Creating a Consumer Law for Professionals: Radical Innovation or Consolidation of National Practices?

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> *"Le droit des contrats contemporains incorpore désormais de manière systématique le facteur d'inégalité et le souci de protection."*[2]

1. *P.CESL: realizing the internal market.* In October 2011 the European Commission published its 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' (hereinafter P.CESL). The aim of the Proposal is to create an optional contract law regime or 28th contract law system which the parties to a sales contract can opt for to apply to their contract instead of their national contract law system.[3] Contrary to earlier initiatives taken by the Commission in the area of contract law, a limited number of specific rules that are to regulate commercial relationships in which one or more small and medium-sized enterprises (hereinafter SME) is involved,[4] were incorporated in the P.CESL,[5] alongside a more extensive body of rules which reflect the general law of obligations. These rules are inspired by and to a large extent copied from the Draft Common Frame of Reference (hereinafter DCFR). Underlying their insertion in the P.CESL is the belief that the existence of 27 different national sales regimes, and the transaction costs resulting from dealings with these various national laws, deters SMEs vested in one Member State from offering their goods and related services in another Member State.[6]

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2 M. FONTAINE, "La protection de la partie faible dans les rapports contractuels", in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 652.

3 On the notion of an optional contract law regime and the many problems related thereto, see e.g. M. HESSELINK, A. VAN HOECK, M. LOOS and A. SALOMONS, *"Groenboek Europees contractenrecht: naar een optioneel instrument?*, Den Haag, Boom Juridische Uitgevers, 2011; MARTIJN HESSELINK, "How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation", *ERPL* 2012, 195-212.
See also F. VON HOLGER, « Optionales europäisches Privatrecht (« 28.Modell »)», *RabelsZ Bd.* 2012, 235-252. VON HOLGER compares the optional character of the P.CESL with earlier attempts to instore a European optional instrument in the area of company law, insurance law and intellectual property law.

4 Article 7 D.CESL clearly stipulates that in B2B-contracts the CESL will be applicable only if a t least one of the contracting parties is an SME. The article defines an SME as *"a trader which employs fewer than 250 persons; and has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts of that Member State or third country."*

5 It is however erroneous to state that no protective B2B-legislation currently exists at the European level. A limited number of directives has been adopted which aim at protecting the customer, irrespective of whether the customer is a consumer or another trader and irrespective of their size. See e.g. Advertising Directive, Product Liability Directive, Insurance Directive, Package Travel Directive, Credit Transfer Directive, E-commerce Directive.

6 See the explanatory memorandum to the Proposal. See also SME Panel Survey on the Impacts of European Contract Law, available at http://ec.europa.eu/justice/contract/files/report_sme_panel_survey_en.pdf; M. HESSELINK, *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*

2. *P.CESL: protecting weaker companies?* It is believed by some that the Commission is hereby creating some kind of 'consumer law for professionals', meaning that the Commission is attempting to protect SMEs contracting with large enterprises (hereinafter LEs) or with other, more powerful,[7] SMEs. This seems surprising. The number of rules which are specifically applicable to B2B-contracts is limited, far more limited than is the case of B2C-contracts. Also, the Preamble to the P.CESL clearly states that its SME-rules mainly aim at preserving demand in the internal market. Contractual protection of SMEs against other companies is not mentioned as an express aim of the proposal. It goes without saying that the mere establishment of the internal market does not suffice to protect the weaker party in a contractual relationship.[8] The DCFR and its preparatory works also do not mention the protection of weaker parties as one of its aims. Furthermore, whereas the Treaty on the Functioning of the European Union expressly proclaims consumer protection as one of the aims of the European Union,[9] such appears not to be the case for SMEs. One can only refer to earlier statements of the European Commission, which seem to indicate that the Commission considers it desirable to offer some sort of protection to weaker companies involved in a B2B-contract. In its Green Paper on the Revision of the Consumer Acquis of 2007 for example the Commission considers that *"some businesses, such as individual entrepreneurs or small businesses may sometimes be in a similar situation as consumers when they*

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consumer law acquis – Final version – 5 July 2007, 23-25, available at http://www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf; Green Paper on the Review of the Consumer Acquis COM (2006) 744 final, Brussels, 8 February 2007, 4; M. DECHAMPS, "Analyse d'impact de la proposition de règlement relative au droit commun européen de la vente sur le droit applicable au contrat de consommation », *European Journal of Consumer Law* 2012, 393-396; J. SMITS, "Diversity of Contract Law and the European Internal Market", *Maastricht WorkingPapers – Faculty of Law* 2005/9, available at http://ssrn.com/abstract=831944.

For a diverging view, see R. ILLESCAS ORTIZ and P. PERALES VISCASILLAS, "The scope of the Common European Sales Law: B2B, goods, digital content and services", *Journal of International Trade Law & Policy* 2012, 2-4.

7 The notion of SME is a very heterogeneous one. Both the trader having no personnel and with an annual turnover of EUR 1 and the trader employing 249 persons and with a turnover of EUR 50 million are SME. I goes without saying the former and the latter SME find themselves in an unequal bargaining position and that the former SME should be protected in its dealings with the latter SME.

8 Critics state that the main aim of the EU has always been to safeguard the level of demand in the internal market and not so much the protection of the customer, even in B2C-contracts. See, implicitly, Green Paper on the Review of the Consumer Acquis COM (2006) 744 final, Brussels, 8 February 2007, 5-6; Consumer policy Strategy 2002-2006 COM (2002) 208 final 6. See also H. COLLINS, "Good Faith in European Contract Law", *Oxford Journal of Legal Studies* 1994, 236-238; M. HESSELINK, *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 – Final version – 5 July 2007*, 13-14, available at http://www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf; M. HESSELINK, "European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?", *European Review of Private Law* 2007, 328-330; J. ROCHFELD, « Du statut du droit contractuel « de protection de la partie faible » : les interférences du droit des contrats, du droit du marché et des droits de l'homme », in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 843-851; S. GRUNDMANN, "The Structure of European Contract Law", *European Review of Private Law* 2001, 5220-521; STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, « Social Jutice in European Contract Law : a Manifesto », *European Law Journal* 2004, 655; A. VERBEKE, *Negotiating (in the shadow of a) European Private Law*, Tilburg Institute of Comparative and Transnational Law Working Paper no. 2008/9, October 2008, 9-11, available at http://ssrn.com/link/Tilburg-TICOM.html.

9 Article 169 TFEU.

buy certain goods or services which raises the question whether they should benefit to a certain extent from the same protection provided for consumers."[10]

One can therefore wonder whether the P.CESL truly aims at protecting weaker companies dealing with more powerful companies, either directly or indirectly. A comparison of the relevant articles of the P.CESL with the approach currently taken by the Member States towards the issue of inequality of bargaining power in B2B-transactions, will show that the P.CESL is at least indirectly capable of offering some sort of protection to the weaker company in a contractual relationship. The contribution hence focuses on the question whether protective commercial law currently exists at either the national or supranational level, or whether the idea is completely new, and if so, how these national rules exactly look like. The national examples will show that the creation of an extensive body of rules which aims at covering the entire life cycle of a contract as the P.CESL sets out to do, almost inevitably entails some form of protection for the weaker party in a B2B-contract.

The material scope of this contribution is limited in two respects. A first limitation concerns the number of legal systems studied. The text only focuses on French-Belgian, Dutch and English contract law, as well as on the relevant provisions of the DCFR. These systems have been chosen, because each of them represents a somewhat different approach to the protection of the weaker contract party. A second limitation is of a more substantive nature, for the text only takes into account traditional national contract law and does not go into issues of competition law. Although competition law also addresses the issue of market power on the supply side,[11] it was not taken into consideration, as the P.CESL also is only concerned with contract law.

1. Protecting the weaker party through detailed legislation

3. The notion of consumer law is often associated with a set of detailed rules, each of them having a specific and clearly delineated scope of application. The central question of the present paragraph is whether such detailed set of rules currently exists at the B2B-level in the national legal orders.

a. No detailed legislation specifically designed for B2B-transactions

4. *Protecting categories.* In the second half of the 20th century national legislators all across Europe introduced comprehensive sets of detailed contract law rules for the protection of the weaker party in all sorts of specific contractual relationships, such as contracts of hire, contracts for the sale and supply of goods and services, medical treatment contracts, etc.

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10 Green Paper on the Review of the Consumer Acquis COM (2006) 744 final, Brussels, 8 February 2007.

11 H. RÖSSLER, « Protection of the Weaker Party in European Contract Law : Standardized and Individual Inferiority in Multi-Level Private Law », *ERPL* 2010, 743. See in detail on the impact of competition law in B2B-transactions A. CATHIARD, *L'abus dans les contrats conclus entre professionnels: L'apport de l'analyse économique du contrat*, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2006, 305-362.

They chose to adopt a categorical approach to the issue:[12] each and every time national legislators focused on clear-cut categories of persons or entities which are automatically and irrefutably presumed to be in a weaker contractual position than their counterpart. Persons and entities obtain protection by the mere fact of belonging to the relevant category, even if – in reality – it is their counterpart that finds itself in a precarious situation. At the same time, protection is refused to all those who do not belong to that category, even when being in a disadvantageous position towards the other contracting party.[13]

5. *Focus on the consumer category.* As far as contracts for the sale and supply of goods and services are concerned, legislators almost exclusively focused on the protection of the 'consumer', excluding all other persons and entities,[14] the consumer being a natural person (sometimes also a legal person) who acquires or utilizes goods or services for purposes which are not related to his or her profession.[15] A person is considered to be acting for professional purposes if he conducts these activities on a regular basis and in exchange for some type of remuneration.[16] In other words, consumer is he who concludes contracts for personal, family or household purposes.[17] The destination given by the recipient to the goods or services he is acquiring, clearly is the decisive element.[18] The European consumer

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12 M. HESSELINK, "European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?", *European Review of Private Law* 2007, 327; E. SWAENEPOEL, *Toetsing van het contractuele evenwicht*, Antwepr, Intersentia, 2011, 19-30.

13 E. HONDIUS, "De zwakke partij in het contractenrecht; over de verandering van de paradigmata van het contractenrecht", in T. HARTLIEF and J. STOLKER, *Contractvrijheid*, Deventer, Kluwer, 1999, 391; T. HARTLIEF, *De vrijheid beschermd*, Oegstgeest, E.M. Meijers Instituut, 1999, 29; J. ROCHFELD, « Du statut du droit contractuel « de protection de la partie faible » : les interférences du droit des contrats, du droit du marché et des droits de l'homme », in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 840-841.

14 In some Member States persons who are acquiring goods or services for mixed purposes, for both professional and business purposes, can be treated as consumers.

15 For Belgium, see article 2, 3° Wet 6 April 2010 betreffende de marktpraktijken en de consumentenbescherming.
The notion has not been explicitly defined in French legislation. Only article L.311-1 Code de la consommation contains a definition – using the destination criterion - in relation to credit contracts. The vast majority of French legal doctrine and French jurisprudence seem to adhere to the same definition. See e.g. J. CALAIS-AULOY and H. TEMPLE, *Droit de la consommation*, Paris, Dalloz, 2010, 7-8; Y. PICOD and H. DAVO, *Droit de la consommation*, Paris, Dalloz, 2005, 23.
For the Netherlands, see e.g. Hoge Raad 14 September 2007, *RvdW* 2007, 793.
For England, see section 12 Unfair Terms in Consumer Contract Regulations; C. WILLET and D. OUGHTON, "Consumer Protection", in M. FURMSTON and J. CHUAH, *Commercial and consumer law*, Pearson, Edingburgh, 2004, 376-377.

16 C. VON BAR and E. CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) – Full Edition*, Vol. 1, München, sellier.european law publishers, 2009, 91 and following.

17 C. VON BAR and E. CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) – Full Edition*, Vol. 1, München, sellier.european law publishers, 2009, 91 and following.

