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Unfair Terms – Assessment of Unfairness in View of Art. 83 and 86 CESL

The topic to be addressed seems to be one of the cornerstones of the Proposed Regulation for a Common Sales Law (CESL).[1] It clearly has an enormous impact on the question whether Art. 114 TFEU is the appropriate legal basis for the enactment of CESL, as Sec. 3 of this article requires that the level of consumer protection within the EU must be high. Without going into any detail already at this point, it must be stressed that the mass of unfair terms, listed in the "black list" of Art. 84 and in the "grey list" of 85 CESL goes far beyond the list contained in Art. 3 of the Directive on Unfair Terms No. 93/13.[2] Thus, this will be the first issue to be taken into account in evaluating the present test of unfairness with the one offered under the perspective of CESL. The second issue to be addressed will then be to assess the relevance of Art. 86 CESL,, as for the first time the EU-Commission has proposed an unfairness test becoming operative in b2b-transactions.

All this is important because the European Parliament just has voted with an overwhelming majority that the CESL, as amended by the proposals of the JURI-Committee,[3] shall become the basis for further debates with the Council.

Thus, at the outset it must be stressed that CESL shall remain an optional instrument (on the basis of a Regulation), but the scope of CESL has changed pursuant to Amendment No. 1 to only cover internet-transactions, i.e. online sales, be they concluded between a trader and a consumer or between two traders.

1. Evaluation of Art. 83 CESL
   a) General Remarks

   It does not need any further evaluation in order to find out that Art. 83 CESL is exactly in line with Art. 3 of the Directive No. 93/13. Thus, the unfairness test will be applicable, provided that the contract term has not been individually negotiated pursuant to the requirements of Art. 7 CESL. However, contrary to the Directive No. 13/93 Art. 2 lit. d) of the Regulation provides for a definition of "standard contract terms", namely that they "have been drafted in advance for several transactions….which not have been individually negotiated by the parties". But in line with Art. 3 Sec. 1 of the Directive Art. 7 CESL states that the term "individually negotiated" requires that the other party "has been able to influence" the content of any "contract term". If this can be found, then there will be no basis to apply the test of unfairness.

   This approach is almost exactly the same as provided for in German Law. The distinction between general contract terms and a term that has been individually negotiated can be

[1] KOM/2011 635 final 2011/0284 (COD); vide Staudenmayer Neue Juristische Wochenschrift (NJW) 2011, p. 3491 sequ.; Graf von Westphalen Zeitschrift für Wirtschaftsrecht (ZIP) 2011, p. 1985 sequ.
[2] Official Journal of the European Commission, April 21, 1993 – L No. 95/29.
[3] Report, dated September 24, 2013 – A7-0301/2013.

found in Art. 305 Sec. 1 German Civil Code[4] and also in Art. 310 Sec. 3 No. 2 with regard to a consumer transaction.[5]

b) Main Content of Art. 83 Sec. 1 CESL

aa) Significant Imbalance

Pursuant to Art. 83 Sec. 1 CESL the test whether a contract term is found to be unfair rests in three requirements: First, there must be a "significant imbalance in the parties rights and obligations arising under the contract". Second, such imbalance then must be to the "detriment of the consumer" and – finally – it must be found that this result is also "contrary to good faith and fair dealing".

Even though there are striking similarities between this article and Art. 3 Sec. 1 of the Directive, the differences must be articulated. The judgements rendered so far by the European Court of Justice demonstrate that the test of such "significant imbalance" of the rights and obligations of the parties pursuant to Art. 3 of the Directive will finally be decided by the national courts.[6] If CESL were enacted, then the European Court of Justice will have the final word in determining whether any contract term is unfair pursuant to Art. 83 Sec. 1 CESL, as there is such a "significant imbalance". Moreover, it must be noted that the rights and obligations of the parties under a contract have to be seen in light of all the provisions of CESL, as any test of unfairness is expressly excluded by Art. 80 Sec. 1 CESL. This article states that all provisions relating to the unfairness test pursuant to Art. 82 sequ. shall not come into play, if these contract terms "reflect rules" of CESL "which would apply if the terms would not regulate the matter". This implies that the yardstick is based on all the rules of CESL to be autonomously interpreted in line with Art. 4 Sec. 1 CESL. Consequently, the test of any "significant imbalance" of the rights and obligations of the parties under a contract will be viewed against the balance of the rights and obligations contained in the rules of CESL. If there is a "significant imbalance", then it follows therefrom that this will also be to the detriment of the consumer. Thus, under the regime of Art. 83 Sec. 1 CESL uniformity in applying the test of unfairness will be prevail in a much higher degree than before.

