a civil law and a common law country[75] is found in the relationship between Scotland and England. As these examples illustrate,[76] a common language or linguistic heritage, and a common legal culture often form the basis for such co-operation.

Latin of course was once the common European language, and Roman law provided a common tradition. Although the present situation bears little resemblance to pre-XIXth century Europe, and therefore a 'return' to that period is highly unlikely, the present interest in a new European civil law is a fascinating challenge to legal historians. As a German author, Schulze, has observed:

> The present and the past are linked in the concepts of European legal culture and European legal history in two ways: the awakening of interest in research into European legal history is prompted by the experience of the present, namely the present-day efforts towards the development of a body of common European law. The resulting research can in turn influence present-day thinking in that, contrary to another tradition and present-day experience, namely the legal thinking moulded by the nation-state, it contributes from a historical standpoint to a consciousness of a shared European identity. The concept of European legal culture is thus directed

[74] Two examples are the development of the law of legitimate expectations and the reception of the idea of proportionality into English law - see J. SCHWARZE, *European Administrative Law*, London/ Luxembourg, 1992, 869-870. The reception has met with scepticism by some authors who argued that proportionality was not transferable - see S. BOYRON, "Proportionality in English Administrative Law: A Faulty Translation?", (1992) 12 *Oxford Journal of Legal Studies* 237-264.

[75] See ZAPHIRIOU, "Harmonization of Private Rules Between Civil and Common Law Jurisdictions", 38 *American Journal of Comparative Law* (1990).

[76] Other examples include both North America - the harmonisation achieved by the Uniform Commercial Code and the Restatements is notorious - and Latin America. As to the latter see A.M. GARRO, *Armonización y Unificación del derecho privado en América Latina: esfuerzos, tendencias y realidades*, Roma, 1992; the same, "Unification and Harmonization of Private Law in Latin America", 40 *American Journal of Comparative Law* 587-616 (1992).

at the definition of an identity for the present based on the past whilst research in European legal history is both defined by and directed towards the present.[77]

Is all this academic speculation designed at upgrading the profile of the law curriculum? A brief look at what the 'actors of the law' are doing shows us that their interest in the development of a European (civil) law is very real. Attorneys all over Europe are forming alliances. Judges are joining their efforts in setting up courses on European legal issues for their continuing education. The most important event is that future attorneys and judges, the law students of today, are very much affected. Many present day students are participating in various exchange programmes, of which ERASMUS - shortly to be replaced by SOCRATES - and TEMPUS are the most successful, and a common legal education is being contemplated in various countries.[78]

Does the European Community have the power to adopt a European Civil Code? Such a question cannot be answered at length in this paper. Those who are in favour of the development of a European code point out that a supporting resolution has already been passed by the European Parliament.[79] There is no doubt that this is an interesting opinion. The Parliament's initiative is reminiscent of an innocuous parliamentary question which lead to the recent recodification of Dutch civil law. Yet not too much should be made of it.

Ever since the famous debate between Thibaut and Savigny in early Nineteenth century Germany, the question of whether (re)codification should be pursued has remained on the civil lawyer's agenda. Germany eventually codified its laws, after an example had been set by Belgium, France, Luxembourg, the Netherlands, Portugal and Spain. Greece and Italy followed suit in 1942, followed by Portugal (1966), East Germany (1975), and the Dutch re-codification took place in 1992. The most recent reform proposals in Germany only have a limited scope, but it should not be overlooked that in the shadow of large scale recodification, updating projects on a far smaller scale have brought most other codes in line with modern trends. Therefore, it cannot be concluded that codification is entirely out-dated as a means of reforming the organisation and substance of laws.

Common law countries and Denmark, one may object, will be radically opposed to any codification whatsoever. It has indeed been argued that the adoption of a

[77] R. SCHULZE, "European Legal History - A New Field of Research in Germany", 13 *Journal of Legal History* 270-295 (1992). See also the author's *Die europäische Rechts- und Verfassungsgeschichte - zu den gemeinsamen Grundlagen europäischer Rechtskultur*, Saarbrücken 1991, 19.