18 For Belgium, see Antwerp 30 June 2009, *NjW* 2010, 504; Gent 4 April 2007, *NjW* 2008, 174; Antwerp 12 September 2000, *TBBR* 2001, 556; Kh. Bergen 9 August 2005, *DAOR* 2006, 435; G.-L. BALLON and S. VERVERKEN, *De wet marktpraktijken: een eerste commentaar*, Mechelen, Kluwer 2011, 20; R. STEENNOT, F. BOGAERT, D. BRULOOT and D. GOENS, *Wet marktpraktijken*, Antwerp, Intersentia 2010, 10; R. STEENNOT and S. DE JONGHE, *Handboek consumentenbescherming en handelspraktijken*, Antwerp, Intersentia, 2007, 10.
For France, see J. CALAIS-AULOY and H. TEMPLE, *Droit de la consommation*, Parijs, Dalloz, 2010, 9; Y. PICOD and H. DAVO, *Droit de la consommation*, Parijs, Dalloz, 2005, 23.

directives, which were adopted parallel to national initiatives, built upon similar definitions.[19] The national contract law systems and the European consumer directives have mutually influenced one another in this regard.[20]

Since all acts of an SME are believed to have a professional character, it is self-evident and probably superfluous to state that the destination criterion excludes SMEs from the scope of application of consumer legislation. The exclusion of SMEs is even further enhanced by the fact that many member states expressly exclude legal persons from the consumer notion. It should thus be clear that, as legislators only focused on consumers and SMEs are not consumers, there is no *specific* and *detailed* legislation protecting companies contracting with more powerful companies which has the same detail as consumer legislation (with the exception of national and European regulations on commercial agency[21] and the Late Payment Directive[22]). It is only in recent years that some *general* and *non-detailed* rules have been adopted (cf. infra). This is also the case for the DCFR: some general B2B-rules were incorporated, but a detailed set of very specific rules is lacking.

b. Extending the consumer notion

For Dutch law on consumer sales, see article 7 :5 DCC; J. HIJMA, *Assers' handleiding tot de beoefening van het Nederlands burgerlijk recht – Bijzondere overeenkomsten – Koop en ruil*, Deventer, Kluwer, 2007, nr. 77.

19 Article 2 (b) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; article 2 (2) article 2 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises; article 1 (2) (a) Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts; article 2 (e) Richtlijn 98/6/EG van het Europees Parlement en de Raad van 16 februari 1998 betreffende de bescherming van de consument inzake de prijsaanduiding van aan de consument aangeboden producten; article 1 (2) (a) Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; article 2 (e) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; article 2 (d) Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC; article 2 (a) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council; article 2 (1) directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. See also V. LUBY, "La notion de consommateur en droit communautaire: une commode inconstance", *CCC* 2000, *Chron.*, 1.

20 E. HONDIUS, "De zwakke partij in het contractenrecht; over de verandering van de paradigmata van het contractenrecht", in T. HARTLIEF and J. STOLKER, *Contractvrijheid*, Deventer, Kluwer, 1999, 390.

21 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. For Belgium, Law 13 April 1995 'betreffende de handelsagentuurovereenkomst'. For the Netherlands, see article 7: 428 to 7: 455 DCC. For France, see LOI no 91-593 du 25 juin 1991 relative aux rapports entre les agents commerciaux et leurs mandants, codifiée aux articles L134-1 et suivants du Code de commerce. For the UK, see The Commercial Agents (Council Directive) Regulations 1993

22 Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

6. *Small businesses as consumers?* The idea that only consumers find themselves in a weaker contractual position than their profesionnel counterparty is however superseded. It is now widely recognized that businesses may also find themselves in an inferior contractual position.[23] In the Green Paper on the Revision of the Consumer Acquis of 2007, already cited above, the European Commission therefore considered extending the consumer notion to weaker companies. The stance taken by the Commission in this Green Paper is not new.[24] In 2005 the Law Commission of England and the Scottish Law Commission also launched a proposal to extent the scope of application of the existing unfair contract terms legislation for consumers to very small businesses.[25] The consumer notion is thus not as intransigent and undisputed as one might think.

7. *Focusing on usual field of business.* In many Member States the exact range of the notion was indeed subject for debate throughout several decennia, especially in the area of unfair contract terms regulation.[26] Whereas Belgium in general tends to hold on to a restrictive interpretation,[27] other systems such as France and the Netherlands, and to a certain extent also England, extended the level of protection granted to consumers against unfair contract terms also to persons acting for professional purposes, but who are supposed to find themselves in a weaker contractual position than their counterparty, hereby possibly covering SMEs (in so far as the regulation on unfair contract terms may be applied to legal persons). Former French jurisprudence concerning unfair contract terms,[28] as well as a part of the relevant present-day English jurisprudence,[29] considered extending the consumer notion to natural persons (and in the case of England also to legal persons) who are acquiring goods and services which fall outside their usual field of business although having a clear professional purpose.[30] However, when looking at French and English law, one will

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23 M. HESSELINK, "Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive", *ERPL* 2010, 57-102.

24 See e.g. M. HESSELINK, "European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?", *European Review of Private Law* 2007, 327.

25 *Unfair Terms in Contracts* (Law Com No 292, Scot Law Com No 1999, 2005) 5LC 292). See H. BEALE, "Exclusion and Limitation Clauses in Business Contracts: Transparency", in A. BURROWS and E. PEEL (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, 191-209.

26 In most other areas of law, the definition on the basis of the destination criterion seems to excite less controversy. On consumer sales law, see e.g. J. HIJMA, *Assers' handleiding tot de beoefening van het Nederlands burgerlijk recht – Bijzondere overeenkomsten – Koop en ruil*, Deventer, Kluwer, 2007, nr. 77

27 For Belgium, see Antwerp 7 April 1997, *RW* 1997-98, 505; R. STEENNOT and S. DE JONGHE, *Handboek consumentenbescherming en handelspraktijken*, Antwerp, Intersentia, 2007, 11; G. STRAETMANS, "Wie verkoper is, is geen consument – Wie consument is, is geen verkoper – Maar is daarom wie geen verkoper is, consument en wie geen consument is, verkoper?", *TBH* 2001, 694; M. VAN DEN ABBEELE, "Les contours de la notion de consommateur dans la loi sur les pratiques de commerces", *DCCR* 2007, 63.
For EU law, G. STRAETMANS, "The consumer concept in EC law", in J. MEEUSEN, M. PERTEGÁS and G. STRAETMANS, *Enforcement of international contracts in the EU: convergence and divergence between Brussels I and Rome I*, Antwerp, Intersentia, 2004, 295-322.

28 For French law, see Cass. civ. 28 April 1987, *D.* 1988, 1; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 20 October 1992, *CCC* 1993, 21.
For English law, see Court of Appeal, R&B Customs Broker Ltd. v United Dominions Trust Ltd [1988] 1 *All ER* 847. See also M. CHEN-WISHART, *Contract law*, Oxford, Oxford University Press, 2010, 466.

29 See Court of Appeal, R&B Customs Broker Ltd. v United Dominions Trust Ltd [1988] 1 *All ER* 847. See also Rasbora Ltd v. JCL Marine Ltd [1977] 1 *Lloyd's Rep* 645.

30 Cass. civ. 28 April 1987, *D.* 1988, 1; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 20 October 1992, *CCC* 1993, 21.

see that the 'usual field of business' of company can be interpreted restrictively or more extensively.

French courts originally held that activities fall outside of the usual field of business when they are not conducted on a regular base and therefore do not form a constituent part of the business. So as to ascertain whether a particular activity is conducted on a regular basis, courts began focusing on the question whether or not the acquiring actor was specialized in the area he was dealing in, and thus replaced the destination criterion by a specialization criterion.[31] The European Court of Justice however has always explicitly rejected the criterion in consumer matters.[32] If a French professional was acquiring goods or services outside of its core business, and thus in an area it was not specialized in, he was considered a consumer.[33] For example, a pharmacist buying a cash till or a baker buying a new bakery were considered to be consumers for the purpose of these acquisitions. Although it was the French *Cour de Cassation* that had extended the consumer notion to non-specialized professional parties, the issue evolved into an object of fierce doctrinal and jurisprudential debate. After decades of discussions on the relevant criteria, the *Cour de Cassation* decided in 1995 that specialization in itself is not an efficient criterion and held that for a natural person to be considered a consumer with respect to a certain operation, this operation may not have 'a direct link with the professional activities' of that person.[34] It is up to the lower courts dealing with a specific case to decide whether such direct link exists or not. Although this notion still seems to allow a wide interpretation of the consumer notion, incorporating instances where an operation only has an indirect link with professional activities (such as the pharmacist buying a cash till), it appears that in practice the French courts almost always decide that there is such direct link when a person is acting for professional purposes.[35] All activities which are not completely atypical for the business at hand are considered to have a direct link with his professional activities.[36] In other words, whereas France originally gave a restrictive interpretation to the usual field of business, it now interprets the term widely.[37]

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31 On the difference between the two criteria, see E. TERRYN, "Invloed van het consumentenrecht op de aannemingsovereenkomst – capita selecta: Informatieverplichtingen, onrechtmatige bedingen en overeenkomsten gesloten buiten onderneming", 6.

32 ECJ 14 March 1991, C-361/89, *ECR* 19991, I-1189; J. GHESTIN, "Rapport introductif", in C. JAMIN and D. MAZEAUD, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 11-12; G. HOWELLS, "Consumer cocnepts for a European Code", in R. SCHULZE (ed.) *New Features in Contract Law*, München, sellier.europeàn law publishers, 2007, 121-122.

33 Cass. civ. 28 April 1987, *D.* 1988, 1; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 25 May 1992, *D.* 1992, 401; Cass. civ. 20 October 1992, *CCC* 1993, 21; G. VIRASSAMY, « Les relations entre professionnels en droit français », in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 493-495.

34 See Cass. civ. 24 January 1995, *D.* 1995, 327; Cass. civ. 21 February 1995, *CCC* 1995, 84. See also Cass. civ. 5 November 1996, *CCC* 1997, 9; Cass. civ. 15 May 2005, *Bull. civ.* 2005, I, nr. 135; J. GHESTIN, "Rapport introductif", in C. JAMIN and D. MAZEAUD, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 12-14.

35 J. CALAIS-AULOY and H. TEMPLE, *Droit de la consummation*, Parijs, Dalloz, 2010, 12 ; G. PAISANT, « A la recherche du consommateur : pour en finir avec l'actuelle confusion née de l'application du critère du rapport direct », *JCP* 2003, I, 121.

36 C. VON BAR and E. CLIVE (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) – Full Edition*, Vol. 1, München, sellier.european law publishers, 2009, 91-109.

37 L. LEVENEUR, *Droit des contrats – 10 ans de jurisprudence commentée – La pratique en 400 décisions*, Parijs, Litec, 2002, 71-86.

English courts have always given such restrictive interpretation to *the usual field of business* and only consider business operations as consumer transactions when they are truly atypical or merely incidental and exceptional for the company.[38] An example of an activity which is completely atypical is the case of a company of brokers buying a car for the personal use of its director. As a result of such, SMEs are now practically always excluded from the consumer notion. At the end of the day, the French and English approach seem to approximate the destination criterion more than one might have expected, to the strong dismay of some authors.[39] Differences between the French and English approach on the one hand and the Belgian approach on the other exist only very exceptionally.