bb) Good faith and fair dealing

It has to be noted that Art. 3 Sec. 1 of the Directive does not define the term "good faith". But it has been said that this yardstick is the final and decisive test of finding that a contract term has been unfair.[7] Consequently, a comprehensive balancing of the interests and of the parties' right and obligations is required. But, it was rightly questioned whether the application of this test would lead to uniform results within the EU, as the cultural and legal differences are too big.[8] Finally, this restriction has been recognized by the European Court of Justice in deciding that it will be left to the national courts to make their final judgment whether any contract term is unfair and against the basic principles of good faith.[9]

[4] BGH NJW 2000, p. 1110.
[5] BGH NJW 2010, p. 1131.
[6] EuGH NJW 2004, 1647 – Freiburger Kommunalbauten.
[7] Wolf in: Wolf/Lindacher/Pfeiffer, AGB-Recht, 5th edition, Munich 2010, Art. 3 Note 12.
[8] Wolf ibid Note 13.
[9] Note 5.

However, Art. 2 lit. b) of the Regulation provides for a definition of "good faith and fair dealing", holding that a "standard of conduct" is required that is "characterized by honesty, openness and consideration of the interests of the other party to the transaction". It must be added that the concept of Art. 2 Sec. 1 CESL states that the parties "have to act in good faith and fair dealing", and Sec. 3 makes it clear that the parties shall not be entitled to "exclude the application of this Article or derogate or vary its effects".

Therefore, it must be said that the concept of "good faith and fair dealing" is extremely strong. It applies both to the unfairness test of standard terms and also to terms that have been individually negotiated pursuant to Art. 7 CESL. Of course, the application of Art. 2 lit. b) of the Regulation will not, from the very beginning after the enactment of this Regulation, lead to uniform decisions by the lower courts of the Member States. Clearly, leading precedents of the European Court of Justice are required in order to lead the way. Nevertheless, this overriding principle should not be deleted simply due to the fear that legal uncertainty will be created[10] - a fear rather often spelled out by practioners. But on the other hand the question must be asked whether there is any other universal accepted legal principle to adjudicate the unfairness of contract terms other than good faith and fair dealing. I do not see any.

It is my understanding that the main aspect of Art. 2 lit. b) of the Regulation in defining the content of "good faith and fair dealing" clearly relates to the requirement that lack of "consideration for the interests of the other party" will determine whether there is unfairness of a specific contract term in a given case. This requirement of due consideration seems to interact with the other element contained in Art. 83 CES, namely that the respective contract term must create a "significant imbalance" of the parties' rights and obligations under the relevant contract. Consequently, the more the contract term disregards the required consideration for the interests of the other party in view of the rules of CESL, the more there will be unfairness invalidating such contract term pursuant to Art. 79 Sec. 1 CESL.

cc) Abstract Assessment of Unfairness

In view of Sec. 2 of Art. 83 CESL a further problem must addressed. Whilst Sec. 2 clearly deals with a number of elements relating to the specific contract in question, the definition of a standard contract term pursuant to Art. 2 lit. d) of The Regulation seems to contain a number of general elements. According to this Article the party having supplied standard terms of contract has to draft them "in advance" and they shall be designed for "several transactions", not involving only one party, but rather "different parties". Thus, the questions arises whether the interpretation of unfairness pursuant to Art. 83 Sec. 1 CESL will not be based on a rather general test.