[78] See for instance F. OST, M. VAN HOECKE, "Pour une formation juridique européenne", *Journal des Tribunaux* 1990, 105-106; H.G. SCHERMERS, "Jurist voor morgen", *Nederlands Juristenblad* 1991, 521-522; R. VERSTEGEN, "Naar een Europese rechtsopleiding", *Rechtskundig Weekblad* 1990-1991, 657-660; G.R. DE GROOT, "European Legal Education in the 21st Century", in B. de Witte, C. Forder (eds.), *The common law of Europe and the future of legal education/Le droit commun de l'Europe et l'avenir de l'enseignement juridique*, Deventer, 1992, 7-30.

[79] Article 1 of this 'Resolution on action to bring into line the private law of the Member States', OJ C 1989, 400, reads: 'Requests that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law, the Member States being invited, having deliberated the matter, to state whether they wish to be involved in the planned unification'. In April 1994, a new resolution of the type described in this quote was adopted by the European Parliament.

European *Code* would not be possible in England.[80] Yet, one should not forget that as recently as the 1950s, with the establishment of the Law Commissions, the United Kingdom contemplated codifying national contract law.

Concluding, there is a chance that the codification idea will be adopted in many parts of Europe. This does not mean that such codification should necessarily be pan-European. Indeed, regional efforts at harmonisation now seem to have better prospects than global efforts.

So far, codification along social-economic lines seems to have been a better way. However, with the increased tendency across Europe to harmonise private law, it is important to preserve rich local traditions, and this can best be done by keeping intact existing categories, even though in most countries these are not as sharp as they once may have been. Should codification of the law in Europe follow the traditional private/public distinction, and with regard to both substantive and procedural law?

Yet, large practical difficulties appear to accompany codification, even along traditional lines. One is tempted to agree with the Italian writer Mengoni, who wrote that 'riconoscere che 'un codice per l'Europa' non è un'alternativa realistica'.[81]

Therefore alternatives to codification[82] are still worthy of consideration. But it is not yet clear how one should proceed, once regulation - be it in the form of codification, restatement or otherwise - has been opted for. Some advocate the use of a single text as a point of departure. Several authors, all Italians, have argued that the Italian Civil Code is best equipped to serve as a model for a European Code on Contract Law.[83]

The Commission on European Contract Law (the Lando Commission) often consults the text of the new Dutch and Québec Civil Codes. There is a growing body of literature written by those engaged in the various harmonisation commissions. These authors have recorded their experiences, and may well serve to indicate how future codification or regulatory work can be organised. All of this may facilitate the easy implementation of future directives affecting civil law.

10. Conclusion

The EC Directive on unfair terms in consumer contracts is an important document, since it is a first step towards harmonisation of European contract law. Trade and industry will not endorse the Directive with enthusiasm, because it does not provide for total harmonisation. Likewise, consumers and organisations which represent their

[80] J.H.M. VAN ERP, in A.S. Hartkamp et al., *Towards a European Civil Code?*, Dordrecht/Nijmegen, 1994, Ch. 8.

[81] L. MENGONI, *L'Europa dei codici o un codice per l'Europa?*, Roma, 1993, 3.

[82] Such alternatives are set out by MÜLLER-GRAFF in Ch. 2 of A.S. Hartkamp et al., *Towards a European Civil Code*, 1994. One such alternative may be the elaboration of Principles of European Contract Law, Tort Law, Procedure, etc., as set out in Ch. 3 of the book mentioned above by Hartkamp (*supra* note 69).

[83] For what reason? 'Pour deux raisons fondamentales: tout d'abord pour la position intermédiaire qu'il revêt par rapport non seulement aux deux principaux courants juridique français et allemand (...) mais par rapport aussi au droit anglais; ensuite pour sa modernité intrinseque, une modernité - dirais-je - raisonnablement prononcée, exempte des exces qui ont amené certains pays a faire en toute hâte marche arriere' (G. GANDOLFI, "Pour un code européen des contrats", *Revue trimestrielle de droit civil* 1992, 707, 726).

interests will be disappointed by the limited scope of the Directive, and in the unclear status of the black list. But the Directive can only serve to facilitate the development of European contract law. In the wake of directives which cover certain specific contracts, such as financial services, insurance and time-sharing, and directives which aim to regulate specific aspects of contract law (distance selling, doorstep sales), there finally exists a centrepiece to European legislative initiatives on the law of contract.[84]

[84] As to alternatives to legislation see O. LANDO, "Principles of European Contract Law/An Alternative or a Precursor of European Legislation", *Rabels Zeitschrift* 1992, 261-273.