8. *Focusing on a combination of criteria.* Underlying former French jurisprudence is the assumption that professional parties dealing outside of their core business always find themselves in a weaker position when acquiring goods or services from a well-organized and experienced supplier.[40] However, one cannot help but wonder whether such assumption is not too categorical. Indeed, a company acting outside of its core business does not always find itself in a disadvantage. In practice, a large non-specialized acquirer does find itself in a stronger economic position than a small specialized supplier.[41]

Dutch contract law seems to be aware of this, as it does not seem to draw such a sharp distinction between B2C- and B2B-contracts as the France and Belgian system do,[42] but then again exclusively focuses on the size of a company so as to decide whether a company is in a consumer-like position, at least at first sight. The starting point for deciding whether a Dutch company can be treated as if it were a consumer in the sense of the unfair contract terms regulations is indeed the size of the company. Dutch contract law is the only contract law system which has thus made an explicit distinction between large companies and small and medium-sized companies.[43]

The Dutch civil code contains a general rule prohibiting unfair contract terms,[44] a black list of contract terms which are considered unfair in all circumstances[45] and a grey list of contract terms which are (refutably) presumed to be unfair[46]. It so happens that the Dutch

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38 See Court of Appeal, R&B Customs Broker Ltd. v United Dominions Trust Ltd [1988] 1 *All ER* 847. See also Rasbora Ltd v. JCL Marine Ltd [1977] 1 *Lloyd's Rep* 645; M. CHEN-WISHART, *Contract law*, Oxford, Oxford University Press, 2010, 466; L. KOFFMAN and E. MACDONALD, *The Law of Contract*, Oxford, Oxford University Press, 2010, 217-219.

39 See e.g. G. RAYMOND, "Domaine d'application du droit de la consommation", *Juris Classeur Commercial*, Fasc. 902, 1 August 2012, nr. 7-13.

40 G. PAISANT, "Essai sur la notion de consommateur en droit positif", *JCP* 1993, I, 3655.

41 D. MAZEAUD, "Droit commun du contrat et droit de la consommation", in X., *Mélanges Calais-Auloy*, Parijs, Dalloz, 2004, 707.

42 M. HESSELINK, "Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive", *ERPL* 2010, 60.

43 The definition given to LE and SMEs in Dutch law of course diverges from the definition given under the D.CESL, since the exact seizure seems to be of a rather arbitrary nature. Article 6:235 DCC defines a large enterprise as a legal person which has made its yearly account public at the moment the contract is concluded and which employs, at that same moment, fifty persons or more. All other companies are small and medium-sized companies.

44 Article 233-234 DCC.

45 Article 236 DCC.

46 Article 237 DCC.

civil code expressly denies large enterprises the possibility to invoke the general rule on unfair contract terms against their counterparty,[47] thereby indicating that non-professional natural persons and SMEs can. A strict reading of the articles describing the black and grey list suggests that these articles can only be invoked by non-professional natural persons and not by SMEs who are allowed to invoke only the general prohibition. Jurisprudence and legal doctrine however accept that the grey and black list *can* be used to interpret the general rule (*reflexwerking*), also in instances where these lists would normally not apply because of the capacity of the recipient parties.[48] SMEs are thus granted the possibility to invoke the black and grey list to interpret the general prohibition, but only if they are truly small and consumer-like.[49] In order to decide whether a small party has a consumer-like character the specialization criterion is eventually taken into account,[50] but other factors are also taken into consideration.[51] In principle, large parties cannot rely on the lists. If a contractual party does not resemble a consumer, but is not to be considered a large party, then the possibility to invoke the grey and black list is limited to those parts of the list which do not specifically concern the consumer, but which aim at protecting the mutual interests and mutual confidence between the contracting parties (such as the section which prohibits a term according to which the supplier can assess himself whether he has fulfilled his obligations)[52]. Lower jurisprudence has extended this reasoning on unfair contract terms also to the regulation on off-premises contracts,[53] but this extension is much debated.[54]

c. Criticism

9. *Substantive versus procedural fairness.* The national attempts to extend detailed consumer protection to small or non-specialized businesses have been fiercely criticized by several authors, at least as far as unfair contract terms legislation is concerned.[55] The former French approach in particular was considered highly problematic, since it only focused on one criterion.[56] The view is that traditional consumer law focuses both on the degree of fairness respected throughout the negotiation process and on substantive fairness of the result which

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47 Article 6: 235 DCC.

48 E. HONDIUS, "Commentaar bij artikel 236 boek 6 BW", in *Groene Serie Verbintenissenrecht*, aantekening 22; E. HONDIUS, "Commentaar bij artikel 237 boek 6 BW", in *Groene Serie Verbintenissenrecht*, aantekening 54.

49 Hoge Raad 14 September 2007, *RvdW* 2007, 793.

50 See e.g. Hof Amsterdam 27 May 2004, *Prg.* 2004, 6249, with critical note P. ABAS. For a case, where a small enterprise was refused this possibility, for acting in an area in which the company was specialized, see e.g. Hof 's-Gravenhage 1 April 2004, *Prg.* 2004, 6251, with critical note P. ABAS; Kantonrechter Zupthen 25 April 2000, *Prg.* 2000, 5497, with critical note P. ABAS.

51 The level of prudence one might expect from certain categories of professionals is also taken into account. See e.g. Rechtbank Zwolle-Lelystad 13 July 2005, *NJF* 2006, 97.

52 It mainly concerns article 6:236 b), c), d), h), k) and 6:237 a) till i) DCC.

53 Rechtbank Utrecht (kantonrechter) 20 January 2010, *RCR* 2010, 36; Rechtbank Rotterdam (kantonrechter) 11 January 2006, *NJF* 2006, 351.

54 Refusing the extension, see e.g. Hof Amsterdam 12 July 2011, *Prg.* 2011, 217, with critical note P. ROS; Rechtbank Roermond 14 December 2010, *Prg.* 2011,61; Rechtbank 11 November 2009, LJN.BL 7301; Rechtbank Breda 12 August 2009, *Prg.* 2010, 28, with critical note P. ROS.

55 An extension of consumer legislation on unfair commercial practices to B2B-contracts is said to be less problematic since the rules on unfair commercial practices are far less detailed than the rules on unfair contract terms and thus leave more room for contextualization.

56 See e.g. J. GHESTIN, "Rapport introductif", in C. JAMIN and D. MAZEAUD, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 14.

is eventually reached through negotiation,[57] whereas in a B2B-context, legal protection should be restricted to procedural fairness in the process of concluding the contract on the one hand and the creation of requirements of business decency in the course of the execution of the contract on the other.[58] In a B2B-contract contextualization is therefore essential. The law should not tackle the mere existence of an inequality of bargaining power between contracting companies, as for B2C-contracts,[59] but only the abuse of such inequality in a particular case should be addressed,[60] since one may expect of a company that it is better capable of protecting its own interests. E.g., the law should not prohibit the insertion of a particular contract term in a B2B-contract altogether in any circumstances; it should only be checked whether the process leading up to the insertion of the term was fair. The consumer can and may not be considered the point of reference in B2B-contracts, since business life is about taking and assessing risks. Businesses are presumed to act responsibly and not to enter into contracts lightly (*caveat emptor*). If a business decides to take risks by entering into a contract which has been concluded on the basis of a fair procedure and is fully informed on the risks taken, then the law should not interfere. If all goes well, the business will make profit, whereas the business will disappear if it turns out wrong.[61]

Consequently, many authors propose to tackle issues related to the inequality of bargaining power in B2B-transactions not by means of specific and detailed rules, but by means of general and open norms which focus on the process and allow for jurisprudential differentiation in light of the specific circumstances of a case.[62] Since such norms imply a

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57 C. CANARIS, "Wandlungen des Schuldvertragsrecht – Tendenzen zu seiner 'Materialisierung", *AcP* 2000, 283; O. CHEREDNYCHENKO, *Fundamental Rights, Contract Law and the Protection of the Weaker Party - a comparative analysis of the constitutionalisation of contract law, with emphasis on risky financial transactions*, München, Sellier, 2007, 10-11; H. RÖSSLER, « Protection of the Weaker Party in European Contract Law : Standardized and Individual Inferiority in Multi-Level Private Law », *ERPL* 2010, 739; E. SWAENEPOEL, *Toetsing van het contractuele evenwicht*, Antwepr, Intersentia, 2011, 30-31.

58 H. BEALE, "Exclusion and Limitation Clauses in Business Contracts: Transparency", in A. BURROWS and E. PEEL (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, 194; C. BRUNNER, *De billijkheid in het Nieuwe BW – Rechtsvinding onder het NBW*, Kluwer, Deventer, 1992, 92; H. SCHELHAAS, "Pacta sunt servanda bij commerciële contracten: Over redelijkheid en billijkheid en objectieve uitleg bij handelscontracten", *Nederlands tijdschrift voor burgerlijk recht* 2008, 150-160. See also mildly, M. HESSELINK, *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 – Final version – 5 July 2007*, 14-18, available at http://www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf.

59 *"This example of binding the consumer to a protective rule even against his own will illustrates the highly standardizing nature of EU private law. Here, the protection is not based on the need to balance the various interests in individual contracts but, instead, finds its justification in the macro-socio-economic realization of the usual inferiority of the consumer."* H. RÖSSLER, « Protection of the Weaker Party in European Contract Law : Standardized and Individual Inferiority in Multi-Level Private Law », *ERPL* 2010, 739.

60 This explains why the Dutch *reflexwerking* is less problematic than the French extension of the consumer notion in the area of unfair contract terms. The Dutch approach allows for contextualization: the grey and black list are not applied automatically to a certain type of business, but only if this seems fair in light of the prevailing circumstances.

61 H. COLLINS, "Good faith in European Contract Law", *Oxford Journal of Legal Studies* 1994, 234-236; M. FONTAINE, "La protection de la partie faible dans les rapports contractuels", in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 621; H.W. MICKLITZ, J. STUYCK and E. TERRYN, *Cases, Materials and Text on Consumer Law*, Oxford, Hart Publishers, 2010, 29.

62 T. HARTLIEF, *De vrijheid beschermd*, Oegstgeest, E.M. Meijers Instituut, 1999, 4; E. HONDIUS, "De zwakke partij in het contractenrecht; over de verandering van de paradigmata van het contractenrecht", in T. HARTLIEF en

more subjective approach to the law, legislators are often reluctant.[63] Nonetheless, it appears that over the past few decades many member states have indeed been using such norms which derive from the general law of obligations in B2B-contexts,[64] although to a lesser extent than for B2C-contracts,[65] thereby focusing – though not always exclusively[66] – on procedural fairness. Indeed, before the enactment of specific consumer legislation, these open norms were used to protect consumers dealing with businesses and still apply to B2C-contracts in so far as no specific legislation has been enacted.[67] The abundance of protective consumer rules which legislators all around have adopted from the 1970s onwards, often are no more than a legislative specification of these norms. But by translating them into detailed hard law consumer legislation, and by combining this approach with a categorical approach to the consumer notion (cf. supra), the legislator has stripped these norms of their flexibility.[68]

2. Protection through general principles

a. Good faith, fair dealing and mutual cooperation

J. STOLKER, *Contractvrijheid*, Deventer, Kluwer, 1999, 392; M. HESSELINK, *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 – Final version – 5 July 2007*, 18; N. HUIS, "Sterke argumenten om zwakke contractpartijen te beschermen", in T. HARTLIEF and C. STOLKER, *Contractvrijheid*, Deventer, Kluwer, 1999, 402; J. ROCHFELD, « Du statut du droit contractuel « de protection de la partie faible » : les interférences du droit des contrats, du droit du marché et des droits de l'homme », in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 837-838.
Some authors have even advocated the adoption of such approach for B2C-contracts, rather than maintaining the current approach of enacting more and more specific legislation. See e.g. B. TILLEMAN and B. DU LAING, « Directives on consumer Protection as a Suitable Means of Obtaining a (More) Unified European Contract Law », in S. GRUNDMANN and J. STUYCK, *An Academic Green Paper on European Contract Law*, Alphen aan den Rijn, Kluwer, 2002, 84.

63 See e.g. J. ROCHFELD, « Du statut du droit contractuel « de protection de la partie faible » : les interférences du droit des contrats, du droit du marché et des droits de l'homme », in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 840-841; G. VIRASSAMY, « Les relations entre professionnels en droit français », in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 494-495.

64 D. MAZEAUD, "La protection par le droit commun", in C. JAMIN and D. MAZEAUD, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 33-54.

65 D. MAZEAUD, "La protection par le droit commun", in C. JAMIN and D. MAZEAUD, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 51-54.