The answer must be given in the affirmative. If a specific standard contract term is drafted in disregard and in lack of "consideration of the interests of the other party", thus violating the principles of good faith and fair dealing, then the "significant imbalance of the rights and obligations of the parties" caused thereby, should be answered in a uniform manner for any

[10] Vide for a comparative law insight Hesselink, in: Schulz/Stuyck, Towards a European Contract Law, Unfair Terms in Contacts Between Businesses, p. 131, 143 sequ.

and all instances. This method of interpretation seems to be supported by the wording of Art. 84 CESL: If any standard contract term listed in this Article is "always" unfair, then this implies that there will be no exceptions to the general rule so formulated.

It is open to doubt whether the same method of interpretation will be applicable for those standard contract terms that are listed in Art. 85 CESL. The many clauses contained in this Article are not always unfair, but there is a presumption of unfairness. Thus, depending upon certain facts relevant to a specific case the test of unfairness under Art. 85 CESL might run one way or the other. Whether the facts to be so ascertained and assessed will relate only to those factors that are listed in Art. 83 Sec. 2 CESL remains yet to be seen.

My present answer to this problem is mainly a "yes". The reason for so arguing relates to the simple finding that Art. 83 CESL contains the general rule of unfairness for any standard contract term, whilst Art. 85 CESL gives a vast number of examples of such unfair terms, presumed to be unfair. Thus, it seems to be adequate to adjudicate the application of this presumption and, moreover, to deny the presumption of unfairness under Art. 85 CESL only on the basis of those individual factors contained in Art. 83 Sec. 2 CESL.

dd) Art. 83 CESL - General Approach v. Individual Approach

If that assumption is correct, then it is mandatory to also answer the question in which way the assessment of unfairness under Art. 83 CESL should operate, as Sec. 1 relates to an abstract understanding of unfairness, whilst Sec. 2 refers to a number of individual factors to be taken into consideration in each instance. In order to better understand the implications of this problem, it seems appropriate to look in which way Art. 3 and Art. 4 of the Directive have resolved this apparent antagonism, as Art. 4 of the Directive also relates to almost the same individual aspects in view of the test of unfairness as Art. 83 Sec. 2 CESL.

At least in German Law there is no precedent so far that has answered this question in interpreting the relation between Art. 3 and Art. 4 of the Directive. It must, however, be stressed that Art. 310 Sec. 2 No. 3 German Civil Code verbally refers to the individual circumstances in line with Art. 4 of the Directive. It states that the test of unfairness must "also" take into consideration the individual "circumstances" prevailing during the conclusion of the contract. But two remarks seem to be appropriate in order to explain the position in German Law somewhat more in detail:

In German literature it is held that the test of unfairness pursuant Art. 3 and Art. 4 of the Directive should be based on two consecutive steps: First, the specific standard term should be interpreted in an abstract and general way.[11] Then, the second step should take into consideration any individual factors and circumstances that finally might lead to the conclusion that the respective contract term shall not be seen to be unfair.[12] But, as stated before, there is no case law showing the way-out of the antagonism between a general and an individual interpretation and assessment of the unfairness test. This lack of evidence may be attributable to the simple fact that the German Law so far has developed a mass of case law holding thousands and thousands of general contract terms to be unfair and thus invalid.

[11] Pfeiffer in: Wolf/Lindacher/Pfeiffer op, cit. § 310 Section 3 Note 36; Fuchs in: Ulmer/Brandner/Hensen, AGB-Recht, 11th edition, Cologne 2011, § 307 Note 397 sequ.
[12] Fuchs supra Note 402.

These decisions are based solely on an abstract and general interpretation of unfairness which is entirely legitimate as Art. 8 of the Directive only requires a minimum harmonization. Member States are therefore allowed to go further if they so wish.

It goes without saying that the later argument will not be applicable under the rules of CESL as this Regulation will and has to cover any and all aspects of the unfairness test in an autonomous way, as provided for in Art. 4 Sec. 1 CESL. But it seems reasonable to assume that the interpretation of Sec. 2 of Art. 83 CESL could be based on the two step approach outlined for the mitigation of the antagonism contained in Art. 3 and Art. 4 of the Directive. Thus, the nature of what is to be provided under the contract, the circumstances prevailing upon conclusion of the contract and also other contract terms must be taken into consideration in assessing whether a contract term held unfair pursuant to the abstract and general test of Sec. 1 of Art. 83 CESL will in the final result be negated.

ee) Requirement of Transparency

It must be noted that the requirement of transparency contained already in Art. 5 of the Directive twice has been mentioned within the rules of CESL. First, there is the general rule of Art. 82 CESL stating that the obligation in drafting general terms of contract implies that these terms must be "drafted and communicated in plain, intelligible language. Apart from this general rule, Art. 83 Sec. 2 No. 1 CESL states that the individual circumstances that have to regarded in assessing the unfairness also relate to the question whether the "trader complied with the duty of transparency" under Art. 82 CESL.