66 E.g. national courts do also sometimes use the doctrine of *laesio (enormis)* to realize material fairness in a B2B-context. See E. SWAENEPOEL, De toetsing van het contractuele evenwicht, Antwerp, Intersentia, 2011, 32.

67 See Article 4 (3) D.CESL; M. HESSELINK, "European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?", *European Review of Private Law* 2007, 331.

68 J. DREXL, "Continuing Contract Law Harmonisation under the White Paper of 1985? – Between Minimum Harmonisation, Mutual Recognition, Conflict of Laws, and Uniform Law", in S. GRUNDMANN and J. STUYCK, *An Academic Green Paper on European Contract Law*, Alphen aan den Rijn, Kluwer, 2002, 126-128; E. HONDIUS, "The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis", *Journal of Consumer Law and Policy* 2004, 243-244; F. WILLEM GROSHEIDE, "Reflections on the Protection of the Weak Party in Dutch and EU Contract Law", K. BOELE-WOELKI and W. GROSHEIDE, *The Future of European Contract Law*, Alphen aan den Rijn, Wolters Kluwer, 2007, 247-248.

10. *Protection through general principle of fairness.* Indeed, although most legislators did not adopt specific and detailed contract law rules for the protection of companies dealing with other more powerful companies, and most jurisprudential attempts to extent the scope of application of consumer law to small companies failed or met with fierce criticism (cf. supra), SMEs are not completely left out in the cold. In the past, continental courts have often granted and still grant smaller companies some protection through the application of general contract law principles of fairness.[69]

Whereas the continental contract law systems as well as the DCFR recognize a general principle of fairness, i.e. the principle of good faith and fair dealing,[70] Although the idea of reasonableness is ever-present, English law is characterized by a more piecemeal approach towards fairness.[71] For a long time, judicial intervention was limited to cases of fraud, deceit, misrepresentation, etc.[72] More recently, English courts reinforced the level of protection offered to the weaker party in a commercial relationship through the extensive application of several equitable doctrines.[73] Nonetheless, one may state that in general English judges are far more reluctant to interfere with a contract as agreed upon by the contracting parties.[74] In commercial contexts, English courts tend to stay strictly within the limits of only enforcing procedural fairness, while continental judges sometimes enter the area of substantial fairness.

11. *Fairness as a body of good commercial practices.* In a commercial context the idea of fairness is embodied by trade usages and good commercial practices: contracting parties operating in

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69 B. DUBUISSON and G. TOSSENS, "Les relations entre professionnels en droit belge", in J. GHESTIN and M. FONTAINE, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 430-431; E. HONDIUS, "De zwakke partij in het contractenrecht; over de verandering van de paradigmata van het contractenrecht", in T. HARTLIEF and J. STOLKER, *Contractvrijheid*, Deventer, Kluwer, 1999, 389; B. LURGER, "Consumer Law – Forerunner for a Part of European contract Law Code? The Case of Austrian Consumer Law", in S. GRUNDMANN and M. SCHAUER, *The Architecture of European Codes and Contract Law*, Alphen aan den Rijn, Kluwer, 2006, 211-212; J. ROCHFELD, « Du statut du droit contractuel « de protection de la partie faible » : les interférences du droit des contrats, du droit du marché et des droits de l'homme », in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 836-837.

70 See article III.-1 :103 DCFR; article 1134 BCC; article 1134 FCC, article. For a comparable stance, see T. HARTLIEF, *De vrijheid beschermd*, Oegstgeest, E.M. Meijers Instituut, 1999, 36-37; M. HESSELINK, *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 – Final version – 5 July 2007*, 4-5, available at http://www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf; L. KOFFMAN and E. MACDONALD, *The Law of Contract*, Oxford, Oxford University Press, 2010, 5-6; F. VERMANDER, "De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering", *TBBR* 2004, 572.

71 N. COHEN, "Pre-contractual Duties: Two Freedoms and the Contract to Negotiate", in J. BEATSON and D. FRIEDMANN, *Good Faith and Fault in Contract Law*, Oxford, Clarendon Press, 1995, 28; R. ZIMMERMANN and R. WHITTAKER (eds.), *Good Faith in European Contract Law*, Cambridge, Cambridge University Press, 2000, 39-48..

72 J. CARTWRIGHT, *Contract Law*, Oxford, Hart Publishing, 2007, 196.

73 P. ATIYAH, *Essays on Contract*, Oxford, Clarendon Press, 1986, 329-330. See also Euro London Appointments Ltd v Claessens International Ltd [2006] *WL* 901069, no. 26; E. MCKENDRICK, *Goode on Commercial Law*, Penguin Books, London, 2010, 103-107; C. MILLER, B. HARVEY and D. PARRY, *Consumer and Trading Law – Text, Cases and Materials*, Oxford, Oxford University Press, 1998, 553-565.

74 See G. HOWELLS and S. WEATHERILL, *Consumer Protection Law*, Ashgate, Aldershot, 2005, 263-264.

a professional capacity should respect all reasonable commercial standards of fair dealing.[75] These standards require that more powerful companies do not take advantage of the weaker economic situation of their counterparty.[76] Not surprisingly, observance of good faith and fair dealing is considered one of the basic values underlying both the UNIDROIT Principles of International Commercial Contracts[77] and the Vienna Sales Convention.[78] Some authors even consider the principle of good faith as the leading principle of the *lex mercatoria*.[79]

12. *Fairness as cooperation.* Fairness provides for a general rule of conduct which parties have to adhere to, both in the process of concluding and executing a contract.[80] Fairness thus obliges contracting parties to behave solidary, honestly and in mutual cooperation.[81] Even English courts often read an implied term of cooperation in a contract.[82] Contracting parties are obliged to cooperate with one another in the different stages of the contracting process. Whereas most national contract law systems do not mention the principle of mutual cooperation, the principle being of a mere jurisprudential nature, the P.CESL explicitly recognizes the obligation in its article 3: *"The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations."* National courts have translated the idea of mutual cooperation into more specific, though still open and flexible, rules which are intended to restore the equality of bargaining power between contracting parties.[83]

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75 Mannai Investment Co Ltd [1999] *AC* 749; C. JARROSSON, « La bonne foi, instrument de moralisation des relations économiques internationales », in X., *L'éthique dans les relations économiques internationales. Hommage à Philippe Fouchard*, Paris, Pendone, 2006, 185.

76 J. ROCHFELD, « Du statut du droit contractuel « de protection de la partie faible » : les interférences du droit des contrats, du droit du marché et des droits de l'homme », in X., *Etudes offertes à Geneviève Viney*, Paris, LGDJ, 2008, 835-836.

77 Article III-1 :103 DCFR; INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, available at http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf, 19; P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 6.

78 Article 7 Vienna Sales Convention.

79 P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 6.

80 A. HARTKAMP and C. SIEBURGH, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 6, Verbintenissenrecht, 3, Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 333.

81 A. CATHIARD, *L'abus dans les contrats conclus entre professionnels: L'apport de l'analyse économique du contrat*, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2006, 373-470; R. DEMOGUE, *Traité des obligations en général*, Tome VI, Paris, Rousseau & Cie, 1931, 9; C. JAMIN, « Plaidoyer pour le solidarisme contractuel », in X., *Le contract au début du XXIe siècle - Mélanges offerts à Jacques Ghestin*, Paris, LGDJ, 2001. See also INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 149-150; M. FONTAINE, "La protection de la partie faible dans les rapports contractuels", in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 637; C. JAMIN, « Plaidoyer pour le solidarisme contractuel », in G. GOUBLEAUX, *Etudes offertes à Jacques Ghestin – Le contrat au début du XXIe siècle*, Paris, LGDJ, 2001, 441-472; P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 3; D. MAZEAUD, "La protection par le droit commun", in C. JAMIN and D. MAZEAUD, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 34; H. SCHOORDIJK, « Het gebruik van open normen naar Belgisch en Nederlands privaatrecht », in E. DIRIX, W. PINTENS, P. SENAEVE and S. STIJNS, *Liber amicorum Jacques Herbots*, Bruges, Kluwer, 2002, 326.

82 H. BEALE, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 895.

83 H. BEALE, B. FAUVARQUE-COSSON, J. RUTGERS, D. TALLON and S. VOGENAUER, *Cases, Materials and Text on Contract Law*, Oxford, Hart Publishing, 2010, 140-158; F. WILLEM GROSHEIDE, "Reflections on the Protection of the Weak Party in Dutch and EU Contract Law", K. BOELE-WOELKI en W. GROSHEIDE, *The Future of European Contract Law*, Alphen aan den Rijn, Wolters Kluwer, 2007, 251-253; J. HIJMA, C. VAN DAM, W. VAN

13. *Limited legislative operationalization of fairness.* These rules cover the different stages of the contracting process, from the time of pre-contractual negotiation to the termination of the contract.[84] The comments to article 1.7 of the UNIDROIT principles clearly state that *"the parties' behavior throughout the life of the contract, including the negotiation process, must conform to good faith and fair dealing."*[85] Some of the rules have remained of a pure jurisprudential nature, and are therefore not always applied in a consequential fashion, whereas others were explicitly confirmed by the legislator.[86] Several member states have in the meanwhile introduced a general prohibition of unfair contract terms (see e.g. French, Dutch, German and English law)[87] and a prohibition of unfair commercial practices in B2B-relationships (see e.g. Belgian and French law)[88]. These prohibitions are to be considered *lex specialis* vis-à-vis the principle of good faith and possibly give weaker companies more possibilities to act against stronger companies.[89] Even when confirmed by the legislator these rules have often

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SCHENDEL and W. VALK, *Rechtshandelingen en overeenkomst*, Deventer, Kluwer, 2010, 17-18; B. VERSCHRAEGEN, « The Dutch Civil Code and its Precedents (1990-1992)», in S. GRUNDMANN and M. SCHAUER, *The Architecture of European codes and Contract Law*, Alphen aan den Rijn, Kluwer, 2006, 112..

84 INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 19; B. DUBUISSON and G. TOSSENS, "Les relations entre professionnels en droit belge", in J. GHESTIN and M. FONTAINE, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 433; A. HARTKAMP and C. SIEBURGH, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 6, Verbintenissenrecht, 3, Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 339.

85 INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 19.

86 For Belgium, see specifically section 5 of proposal for an Economic Code.

87 For French law, see article L-442-6, I, 2° CC.
For Dutch law, see Article 233-234 DCC.
In English law, there are two different acts prohibiting (each of them different) unfair contract terms. The Unfair Terms in Consumer Contracts Regulations 1999, which is implementing a European Directive, only apply to B2C-contracts which have not been individually negotiated upon (section 4 Unfair Terms in Consumer Contracts Regulations 1999). The Unfair Contract Terms Act 1977 however not only applies to B2C-transactions; certain provisions of the act specifically stipulate that they also apply to B2B-transactions in so far as one company is dealing on the other's written standard terms of business (section 3 Unfair Contract Terms Act 1977; Chester Grosvenor Hotel Co Ltd v. Alfred McAlpine Management Ltd [1991] 56 Build LR 115; G. HOWELLS and S. WEATHERILL, Consumer Protection Law, Ashgate, Aldershot, 2005, 270). If both companies have individually negotiated on the different clauses of their contract, the latter act does not apply. Once again it appears that jurisprudence is stricter when assessing whether a given contract term is unfair in B2B-transactions than when it is making such assessments in B2C-transactions, since companies are said to have a better foreknowledge than consumers (Barclays Mercantile Business Finance Ltd v Marsh [2002] WL 31442486; Photo Production Ltd v. Securicor Transport Ltd [1980] AC 827).