2. Evaluation of Art. 84 CESL

In assessing the unfairness of general contract terms pursuant to the list[13] contained in Art. 84 CESL it seems appropriate to first mention the difference between this „black" list and the Annex of Art. 3 Sec. 3 of the Directive. There has been a debate in the past whether the clauses mentioned in said Annex were only indicative and thus examples of unfair terms not being binding for the lawmakers[14] or whether the contrary is true.[15] This controversy shall not be answered here in detail. However, the better arguments seem to support the view that the list of Art. 3 Sec. 3 of the Directive is not binding as its headline clearly reads „Hinweis".[16]

But in the context of this paper it must be stressed that Art. 84 CESL contains a list of general terms that are „always" unfair. Thus, the assessment of the relevant unfairness test is simple, as these clauses, if used, carry their own verdict. It also seems worth mentioning that this list is nothing but a reflection of the general provision of Art. 83 Sec. 1 CESL, as all these general terms cause a "significant imbalance" of the rights and obligations of the parties to a contract.

Consequently, the assessment of unfairness in all consumer sales transactions has its basic routs in Art. 83 Sec. 1 CESL. And it seems appropriate to assume that Art. 83 Sec. 2 CESL will

[13] The former list of Art. 84 CESL has been amended in some details by the amendments of the JURI-Committee, i.e. by Amendments No 157 sequ., vide Note 3 above.
[14] Wolf, in: Wolf/Lindacher/Pfeiffer, op. cit., Art. 3 Note 31.
[15] Pfeiffer, Grabitz/Hill, Das Recht der EU, Art. 3 Note 80.
[16] Kappus, NJW 1994, p. 1847, 1848.

not come into operation in all those instances where contract terms have been used that are listed in Art. 84 CESL. Were it otherwise, then the essence of Art. 84 CESL would be negated, as there might be instances in which the general terms listed therein ars held fair due to the circumstances laid down in Art. 83 Sec. 2 CESL.

3. Evaluation of Art. 85 CESL

The question therefore arises whether the same is true for the contract terms listed in the „grey" list of Art. 85 CESL. These contact terms are only „presumed" to be unfair. Such presumption of unfairness might come into operation, if the evidence available to the consumer is restricted by the trader or if the contract term imposes a burden of proof on the consumer „which would legally lie with the trader" (lit a). The same applies if the trader „inappropriately excludes" or limits the remedies available to the consumer in case of non-performance by the trader (lit b).

In assessing the unfairness test in these two cases, taken as an example for all the terms listed in Art. 85 CESL, it seems reasonable to assume that there is a need to evaluate in detail whether an exclusion of liabilities or the respective restriction of the remedies available to the consumer is to be held „inappropriate" and thus to be unfair. Of course, such judgement is dependent upon the finding which remedies available under the rules of CESL have been restricted and which acts of non-performance were addressed by the relevant limitation clauses.

In this respect the question arises how best to adjudicate the presumption of unfairness under Art. 85 CESL. Certainly, such presumption of unfairness of a general term of contract runs to the benefit of the consumer. Hence, it is necessary that the trader carries the burden to negate this presumption of unfairness by presenting facts to the contrary. If one accepts the starting point that Art. 83 CESL in all instances is the basis for any unfairness test in a b2c-transaction, then it follows that the trader will be restricted to present the elements contained in Art. 83 Sec. 2 CESL in order to negate the presumption of unfairness in Art. 85 CESL.

Provided that this analysis proves to be correct, then the trader might argue that the limitation of remedies available to the consumer in case of non-performance of the trader pursuant to Art. 85 lit. b) CESL is justified due to the nature of the contract pursuant to Art. 83 Sec. 2 lit. b) CESL. Or he might argue that other contract terms are such to mitigate the presumption of unfairness of such a limitation clause.