88 For Belgian law, see article 95 WMPC. For French law, see Article L. 446-6 Code de Commerce. Dutch law did introduce a general rule prohibiting unfair contract terms, but did not introduce a general rule prohibiting unfair commercial practices. However, several authors are in favor of giving a reflexive function of the B2C-prohibition in B2B-contracts. See e.g. A. CASTERMANS, "Misleidende omissie bij het aangaan van de overeenkomst. Reflexwerking van de regeling oneerlijke handelspraktijken", MvV 2011, 202-208; L. KROON and C. MASTENBROEK, "Intellectuele Eigendom en Reclamerecht, De Richtlijn oneerlijke handelspraktijken en de implementatie daarvan in het BW: mogelijke complicaties in de praktijk", *IER* 2008, 70; J. VERDEL, "Bescherming voor niet-consumenten door het ontstaan van reflexwerking van de 'zwarte lijsten' uit de Wet oneerlijke handelspraktijken", *TvCo* 2008, 34.

89 A. CASTERMANS, "Misleidende omissie bij het aangaan van de overeenkomst. Reflexwerking van de regeling oneerlijke handelspraktijken", *MvV* 2011, 202-208; D. DESSARD and A. DE CALUWÉ, *Les usages honnêtes*, Brussels, Larcier, 2007, 9-10; J. LIGOT, F. VANBOSSELE and O. BATTARD, *Les pratiques loyales*, Brussels, Larcier, 2012, 9.

retained their open character; they obviously lack the same level of detail as is the case for traditional consumer legislation.

b. Good faith in the pre-contractual stage

14. *Culpa in contrahendo.* The rules applicable to contracting parties in the pre-contractual stage perfectly illustrate how courts often use the principle of mutual cooperation and solidarity to restore a structural imbalance in bargaining power between those parties,[90] for solidarity entails that a party does not take advantage of the weaker economic position, or even economic dependence, of its counterparty so as to obtain a contract which would otherwise not be concluded or would be concluded under different circumstances. According to the continental legal orders, a party that infringes upon these principles is guilty of pre-contractual mistake (*culpa in contrahendo*) and will be held liable to pay damages.[91] Dutch law founded the theory of pre-contractual mistake on the obligation of good faith in the execution of the contract.[92] Belgium and France on the contrary base the theory on tortious liability (which is also an expression of the general principle of good faith)[93],[94] although there is a clear tendency in both recent jurisprudence and legal doctrine to give the information obligation its foundations in the principle of good faith.[95] Both the principle of good faith and the doctrine of tortious liability are no more than particular expressions of the idea of fairness.

The theory of *culpa in contrahendo* first and foremost implies a prohibition for contracting parties to behave 'violently' or 'unfairly' during the bargaining process. Secondly, and linked to the first point, the parties are bound to supply each other with all information which is necessary for their counterpart in deciding whether or not to conclude the contract. Self-evidently, the theory is closely linked to other doctrines such as mistake, fraud, deceit, etc. The English legal order, which does not recognize the theory of pre-contractual mistake, exclusively uses the latter doctrines together with equitable doctrines (such as duress, abuse of confidence, undue influence, etc.) to address misconduct in the pre-contractual stage.[96] In other words, English judges will only interfere when the contract is vitiated (cf. supra).[97]

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90 E. SWAENEPOEL, De toetsing van het contractuele evenwicht, Antwerp, Intersentia, 2011, 33.

91 H. GEENS, "De grondslagen van culpa in contrahendo", *Jura Falconis* 2003-04, 433-460; M. HESSELINK, *De redelijkheid en billijkheid in het Europese privaatrecht*, s.l., Kluwer, 1999, 67-92; P. LE TOURNEAU and M. POUMADÈRE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 9; H. SCHOORDIJK, « Het gebruik van open normen naar Belgisch en Nederlands privaatrecht », in E. DIRIX, W. PINTENS, P. SENAEVE and S. STIJNS, *Liber amicorum Jacques Herbots*, Bruges, Kluwer, 2002, 330.

92 M. HESSELINK, *De redelijkheid en billijkheid in het Europese privaatrecht*, s.l., Kluwer, 1999, 69.

93 P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 7.

94 See Cass. civ. 28 June 2006, *D.* 2006, 2322; Cass. Civ. 15 March 2005, *D.* 2005, 1462; D. DESSARD and A. DE CALUWE, *Les usages honnêtes*, Brussels, Larcier, 2007, 9-10 ; J. LIGOT, F. VANBOSSELE and O. BATTARD, *Les pratiques loyales*, Brussels, Larcier, 2012, 9; N. DISSAUX, "Fonds de commerce – Cesssion. Formation", *JurisClasseur Commercial*, 1 October 2010, n° 14-15; M. SANTA-CROCE, "Contrats internationaux", *JurisClasseur Civil Code* > 2e *App. Art . 1134 et 1135*, Fac. 60, 1 March 2008, n° 4.

95 See e.g. P. JOURDAIN, « Droit à réparation. – Responsabilité fondée sur la faute . – Applications de la notion de faute : imprudences et négligences ; fautes commises à l'occasion d'un contrat », *JurisClasseur Civil Code* > Art. 1382 à 1386, Fasc. 130-10, n° 44-45 (with references); P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 8.

96 See e.g. Pitt v. Holt [2011] *WL* 674966, No. 165; P. BRIKS and C. NYUK YIN, "On the Nature of Undue Influence", in J. BEATSON and D. FRIEDMANN, *Good Faith and Fault in Contract Law*, Oxford, Clarendon Press,

15. *Prohibition of unfair commercial practices.* A company should thus abstain from all violent or unfair commercial practices towards other companies. This has all sorts of implications.[98] Of course a company is free to start negotiations with another company and may decide to end these negotiations at any given time. Also, it is not erroneous to conduct negotiations with several other companies at the same time.[99] However, the instigating company may not do so abusively. For example, a company may not start negotiations with another company with whom they have no intention whatsoever to conclude a contract with the counterpart.[100] They may not disclose or improperly use confidential information obtained from their counterpart during the negotiations.[101] Ongoing negotiations should not be ruptured in a way which is, with the relevant circumstances in mind, clearly abusive or violates created expectations, for example because negotiations are at a very advanced stage.[102] English law is somewhat stricter than the continental legal orders on the latter point: breaking of negotiations by one of the negotiating parties is erroneous and entails tortious liability only if there was a negligent misstatement by that party leading the other party to believe that a contract would be concluded.[103]

1995, 57-97; J. CARTWRIGHT, *Contract Law*, Oxford, Hart Publishing, 2007, 65; E. MCKENDRICK, *Goode on Commercial Law*, Penguin Books, London, 2010, 103-107; C. MILLER, B. HARVEY en D. PARRY, *Consumer and Trading Law – Text, Cases and Materials*, Oxford, Oxford University Press, 1998, 371-373.

97 J. CARTWRIGHT, *Contract Law*, Oxford, Hart Publishing, 2007, 66.

98 F. X. TESTU and J. HERZELE, "La formalisation contractuelle du résultat des négociations commerciales entre fournisseurs et distributeurs », *La semaine Juridique Entreprise et Affaires* 2008, 1113.

99 P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 9-10.

100 P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 9.

101 Article 2.1.17 Unidroit principles; INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 62-63; Seager v. Copydex Ltd. (No. 1) [1967] 1 *WLR* 923; H. BEALE, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2004, 534; M. BOLLEN, "Precontractuele aansprakelijkheid voor het afspringen van onderhandelingen, in het bijzonder m.b.t. een acquisitieovereenkomst", *TBBR* 2003, 150; P. LE TOURNEAU and M. POUMADÈRE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 11-12.

102 Article 2.1.15 Unidroit Principles; INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 59-61.
For Belgium, see M. BOLLEN, "Precontractuele aansprakelijkheid voor het afspringen van onderhandelingen, in het bijzonder m.b.t. een acquisitieovereenkomst", *TBBR* 203, 136-160; H. GEENS, "De grondslagen van culpa in contrahendo", *Jura Falconis* 2003-04, 444-445.
For French law, see Article L. 446-6, 5°; Cass. com. 26 November 2003, *RJDA* 2004, n° 511; Cass. com. 11 July 2000, *CCC* 2000, no. 174; Cass. Com. 22 April 1997, *RTD Civ.* 1997, 651; N. DISSAUX, "Fonds de commerce – Cesssion. Formation", *JurisClasseur Commercial*, 1 October 2010, n° 12; J. GHESTIN, « La responsabilité délictuelle pour rupture abusive des pourparlers », *JCP G* 2007, I, 155.
For Dutch law, see HR 29 October 2010, *NJB* 2010, 251; HR 21 September 2001, *NJ* 2002, 254, with critical note T. DE BOER; Gerechtshof 's-Hertogenbosch 29 November 2005 , *NJF* 2006, 249; Rb. 's-Hertogenbosch 15 August 2012, LJN:BX4774, nyr; Y. BLEI WEISSMANN, "Diligentieovereenkomst – Voorbereidende hulpovereenkomst", aantekening 44 bij artikel 217 Boek 6 BW, in *Groene Serie Verbintenissenrecht*, Kluwer, Deventer, 2010.

103 Walford v. Miles [1992] *AC* 128 ; Box v. Midland Bank Ltd. [1979] *Lloyd's Rep.* 391; J. CARTWRIGHT, *Contract Law*, Oxford, Hart Publishing, 2007, 72; N. COHEN, "Pre-contractual Duties: Two Freedoms and the Contract to Negotiate", in J. BEATSON and D. FRIEDMANN, *Good Faith and Fault in Contract Law*, Oxford, Clarendon Press, 1995, 32-42.

Also companies may not try to acquire excessive advantages from the other company under threat of rupturing existing contracts,[104] or by taking advantage of the latter's unequal bargaining position. Such unequal bargaining position may result from urgent needs or economic distress, its improvidence, ignorance, inexperience or a lack of bargaining skill (e.g. through excessive exemption clauses).[105]

16. *Mutual information duty.* The continental principle of solidarity in the pre-contractual stage was also translated into a mutual information duty in the pre-contractual stage[106] - which lives through in the contractual stage – so as to restore any information asymmetry which might exist between contracting parties.[107] The supplier in particular is bestowed with various information requirements, both in B2C- and B2B-contracts, as he is generally more aware of the qualities of the goods and services he is supplying.[108] Since the supplier is often more specialized than the buyer, the supplier enjoys a certain leeway in how he will execute the contracts, but this leeway is counterbalanced by an information duty.[109] If the supplier does not deliver all necessary information or gives the wrong information, than the customer can obtain damages or even, in the event of mistake or fraud, the contract which is ultimately concluded on the basis of that information, will be void or voidable.[110] Once again, English law is more reticent and does not recognize a general duty to disclose information during the negotiation process; English law accepts tortious liability for lack of information only in case of deceit or negligence which has provoked misrepresentation.[111]

If it turns out in a particular case that certain information is not available to or not deployable by the customer, a stronger information duty will be imposed upon the supplier

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104 Article L. 446-6, 4° French Code de Commerce; M. BOLLEN, "Precontractuele aansprakelijkheid voor het afspringen van onderhandelingen, in het bijzonder m.b.t. een acquisitieovereenkomst", *TBBR* 203, 136-160; H. GEENS, "De grondslagen van culpa in contrahendo", *Jura Falconis* 2003-04, 444-445.

105 Article 3.2.7 Unidroit Principles. See e.g. for English law, Royal Bank of Scotland Plc v. Chandra [2011] *NPC* 26 (unconscionable bargain); Silver Queen Maritime Ltd v Persia Petroleum Services Plc [2010] *WL* 4602351 (unconscionable bargain); Borrelli v Ting [2010] *WL* 2898052 (economic duress); E. MCKENDRICK, *Goode on Commercial Law*, Penguin Books, London, 2010, 107.

106 Cfr. Article II.-9:402 DCFR.

107 E. SWAENEPOEL, De toetsing van het contractuele evenwicht, Antwerp, Intersentia, 2011, 33.

108 This is clearly demonstrated by English law, since English judges hold that the duty for the seller to provide information is encompassed within the implied term of quality and fitness. See e.g. E. MCKENDRICK, *Goode on Commercial Law*, Penguin Books, London, 2010, 362.

109 T. TJONG TJIN TAI, *Mr. C. Asser's Inleiding tot de beoefening van het Nederlands burgerlijk recht, 7, Bijzondere Overeenkomsten, 4, Opdracht incl. de geneeskundige behandelingsovereenkomst en de reisovereenkomst*, Deventer, Kluwer, 2009, 63

110 For Belgium, see A. DE BOECK, *Informatierechten en –plichten bij de totstandkoming en uitvoering van overeenkomsten*, Antwerp, Intersentia, 2000, 221-223 and 246-247; B. VAN DEN BERGH, « De overdracht van een handelszaak en de informatieplicht vanwege de overdrager: « spreken is zilver, zwijgen is goud » », *TBBR* 2009, 369-370.
For France, see Cass. com. 13 March 2007, n° 05-51.564, nyr; Cour d'appel Lyon 7 September 2001, n° 2000/00355, nyr ; N. DISSAUX, "Fonds de commerce – Cesssion. Formation", *JurisClasseur Commercial*, 1 October 2010, n° 16; P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 12-13.
For the Netherlands, see article 6:228 DCC; HR 25 January 2002, *NJ* 2003, 31, with critical note J. VAN DER VRANKEN.

111 J. CARTWRIGHT, *Contract Law*, Oxford, Hart Publishing, 2007, 70-71.

and it will be easier for the customer to invoke defects in consent.[112] One should always inform the buyer on its standard terms,[113] but the more unusual or onerous certain contract terms are, the more important the information duty of the professional supplier.[114] Elements such as the legibility and the readability of the clause will be taken into account to assess whether information requirements are being fulfilled.[115] Thus, courts often use information duties to attack unfair contract terms.[116] It is in this context that one should situate the UNIDROIT principle according to which a standard contract terms which is suggested by one of the contract parties and which is surprising to the other party is applicable only if the term has been expressly accepted by the latter party (and thus expressly indicated by the former party).[117]

The unusual or onerous character of a contract term is assessed by reference to the buyer's capacity. When the customer is a consumer for example, the information duties imposed upon the supplier are always far-reaching, the supplier being obliged by law to give practically all information about the good or the service and its price, irrespective of the concrete capacity and foreknowledge of the consumer. The consumer is considered unknowing. In B2B-contracts the information duty is generally not as strong as it is the case for B2C-contracts, since a customer dealing in a professional capacity is presumed to have some knowledge about the transactions at hand, to take initiative and to make the necessary inquiries into those aspects of the transaction he is unaware of.[118] In B2B-contracts, most national legal orders will make a concrete assessment of the prevailing information asymmetries so as to determine the extent of the information duties which should be imposed upon the supplier.[119] For example, case law often burdens the supplier with stronger information duties when dealing with a professional customer who does not have

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112 G. VIRASSAMY, « Les relations entre professionnels en droit français », in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 485-488.

113 M. LOOS, "De algemene voorwaardenregeling in het voorstel voor een Gemeenschappelijk Europees kooprecht: een vergelijking met het Nederlandse recht", *NTBR* 2012, 24.

114 Cfr. Article II.-9:402 DCFR. See also Interfoto Picture Library Ltd v. Stiletto Visual Progammes Ltd [1988] 2 *WLR* 615; J. CARTWRIGHT, *Contract Law*, Oxford, Hart Publishing, 2007, 198; G. HOWELLS and S. WEATHERILL, *Consumer Protection Law*, Ashgate, Aldershot, 2005, 278.

115 D. MAZEAUD, "La protection par le droit commun", in C. JAMIN and D. MAZEAUD, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 37.

116 J. CARTWRIGHT, *Contract Law*, Oxford, Hart Publishing, 2007, 198; D. MAZEAUD, "La protection par le droit commun", in C. JAMIN and D. MAZEAUD, *Les clauses abusives entre professionnels*, Paris, Economica, 1998, 36-38.

117 Cf. article 2.1.20 Unidroit Principles, with regard to surprising standard contract terms. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 68-69.

118 A. DE BOECK, « De onderzoeksplichten onderzocht, in het bijzonder de aankoop van tweedehandswagens», *TBH* 2004, 281; G. VIRASSAMY, « Les relations entre professionnels en droit français », in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 485-487.

119 For Belgian and French law, see e.g. Cass. 5 July 2003, *Arr. Cass.* 2003, 1337; D. BERTHIAU, *Le principe d'égalité et le droit civil des contrats*, Paris, LGDJ, 1999, 136; A. DE BOECK, « Enkele aspecten van de precontractuele informatie-uitwisseling. Noot n.a.v. Luik 24 April 2001 en Gent 27 juni 2001 », *TBBR* 2004, 263-264; B. DUBUISSON and G. TOSSENS, "Les relations entre professionnels en droit belge", in J. GHESTIN and M. FONTAINE, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 434.
For Dutch law, see e.g. 24 February 2012, *NJ* 2012, 144.

any experience with regard to the goods or services being acquired (e.g. the pharmacist buying a cash till) than when he is selling to an experienced customer.[120] Such non-experienced customer, who does not receive all necessary information or receives wrong information, will often obtain damages or even the annulment of the contract in case of mistake or fraud.[121]

Even in B2B-contracts, standard contract terms on which the buyer was not informed cannot be binding upon the customer.[122] As this was also the case for consumers, many judges believe that a professional non-experienced customer is intellectually incapable of asking for particular information and correctly use information,[123] but one should always make a concrete assessment of whether the non-experienced company should be aware of a particular piece of information. The specialization criterion (cf. supra) re-emerges. However, in the context of B2B-contracts, and contrary to B2C-contracts, this assumption made by many national judges is not held to be absolute. Some national cases attenuated the information duty of the seller for example when a professional non-experienced buyer has called upon the assistance of a specialist before concluding the contract with the seller,[124] without it being obliged for the non-specialized customer to invoke such assistance.[125]

c. Good faith in the contractual stage

17. *Three functions of good faith.* Contracting parties should not only respect the principles of good faith, fair dealing and mutual cooperation in the course of the conclusion of the contract; once the contract is concluded, they are equally bound to execute the contract in light of the aforementioned principles. Jurisprudence has bestowed the principle in the contractual stage with an interpretative function, a supplementary function and to a certain

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120 For Belgian law, see e.g. Kh. Ieper 12 October 1998, *RW* 2001-02, 926.
For French law, see e.g. Cass. civ. 17 June 2012, n° 09-15.843, nyr; Cass. com. 13 March 2007, n° 05-51.564, nyr; Cour d'appel Paris 18 January 2007, n° 04/24535, nyr; Cour d'appel Lyon 7 September 2001, n° 2000/00355, nyr; Cour d'appel Montpellier 24 April 2001, n° 00/00815, nyr.
For Dutch law, see e.g. HR 24 February 2012, *NJ* 2012, 144; HR 28 November 1997, *&V* 1998, 42; Hof Arnhem 8 January 2002, *BR* 2002, 630.

121 For the specialized customer on the contrary it will not be so easy to invoke mistake since it will not be excusable (see article 6 :228 DCC. See also B. DUBUISSON and G. TOSSENS, "Les relations entre professionnels en droit belge", in J. GHESTIN and M. FONTAINE, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 432; A. DE BOECK, *Informatierechten en –plichten bij de totstandkoming en uitvoering van overeenkomsten*, Antwerp, Intersentia, 2000, 241-244) although it is likely that he will still be able to invoke fraud if applicable (Cass. 23 September 1977, *Arr. Cass.* 1978, 107) or to invoke mistake if the seller unintentionally gave wrong information (see e.g. C. COUDRON, "Culpa in contrahendo en verschoonbare dwaling: een toepassing", *TBBR* 2002, 355-357).

122 F. WALSCHOT, "Algemene voorwaarden in een B2B-relatie", in J.-F. BELLIS, D. BLOMMAERT, *tendensen in het bedrijfsrecht*, s.l., Instituut voor bedrijfsjuristen, 2011, 133-162.

123 See e.g. Cass. com. 20 February 1996, *RTD Civ* 1997, 119. See also B. VAN DEN BERGH, « De overdracht van een handelszaak en de informatieplicht vanwege de overdrager : « spreken is zilver, zwijgen is goud » », *TBBR* 2009, 369-370; G. VIRASSAMY, « Les relations entre professionnels en droit français », in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 485-488.

124 B. DUBUISSON and G. TOSSENS, "Les relations entre professionnels en droit belge", in J. GHESTIN and M. FONTAINE, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 436.

125 A. DE BOECK, *Informatierechten en –plichten bij de totstandkoming en uitvoering van overeenkomsten*, Antwerp, Intersentia, 2000, 244-245.

extent also a derogating function.[126] Once again, these principles are often utilized in such way that protection is offered to a weaker contracting party dealing with a more powerful party.

18. *Interpretative function.* Whereas problems related to the interpretation of contractual clauses are concerned,[127] the general rule in continental law is that a clause should be interpreted in light of the common intention of the parties,[128] while taking into account the interpretation which reasonable contracting parties in similar circumstances would give to the contracts wording, rather than focusing exclusively on the contract's wording.[129] If it is not possible to deduce this common intention from the contract's wording or from its context, courts will thus interpret a B2B-contract by referring to the principle of good faith,[130] though only in so far as doubt on the exact interpretation of the contract appears to be rational and reasonable in light of the circumstances of the case.[131] In order to assess whether doubt is rational, elements such as the level of specialization of both parties, possible assistance by experts, the nature of the agreement, etc. are taken into account.[132] Specifically for mercantile contracts, it has been stated that, if their wording is unclear and ambiguous, they should be interpreted in a business fashion and receive a meaning that makes good commercial sense.[133] In case of rational doubt courts shall often interpret clauses (especially

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126 Cfr. article 6:2 and 6:248 DCC, which constitute a legislative recognition of the derogating function of the principle of good faith. See E. DEWITTE, "Spreken, zwijgen of liegen... U kiest maar! Of toch niet?! Welke verplichtingen brengt de goede trouw met zich mee voor werkgever en kandidaat-werknemer in de precontractuele fase van de arbeidsovereenkomst, en wanneer krijgen zij het deksel van de wilsgebreken op hun neus?", *Jura Falconis* 2010-11, 287-291; S. STIJNS, *Verbintenissenrecht*, book 1, Bruges, Die Keure, 2005, 51-53; A. HARTKAMP and C. SIEBURGH, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 6, Verbintenissenrecht, 3, Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 340; C. SIEBURGH, "Principles in Private Law: From Luxury to Necessity – Multi-layered Legal Systems and the Generative Force of Principles", *ERPL* 2012, 301-302; F. VERMANDER, "De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering", *TBBR* 2004, 574-578.

127 C. JAMIN, « Plaidoyer pour le solidarisme contractuel », in G. GOUBLEAUX, *Etudes offertes à Jacques Ghestin – Le contrat au début du XXIe siècle*, Paris, LGDJ, 2001, 450-451.

128 Article 4.1 Unidroit Principles ; article II.-8 :101 DCFR. A. CRUQUENAIRE, "L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle : réflexions à partir de l'exemple des contrats relatifs au droit d'auteur », *TBBR* 2008, 585; P. MALAURIE, « L'interprétation des contrats : hier et aujourd'hui », *La semaine juridique* 2011, 1402.

129 HR 13 March 1981, *NJ* 1981, 635; N. CORNET, « The interpretation, implication and supplementation of contracts in England and the Netherlands », in J. SMITS and S. STIJNS (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 55.

130 Article 8 Vienna Sales Convention; article 8 :102 (1) (g) DCFR. A. CRUQUENAIRE, "L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle : réflexions à partir de l'exemple des contrats relatifs au droit d'auteur », *TBBR* 2008, 585; P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 14; INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 137-138.

131 Cass. 23 March 2006, *RW* 2006-07, 874.

132 See A. CRUQUENAIRE, "L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle : réflexions à partir de l'exemple des contrats relatifs au droit d'auteur », *TBBR* 2008, 599-600; J. HIJMA, "Uitleg contra proferentem", in T. HARTLIEF and C. STOLKER, *Contractvrijheid*, Deventer, Kluwer, 1999, 469 and 471-473.