However, it seems unlikely that the trader might resort to other arguments outside the scope of Art. 83 Sec. 2 CESL in order to take issue with the presumption of unfairness of any contract term listed in Art. 85 CESL. Therefore, the trader will not be entitled to argue that the consumer himself has fully been aware of such limitation clause and has voluntarily accepted the contract and the respective clause. Unless there is evidence that the consumer had the chance to individually negotiate the limitation clause pursuant to the requirements of Art. 7 CESL, such defence will not be available to the trader.

Art. 7 CESL requires that the consumer was „able to influence" the content of the respective contract term. Such influence may only been seen if there is satisfactory evidence that the

clause has been modified or amended by the consumer one way or the other in order to better protect his best interests. Lacking such evidence I believe that it will not be warranted to hold that any such clause, regardless of any such change or amendment, may be held to be individually negotiated pursuant to Art. 7 CESL Apart from this, I believe that the burden of proof in such cases shall rest with the trader, provided there is a prima facie showing that the respective contract term has been supplied by the trader pursuant to the requirements of Art. 2 lit. d) CESL.

4. Evaluation of Art. 86 CESL

A proper assessment of the unfairness test contained in Art. 86 CESL, being applicable for any b2b-transactions within the scope of Art. 7 of the Regulation, seems, at first sight, to be very different from the one contained in Art. 83 CESL. But he answer to be found is open to doubt in two distinct steps.

a) Differences between Art. 83 CESL and Art. 86 CESL

In trying to evaluate the differences between these two concepts, it must be said that there are two striking similarities: First, the definition of contract term is the same in both instances: Hence, the definition of Art. 2 lit. d of the Regulation is applicable, stating that any standard contract term must be drafted in advance „for several transactions“ and, second, that such standard contract term shall not be individually negotiated between the parties. This is the essence that has been spelled out in Art. 86 Sec. 1 lit. a) CESL.

However, the differences start in analysing the appropriate meaning of Sec. 1 lit. b. In accordance with the requirements listed therein the unfairness test depends upon a finding that the respective contract term „grossly deviates“ from " good commercial practice“, and must be „contrary to good faith and fair dealing“. These two requirements need to be further analysed.

aa) „Good Commercial Practice“

What the drafters of this Regulation meant by „good commercial practice“ has not been defined and, thus, is open to doubt. However, it seems well reasoned to assume that this requirement must be interpreted in line with the general principle laid down in Art. 4 Sec. 1 CESL. Pursuant to this Article all provisions of CESL must be interpreted „autonomously“ and this interpretation, furthermore, must be in accordance with the „objectives“ of CESL and „its principles underlying it“. What does it mean?

One of the foremost „objectives“ of CESL is laid down in Recital No. 9 and is designed to create „within each Member State’s national law a second contract law regime for contracts within its scope“. This law must be chosen by both parties. Besides this, Recital No. 29 makes it clear that any questions of interpretation should not be governed by taking recourse to national law.

Clearly, whatever elements are contained within the requirement of „good commercial practise“, all of them relate to questions of fact. Is it „good commercial practice“ to entitle the seller to disclaim his liability for consequential damages and loss of profits in case he has delivered a non-conforming good to the buyer? If one looks at general contract conditions

that govern sales contracts and that have been drafted by the seller, then the answer is a clear „yes“. If one, on the other hand, looks at purchase conditions, then the answer is a clear „no“. You will never find purchase conditions stating that the seller may be in breach of contract without allowing the buyer to take recourse to the legal remedies available to him under his national law.

This having said, it follows therefrom that the test whether a contract term is in line or „grossly deviates“ from „good commercial practice“ may only be answered by taking the interests of both parties into account. Furthermore, it seems reasonable to assume that any such practice must have been established for a rather long period within the relation of seller and buyer in a given branch. If, however, this requirement of a rather long practical usage is lacking, then it seems hard to assume that any such „commercial practice“ does really deserve the connotation of being „good“. This element clearly requires voluntary acceptance and recognition of certain general conditions of contract as being a reasonable balance of divergent interests of the parties. Without such recognition no commercial practice shall be deemed to be „good“. It must, therefore, take the interests of both parties into account in order to strike a balance between them. It is by no means the drafter of the general contract terms that shall profit from being the party to define what is „good“ in a given case.