133 Rainy Sky S. A. and others v Kookmin Bank [2011] *UKSC* 50; Sirius International Insurance (Publ) v FAI General Insurance Ltd [2004] 1 *WLR* 325; Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 *AC* 191, 201; Society of Lloyd's v Robinson [1999] 1 *All E.R.* 551. See also J. WAELKENS, "Belgian Perspective on Rainy Sky S. A. and others (Appellants) v Kookmin Bank (Respondent)", to appear in *ERPL* 2013.

exemption clauses) which deviate from general contract law rules restrictively.[134] Also, clauses are often interpreted to the detriment of the party that stipulated it and thus in favor of other the party (*contra proferentem*).[135] Weaker contractual parties will most often benefit therefrom, as it is mostly – though not always – the stronger party that imposes all sorts of clauses upon its weaker counterpart and tries to deviate from the general rules,[136] for example through standard contracts.[137] It is not by coincidence that the *contra proferentem* rule is often used as a way of mitigating exemption clauses.[138] The *contra proferentem* rule dates long back and is, obviously, flexible enough to take into account the specific circumstances of a certain case. However, more recently, a European directive has forced member states to interpret a B2C-contract in favor of the consumer in all circumstances,[139] even if it is a clause which has been stipulated by the consumer that is unclear.[140]

Whereas continental judges tend to be very creative in applying the *contra proferentem* rule to the benefit of weaker parties, and sometimes even apply it in cases where the wording of the contract is fairly clear, English judges, although applying the principle as well,[141] again appear to use the rule with more restraint.[142] This should not be surprising. Rather than interpreting starting from the common intention of the parties and the principle of good faith, English lawyers primarily stick to the literal wording used by the parties in their contract and only in second instance take into account the context in which the contract was concluded.[143] However, one cannot deny that in practice common law judges have also reverted to interpretation as a means of realizing fairness.[144]

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134 Brussels 18 November 1999, *TBH* 2000, 680, with critical note J.P. BUYLE and M. DELIERNEUX; B. TILLEMAN, *Beginselen van Belgisch privaatrecht, X, Overeenkomsten,* Part 2, *Bijzondere overeenkomsten,* A, *Verkoop,* part 2, *Gevolgen van de koop,* Mechelen, Kluwer, 2012, 323; M. FONTAINE, "La protection de la partie faible dans les rapports contractuels", in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges,* Paris, LGDJ, 1996, 638; Y.-M. LAITHIER, "L'avenir des clauses limitatives et exonératoires de responsabilité contractuelle", *Revue des contrats* 2010, 1091; S. STIJNS, *Verbintenissenrecht,* book 1, Bruges, Die Keure, 2005, 58.

135 Article 1162 and 1602 BCC; article 1162 and 1602 FCC; article 6 :238 (2) DCC; article 4.6 Unidroit Principles ; Mons 6 May 2003, *JLMB* 2003, 41 ; Tekrol Ltd v International Insurance Co of Hannover Ltd [2005] 2 *Lloyd's Rep.* 701. See H. BEALE, *Chitty on Contracts,* vol. 1, *General principles,* London, Sweet & Maxwell, 2008, 911; A. CRUQUENAIRE, « L'interprétation du contrat de vente », *TBBR* 2008, 307-318; J. HIJMA, "Uitleg contra proferentem", in T. HARTLIEF and C. STOLKER, *Contractvrijheid,* Deventer, Kluwer, 1999, 461 and 468; P. MALAURIE, « L'interprétation des contrats : hier et aujourd'hui », *La semaine juridique* 2011, 1402.

136 Cfr. Article II.-8 :103 DCFR (interpretation against dominant party). See A. CRUQUENAIRE, "L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle : réflexions à partir de l'exemple des contrats relatifs au droit d'auteur », *TBBR* 2008, 584.

137 A. CRUQUENAIRE, "L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle : réflexions à partir de l'exemple des contrats relatifs au droit d'auteur », *TBBR* 2008, 586; S. STIJNS, *Verbintenissenrecht,* book 1, Bruges, Die Keure, 2005, 58.

138 J. CARTWRIGHT, *Contract Law,* Oxford, Hart Publishing, 2007, 187.

139 Article 10 Directive 93/13/EEG. See also article 40 § 2 WMPC.

140 A. CRUQUENAIRE, "L'incidence du droit commun des obligations sur les règles d'interprétation préférentielle : réflexions à partir de l'exemple des contrats relatifs au droit d'auteur », *TBBR* 2008, 602-603.

141 See e.g. Hollier v. Rambler Motors Ltd [1972] 2 *QB* 71.

142 H. BEALE, *Chitty on Contracts,* vol. 1, *General principles,* London, Sweet & Maxwell, 2008, 858-860; G. HOWELLS and S. WEATHERILL, *Consumer Protection Law,* Ashgate, Aldershot, 2005, 278.

143 Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 *WLR* 896; H. BEALE, *Chitty on Contracts,* vol. 1, *General principles,* London, Sweet & Maxwell, 2004, 838-842 and 852.

144 P. ATIYAH, *Essays on Contract,* Oxford, Clarendon Press, 1986, 337-341.

19. *Supplementary function.* Continental legal orders do not merely use the principle of good faith as a guideline for interpreting contracts; they also use the principle to supplement the express provisions of a contract. Terms are added to the contract, or more precisely said to be already implicitly included in the contract, when such is considered reasonable in light of the circumstances of a certain case.[145] In a commercial context, trade usages are often referred to so as to supplement the contract.[146] English law also has a tradition of implied terms, but its test for reading such term in a contract is stricter: a term is implied in the contract only if such is necessary for reasons of efficacy or because an officious bystander would necessarily read these terms into the contract,[147] not merely because such would be reasonable.[148]

Several of these implied terms are capable of protecting the weaker mercantile party. For example, all legal orders under study have held that a goods or services contract (explicitly or implicitly) contains an obligation for the supplier to execute the contract with reasonable care. This implies amongst others an obligation to inform the buyer in the course of the execution of the contract, to warn him about obstacles which might hinder the execution of the contract, to give guidance, etc. (and vice versa).[149] Once again, the information duty imposed upon a professional supplier is often judged more burdensome if he is contracting with a non-specialized commercial buyer.[150] In some instances, where new information upsets the contract as it was originally concluded, courts even held that a commercial contract contains an implied term according to which parties are under an obligation to renegotiate the contract.[151]

It has also been held that a supplier who is dealing in a professional capacity is liable for any lack of conformity in the goods or services he is supplying, since he is presumed to be aware of all defects in the goods or services concerned and thus to be in bad faith.[152] Such

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145 See on this topic, N. KORNET, *Contract interpretation and gap filling: comparative and theoretical perspectives*, Antwerp, Intersentia, 2006.

146 J. ADAMS and H. MACQUEEN, *Atiyah's Sale of Goods*, London, Longman, 2010, 207.

147 The Moorcock [1889] *LR* 14 *PD* 64; Shirlaw v Southern Foundries Ltd [1939] 2 *KB* 206.

148 H. BEALE, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 889-892

149 Vred. Oudenaarde – Kruishoutem 16 November 2006, *JJP* 2009, 323; N. CORNET, « The interpretation, implication and supplementation of contracts in England and the Netherlands », in J. SMITS and S. STIJNS (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 74; A. HARTKAMP and C. SIEBURGH, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 6, Verbintenissenrecht*, 3, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 342; P. LE TOURNEAU and M. POUMADÈRE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 20-21; E. MCKENDRICK, *Goode on Commercial Law*, Penguin Books, London, 2010, 362; F. VERMANDER, "De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering", *TBBR* 2004, 577.

150 Cass. com. 21 November 2006, *RJDA* 2007, no. 337.

151 P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 15-16; G. VIRASSAMY, « Les relations entre professionnels en droit français », in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 498-500.

152 For sales contracts, see e.g. for Belgium, Cass. 4 May 1939, *Pas.* 1939, I, 224; Cass. 18 October 2001, *Arr. Cass.* 2001, 1721; Ghent 18 June 1999, *RW* 2002-03, 1060. See also B. DUBUISSON and G. TOSSENS, "Les relations entre professionnels en droit belge", in J. GHESTIN and M. FONTAINE, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 437-438; B. STROOBANTS, « De aansprakelijkheid voor verborgen gebreken voor de professionele verkoper van onroerende goederen », *Nieuwbrief Notariaat* 2009, No. 07; B. TILLEMAN, *Beginselen van Belgisch privaatrecht*, X, *Overeenkomsten*, Part 2, *Bijzondere overeenkomsten*, A, *Verkoop*, part 2,

presumption does not automatically exist for the buyer. Even when the buyer is buying professionally, no such automatic presumption exists.[153] However, when the professional buyer is specialized in the goods he is acquiring, this element will be taken into account in order to assess whether a certain defect is either visible or hidden for him:[154] what is hidden for a non-specialized buyer is not necessarily hidden for a professional buyer. If a defect is hidden, then the seller will be held liable. If however a defect is held to be visible for the buyer, then the seller cannot be held liable once the buyer has accepted the delivery of the goods or services concerned; the buyer should protest before accepting delivery. The possibilities for the professional seller to insert exoneration terms in the contract will hence be more extensive when he is dealing with a specialized buyer,[155] at least as far as hidden defects are concerned.[156] Other elements such as sectorial usages, disposable technical means, the prevailing circumstances at the moment of acceptance, etc. are also taken into account when assessing the visible or hidden nature of a defect.[157]

20. *Moderating function.* Thirdly, and lastly, case law and legal scholarship have endowed the principle of good faith with the possibility of mitigating express contract terms, or, to be more correct, the possibility of mitigating the execution of a contract term. In other words, good faith and fairness preclude a party from executing a contract in a manner which is clearly unreasonable in light of specific circumstances of a certain case. If a party invokes contract terms in a manner which is unreasonable, the judge might decide to mitigate these contractual provisions to the normal level of execution of the contract, to reject the possibility for that party to invoke the term at all or to order reparation of damages inflicted by the abuse.[158] Self-evidently, the moderating function of good faith is applied with the

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Gevolgen van de koop, Mechelen, Kluwer, 2012, 372. For France, see Cass. Civ. 17 May 1965, *Bull. civ.* 1965, I, n° 62-12790; A. BENABENT, « La qualification du « vendeur professionnel » », *Revue des contrats* 2009, 111; M.-A. HOUTMANN, « La mauvaise foi effective des vendeurs professionnels en matière de garantie d'éviction et des vices cachés », *Petites affiches* 1 August 2002, n° 153, 6; C. NORMAND, "Le professionnel de l'immobilier et la garantie des vices cachés dans la jurisprudence", *Petites affiches* 28 January 2010, n°20, 6. For the Netherlands, see e.g. HR 27 April 2001, *NJ* 2002, 213; Rb. 's-Gravenhage 4 June 2008, *Prg.* 2008, 191.

153 Cass. Com. 23 June 1992, *CCC* 1992, n° 220; L. LEVENEUR, *Droit des contrats – 10 ans de jurisprudence commentée – La pratique en 400 décisions*, Parijs, Litec, 2002, 69-71; B. TILLEMAN, *Beginselen van Belgisch privaatrecht*, X, *Overeenkomsten*, Part 2, *Bijzondere overeenkomsten*, A, *Verkoop*, part 2, *Gevolgen van de koop*, Mechelen, Kluwer, 2012, 323.

154 G. VIRASSAMY, « Les relations entre professionnels en droit français », in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 501.

155 T. DE GRAAF, *Exoneraties in (ICT-)contracten tussen professionele partijen*, Deventer, Kluwer, 2006, 45-47.

156 One can always exonerate himself for visible defects. See Cass. com. 22 June 1993, *Bull. civ.* 1993, IV, 188; G. VIRASSAMY, « Les relations entre professionnels en droit français », in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 504-505.

157 B. DUBUISSON and G. TOSSENS, "Les relations entre professionnels en droit belge", in J. GHESTIN and M. FONTAINE, *Les relations entre professionnels en droit belge*, Paris, LGDJ, 1996, 439.