This raises the question whether any such recognition of a commercial practice as being „good“ can be reasonably addressed without giving due regard to all provisions of CESL. Art. 4 Sec. 1 CESL seems to require this element, as it is a general element of interpretation. The answer must be a clear „yes“. No single contract term may be seen as representing „good commercial practice“ that has not been tested against the background of all rules of CESL.

Consequently, the conclusion seems warranted that the benchmark for any „gross deviation“ from „good commercial practice“ must take into consideration the rights and obligation of the parties as mirrored by the provisions of CESL. The test whether any contract term „grossly deviates“ from these rules is the final test for accepting any commercial practice within b2b-transactions as being „good“.

bb) <u>“Customary commercial practice”</u>

It must be noted that the JURI-Committee and thus the vote taken by the European Parliament has accepted a different version of Art. 86, as the term “good commercial practise” has been changed to only include a “customary commercial” practise.[17] Whether such change will have any effect on the interpretation of the general principle of trust and confidence, as being the decisive pillar for any invalidation of general terms of contract, remains to be seen.

My personal assumption is that it will have no effect: If there were any “customary” commercial practise supporting the validity of any general contract term, then it is hard to find that such practise could violate the general principle of good faith and fair dealing. This seems to be true regardless of the fact that Art. 2 (Annex) has changed the concept of fair

[17] Vide Note 3 above, p. 92.

dealing and good faith to no longer support the so called sword-theory, but leaving the so called shield-theory intact.[18]

cc) „Good Faith and Fair Dealing"

This term is readily defined in Art. 2 lit. b) of the Regulation. It requires amongst other elements that the respective conduct of the party should be open and in „consideration for the interests of the other party to the transaction".

There is no doubt that such „consideration for the interests of the other party" are reflected within the rules of CESL. This conclusion is supported by Art. 80 Sec. 1 CESL foreclosing the argument that any contract term being in line with the rules of CESL may be considered to be unfair. Even stronger, Art. 80 Sec. 1 CESL states that Art. 82 sequ. shall not be applicable in such a case.

To conclude this part of the assessment of unfairness in b2b-transactions it must be said that Art. 86 Sec. 1 lit. b) CESL applies the test of unfairness by establishing the rules of CESL as the appropriate benchmark, as adherence to these rules does reflect „good commercial practice" and they also reflect due consideration for the interests of the other party, which by itself is a key factor of „good faith and fair dealing".

dd) Requirement of a Gross Deviation

In reading Art. 86 Sec. 1 lit. b CESL the real stumbling block in ascertaining the unfairness test of any contract term is described by the use of the words that the respective term „is of such a nature that its use grossly deviates" from the standards outlined above, namely the standard of „good commercial practice" and the principles of „good faith and fair dealing". If the interpretation offered hereinabove is not entirely incorrect, then the relevant test is whether a standard term is unfair because it grossly deviates from the rules provided for in CESL.

Such reading then will fully be in line with the unfairness test offered in Art. 83 CESL which refers to a „significant imbalance" of the rights and obligation of the parties to a transaction. Therefore, the question remains whether there is a distinct difference between the word „gross" and „significant" used in Art. 86 respectively in Art. 83 CESL. To the best of my understanding this difference, if it exists at all, is only minor. The word „gross" seems to imply somewhat more than the word „significant"; it sounds little stronger.

Thus, it remains to be seen how the courts will interpret Art. 86 Sec. 1 lit. b) CESL in relation to the requirement of a „significant imbalance" of the rights and obligations of the parties. In any case, the benchmark used will be the same in both instances. Whether there is such a „significant imbalance" or whether there is a gross deviation, the respective rules of CESL in relation to the relevant general term of contract will play the decisive role in rendering such contract term ineffective pursuant to Art. 79 Sec. 1 CESL.

ee) Abstract Test v. Individual Test

[18] Amendment No. 83 vide Note 3.

In view of the interpretation of Art. 86 Sec. 2 CESL it seems reasonable to assume that the same problem will arise as outlined already in discussing Art. 83 Sec. 2 CESL. In this respect it was said that Art. 83 Sec. 1 CESL refers to a general-abstract interpretation of any contract term, whilst Sec. 2 then will require to take all relevant, individual factors listed therein into account, such as the nature of the contract or the circumstances prevailing at the time of conclusion of the contract. Thus, the method of interpretation proposed was a two-step-approach.

To apply the same method in interpreting Art. 86 CESL is supported by the simple fact that Sec. 2 takes into consideration all factors that have been mentioned in Sec. 2 of Art. 83 CESL. The only difference is that the drafters did not refer to the requirement of transparency in Art. 86 sec. 2 CESL. But this is entirely irrelevant, as Art. 82 CSEL is by definition restricted to b2c-transactions.

Thus, it may be concluded that Art. 86 Sec. 1 CESL also asks for a general-abstract interpretation of a contract term used in a b2b-transaction. If it is found that the respective contract term is violating the test of „good faith and fair dealing" pursuant to the requirements of Art. 2 lit. b) of the Regulation as the supplier of such term did not act in „consideration of the interests" of the other party, then Sec. 2 will come into play. The factors to be considered in this respect might then allow the final conclusion that the unfairness, based on the general test of Sec. 1, might be negated due to the individual circumstances of the respective transaction.

ff) Difference of Bargaining Power is not an Appropriate Test

It is worth mentioning that neither Art. 83 nor Art. 86 CESL applies the test of unfairness of any contract term in view of the differences in bargaining power. However, Recital No. 31 refers to the differences in b2c and b2b-transactions and mentions „the relative level of expertise of the parties" which is built-in in any b2c-transaction. But there is no further reference to the otherwise often mentioned differences in bargaining power that might exist between the parties in a b2b-sale, requiring a higher level of protection for a very small SME in comparison to a larger entity.[19]

It must be taken into account that Recital No. 31 only refers to b2b-transactions by saying that „good commercial practice in the specific situation" must be taken into consideration. This reference, however, relates to the general definition of Art. 2 lit. b) of the Regulation, already explained in detail above and is embedded in the unfairness test pursuant to Art. 86 Sec. 1 CESL. If one accepts the argument offered hereinabove, namely that the salient benchmark for determining whether a contract term grossly deviates „from good commercial practice" is to be found in the rules of CESL, then the conclusion seems warranted: The test whether there was a difference of bargaining power between the two parties of a transaction will not be a decisive factor in holding that a specific contract term will be unfair and thus ineffective pursuant to Art. 79 Sec. 1 CESL.

b) Effects of Art. 84 and 85 CESL on b2b-transactions

[19] Hesselink, supra, p. 131, 132 sequ.

One of the foremost problems will be the answer to the question whether the long „black“ and „grey“ lists of Art. 84 and 85 CESL will carry any consequences in interpreting Art. 86 CESL. My main arguments run along the following lines:

A rather formalistic view might hold that Art. 86 CESL is separated from Art. 84 and 85 CESL by virtue of the headline of “Section 3“, as this only refers to „unfair terms in contracts between traders“. Thus, this indicates a clear border-line to be respected. Therefore, it seems appropriate to never touch any provision laid down in Art. 84 or 85 CESL in interpreting the unfairness of any contract term used between traders, as this test is restricted to the application of Art. 876 CESL only.

But, I have severe doubts whether this approach is sustainable. The main reason for a counter argument is based on the interpretation of Art. 86 CESL showing almost identical requirements and results as those brought forth by the interpretation of Art. 83 CESL. If it can be held that Art. 84 and 85 CESL are nothing but a reflex of the general rule of unfairness pursuant to Art. 83 CESL, then it seems very likely and also reasonable to hold more or less the same results to be warranted in applying the unfairness test pursuant Art. 86 CESL.

Let’s take two examples out of the list of Art. 84 CES: If there is evidence that there has been gross negligence or even a deliberate act on the part of the supplier of the general terms and that the liability in respect of such acts or omissions has been excluded or limited (Art. 84 lit. a) CESL), then the question must be answered on the basis of Art. 86 CESL whether such exclusion or limitation of liabilities is consonant with the principles of „good faith and fair dealing“.

Then, the answer to be given depends on the finding whether such general term has been drafted in „consideration of the interests of the other party“, being the party that was not able to influence this term pursuant to Art. 7 CESL, but has incurred damages due to such breach of contract. Hence, my personal assessment of the unfairness test in Art. 86 CESL leads to conclude that such general term is unfair and thus ineffective.

Another example: If there were a general term to be held to be unfair in line with Art. 86 lit. a) CESL, as such term has restricted the evidence available to the trader or has shifted the burden of proof against the rules provided for in the applicable law, then I also have no severe doubts to hold that such a contract term must also be held to be unfair pursuant to the requirements of „good faith and fair dealing“ laid down in Art. 86 Sec. 1 CESL.[20]

This, however, does not imply that Art. 84 and 85 CESL should be made to apply in b2b-transactions by virtue of an analogy and, thus, interpreting the unfairness test of Art. 86 CESL in the same manner as in b2c-transactions. Such argument would be in gross conflict with Recital No. 31 outlined above, holding that there are different levels in b2c and b2b-transactions.

But reading of Art. 84 and 85 CESL against the background of Art. 83 and 86 CESL does seem to support, to the best of my understanding, the conclusion that the „black“ and „grey“ list should always be carefully looked at whether the unfairness expressed therein does not

[20] For a rather lengthy comparison with German Law vide Graf von Westphalen, ZIP 2011, p. 1985 sequ.

contain sustainable arguments to hold the same result to be true for a same general term supplied in a b2b-transaction and, thus, to be held unfair and ineffective.

5. Summary

The assessment of unfair general terms of contract in Art. 83 sequ. CESL shows an important result that has not at all been communicated in this paper: Namely the striking similarity that exists in comparison to German Law, namely to the interpretation of Art. 307 sequ. German Civil Code.[21]

But German Law cannot be a basis for the proper assessment of unfairness in general terms of contract in consideration of the rules of CESL. Art. 4 CESL clearly requires an autonomous interpretation of all rules of CESL, including the interpretation of the unfairness test laid down in Art. 83 and 86 CESL.

Whilst Art. 83 CESL is nothing but a reflection of Art. 3 of the Directive, the main trust of consumer protection offered under the rules of CESL relates to the "black" and "grey" list contained in Art. 84 and 85 CESL. These rules are mandatory and thus go well beyond the list contained in the Annex of Art. 3 Sec. 3 of the Directive.

The salient issue in any b2b-transactions will be the appropriate interpretation of Art. 86 CESL. In taking the requirements of "good faith and fair dealing" and of "good commercial practise" of Art. 86 CESL or the "customary commercial practise"[22] (JURI-Report – Parliament) into consideration, this writer concludes that there are striking similarities between the test of unfairness of any contract term in b2c and b2b-transactions. There are two relevant benchmarks for any such assessment of unfairness, namely the requirement of „good faith and fair dealing", as defined in Art. 2 lit. b) of the Regulation which is reflected in Art. 86 Sec. 1 CESL and – second – the rules of CESL that determine whether there is a „significant imbalance" of the rights and obligations of the parties (Art. 83 Sec. 1 CESL). These rules of CESL also determine whether there is a gross deviation of the respective general contract term pursuant to Art. 86 Sec. 1 CESL.

Seen in this way, the rules of CESL will, to a vast extent, become mandatory rules for adjudicating whether any contract term is to be held unfair, both in the light of Art. 83 Sec. 1 CESL and Art. 86 Sec. 1 CESL. It matters little whether the specific contract term is a "gross deviation" of creates a "significant imbalance" of the rights and obligations of the parties under the contract. In ascertaining the practical relevance of the unfairness test of Art. 86 Sec. 1 CESL and the lack of "consideration of the interests" of the other party pursuant to the requirement of "good faith and fair dealing" in a b2b-transaction one may also look at the rules contained in the "black" and "grey list" of Art. 84 and 85 CESL, as they reflect an imbalance of the rights and obligations in consideration of the rules of CESL.

[21] Graf von Westphalen, supra.
[22] Amendement No. 83 vide Note 3.