158 See e.g. Kh. Ieper 29 June 1998, *RW* 1999-2000, 21; A. HARTKAMP and C. SIEBURGH, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht*, 6, *Verbintenissenrecht*, 3, *Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 368-369; S. LINDBERGH, « Bescherming van de 'zwakkere': regel en uitzondering », in T. HARTLIEF and C. STOLKER, *Contractvrijheid*, Deventer, Kluwer, 1999, 406-407; S. STIJNS, "De matigingsbevoegdheid van de rechter bij misbruik van contractuele rechten in de Belgische rechtspraak van het Hof van Cassatie", J. SMITS and S. STIJNS (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 94-97; F. VERMANDER, "De aanvullende werking van het

necessary reticence.[159] Only in cases of clear disproportionality will a judge decide to intervene.[160] Belgium and France for example chose to link the moderating function of good faith with the doctrine of abuse of rights.[161]

The moderating function of good faith has been used on numerous occasions to protect the weaker party in a B2B-relationship (cases of hardship,[162] abuse of sanctions,[163] abuse of non-competition clauses,[164] etc.). Once again, exemption clauses provide us with an excellent example. All member states have incorporated into their national legislations rules which limit the possibility of introducing exemption clauses in B2C-contracts, so as to comply with European legislation. With the exception of English law which contains an express provision clearly stating that a party to a B2B-contract can invoke an exemption clause only if such is reasonable,[165] such specific B2B-provision does not exist in other member states, the doctrine on exemption clauses in B2B-contracts being purely based on case law.

Since exemption clauses which are too extensive and therefore undermine the essence of the contract cannot be addressed by simply reverting to the principle of interpretation in good faith, judges will often have to act more invasively in order to limit their scope.[166] E.g., in

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beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering", *TBBR* 2004, 576.

159 HR 8 February 2002, *NJ* 2002, 284; A. HARTKAMP and C. SIEBURGH, *Asser's handeleiding tot de beoefening van het Nederlands burgerlijk recht, 6, Verbintenissenrecht, III, Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, no. 412-413.

160 P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 22-23.

161 INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 20; Cass. 19 September 1983, *RW* 1983-84, 1480; A. CATHIARD, *L'abus dans les contrats conclus entre professionnels: L'apport de l'analyse économique du contrat*, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2006, 471-518; A. HARTKAMP and C. SIEBURGH, *Asser's handeleiding tot de beoefening van het Nederlands burgerlijk recht, 6, Verbintenissenrecht, III, Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, no. 413; S. STIJNS, "De matigingsbevoegdheid van de rechter bij misbruik van contractuele rechten in de Belgische rechtspraak van het Hof van Cassatie", J. SMITS and S. STIJNS (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 79-100; F. VERMANDER, "De interpretatie en aanvulling van een overeenkomst naar Belgisch recht", in J. SMITS and S. STIJNS (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 38-40.

162 INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, *Unidroit Principles of International Commercial Contracts 2010*, Rome, s.n., 2010, 212-222; A. HARTKAMP and C. SIEBURGH, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 6, Verbintenissenrecht, 3, Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 369-373.

163 W. DE BONDT, "Uitlegging van overeenkomsten naar de geest: mogelijkheden, grenzen en alternatieven", *RW* 1996-97, 1010-1012; P. LE TOURNEAU and M. POUMADÈRE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 22; F. VERMANDER, "De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering", *TBBR* 2004, 578.

164 P. LE TOURNEAU and M. POUMADERE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 22.

165 Section 5 UCTA; H. BEALE, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 963-968.
Before the provision was introduced in UCTA, English judges reverted to the doctrine of unconscionability, the doctrine of fundamental breach etc. in order to attack unreasonable exemption clauses. See J. ADAMS and H. MACQUEEN, *Atiyah's Sale of Goods*, London, Longman, 2010, 216; M. BRIDGE, *Benjamin's Sale of Goods*, London, Thomson Reuters, 2010, 696.

166 J. ADAMS and H. MACQUEEN, *Atiyah's Sale of Goods*, London, Longman, 2010, 216; H. BEALE, *Chitty on Contracts*, vol. 1, *General principles*, London, Sweet & Maxwell, 2008, 911.

case of a sales contract for example, courts often reverted to good faith and related doctrines to attack an exemption clause in which a seller altogether exonerated himself for warranty against eviction or for delivery of the goods.[167] Belgian and French courts go even further and state that, since a professional seller is aware of all hidden defects (cf. supra), he cannot exonerate himself for hidden defects. Strangly enough, the rule applies to both B2C- and B2B-sales.[168] In other member states on the contrary, exemption clauses in B2B-contracts are not prohibited *tout court*, but only in so far as they are unreasonable in light of the specific circumstances of a certain case. In order to assess the reasonable character of an exemption clause in a B2B-contract the level of specialization of the parties involved, the size of their business, etc. are taken into account.[169] The French-Belgian austerity towards exemption clauses has thus been criticized, especially in the context of B2B-contracts, for being simply too categorical and for going beyond the demands of procedural fairness (cf. supra).[170]

Another excellent example of how the moderating function of good faith is used in a commercial context is the case law on price setting in cases where the price was fixed by one of contracting parties. Many commercial contracts concluded between two businesses contain an express or implicit term giving the supplier the authority to fix the price of the goods or services he is supplying unilaterally. In most member states, with the exception of Belgian sales law, such clause is not prohibited in itself. If however the supplier abuses the right conferred on him by the contract and acts in a grossly unreasonable and unfair manner, a judge may intervene.[171]

21. *Different degrees of judicial intervention.* The demarcation lines between the three functions of good faith are often blurry.[172] It is for this reason that some authors have proposed to

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167 Article 6 (1) UCTA. M. BRIDGE, *Benjamin's Sale of* Goods, London, Thomson Reuters, 2010, 696; B. TILLEMAN, *Beginselen van Belgisch privaatrecht, X, Overeenkomsten,* Part 2, *Bijzondere overeenkomsten, A, Verkoop,* part 2, *Gevolgen van de koop,* Mechelen, Kluwer, 2012, 416.

168 For France, see Cass. Civ. 17 May 1965, *Bull. civ.* 1965, I, n° 62-12790; A. BENABENT, « La qualification du « vendeur professionnel » », *Revue des contrats* 2009, 111; M.-A. HOUTMANN, « La mauvaise foi effective des vendeurs professionnels en matière de garantie d'éviction et des vices cachés », *Petites affiches* 1 August 2002, n° 153, 6; C. NORMAND, "Le professionnel de l'immobilier et la garantie des vices cachés dans la jurisprudence", *Petites affiches* 28 January 2010, n°20, 6. For Belgium, see Cass. 4 May 1939, *Pas.* 1939, I, 223; Luik 2 June 2004, *JLMB* 2004, 1729; B. TILLEMAN, *Beginselen van Belgisch privaatrecht, X, Overeenkomsten,* Part 2, *Bijzondere overeenkomsten, A, Verkoop,* part 2, *Gevolgen van de koop,* Mechelen, Kluwer, 2012, 411-416.

169 Rb. 's- Gravenhage 4 June 2008, nyr; Balmoral Group Ltd v Borealis UK Ltd [2006] 2 *Lloyd's Rep* 629; Photo Productions Ltd v Securicor Transport Ltd [1980] AC 827; H. BEALE, *Chitty on Contracts,* vol. 2, *Specific contracts,* London, Sweet & Maxwell, 2008, 1453.

170 Cfr. I. CLAEYS and K. VAN STRYDONCK, "Contractuele aansprakelijkheidsbeperkingen van de professionele verkoper bij verborgen gebreken in het gemeen kooprecht: elk argumenten pro", in H. BOCKEN, C. CAUFMANN, a.o., *Bijzondere overeenkomsten,* 2008, Mechelen, Kluwer, 309-334; Y.-M. LAITHIER, "L'avenir des clauses limitatives et exonératoires de responsabilité contractuelle", *Revue des contrats* 2010, 1091.

171 Article 7:904 DCC; Lymington Marina Ltd v MacNamara [2007] *EWCA Civ* 151; H. BEALE, *Chitty on Contracts,* vol. 1, *General principles,* London, Sweet & Maxwell, 2008, 9020; A. HARTKAMP and C. SIEBURGH, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 6, Verbintenissenrecht, 3, Algemeen overeenkomstenrecht,* Deventer, Kluwer, 2010, 364; P. LE TOURNEAU and M. POUMADÈRE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 15-16; D. MAZEAUD, "La protection par le droit commun", in C. JAMIN and D. MAZEAUD, *Les clauses abusives entre professionnels,* Paris, Economica, 1998, 38-39; G. VIRASSAMY, « Les relations entre professionnels en droit français », in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges,* Paris, LGDJ, 1996, 498-500.

172 See M.E. STORME, *De invloed van de goede trouw op de kontraktuele schuldvordering,* 118.

merge the three functions in one general notion of interpretation.[173] Let me give an example which I have already briefly touched upon earlier. In theory, the supplementary and derogating function of good faith start where the interpretative function ends.[174] However, continental judges often tend to protect weaker contract parties by depicting their intervention as a matter of interpretation, whereas they are in reality adding terms to the contract or mitigating express terms for reasons of good faith, and are thus often infringing upon the principle that the principle of good faith can only be referred to for interpreting a contract when there is doubt on the meaning of its words (cf. supra).[175] English judges will recognize more easily that they are reading implied terms into the contract. In the end however, the results are the same.

3. P.CESL accepts procedural fairness and contextualization in a B2B-context

22. *Conclusion.* It should be clear by now that, as far as B2B-contracts are concerned, none of the Member States reverted to the level of formalism and the intensive mania for organization which often seem so prevail in a B2C-context.[176] Furthermore, none of them has accepted neither a general principle nor specific rules of relief against inequality of bargaining power. In general national courts will act only when one company *abuses* such inequality of bargaining power to the detriment of another company, by referring to general principles of fairness (such as good faith, mutual cooperation, etc.).[177]

23. *What about the P.CESL?* Since the P.CESL aims to cover the entire life cycle of a contract, the introduction of such general behavioral guideline was inevitable, not only for B2B-contracts but even for B2C-contracts. *"The main advantage of an overarching general clause for consumer contracts in the horizontal instrument would be the creation of a tool which would provide guidance for the interpretation of more specific provisions and would allow the courts to fill gaps in the legislation by developing complementary rights and obligations. It could therefore provide a safety net for consumers and create certainty for producers by filling gaps in legislation. In addition, a general provision may also be a useful tool when interpreting clauses contained in offers or contracts and it may as well respond to the criticism that certain directives or provisions are not time-proof. A general provision could be built round the phrase "good faith and fair dealing". This includes the idea*

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173 A. HARTKAMP and C. SIEBURGH, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 6, Verbintenissenrecht, 3, Algemeen overeenkomstenrecht*, Deventer, Kluwer, 2010, 340-341; M. HESSELINK, *De redelijkheid en billijkheid in het Europese privaatrecht*, s.l., Kluwer, 1999, 131-172; M.E. STORME, *De invloed van de goede trouw op de kontraktuele schuldvordering*, 118.

174 F. VERMANDER, "De interpretatie en aanvulling van een overeenkomst naar Belgisch recht", in J. SMITS and S. STIJNS (eds.), *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, Antwerp, Intersentia, 2005, 31-34.

175 N. KORNET, *Contract interpretation and gap filling: comparative and theoretical perspectives*, Antwerp, Intersentia, 2006.

176 M. FONTAINE, "La protection de la partie faible dans les rapports contractuels", in J. GHESTIN and M. FONTAINE, *La protection de la partie faible dans les rapports contractuels – Comparaisons franco-belges*, Paris, LGDJ, 1996, 627; H. SCHOORDIJK, « Het gebruik van open normen naar Belgisch en Nederlands privaatrecht », in E. DIRIX, W. PINTENS, P. SENAEVE and S. STIJNS, *Liber amicorum Jacques Herbots*, Bruges, Kluwer, 2002, 348-350.

177 See H. BEALE, "Exclusion and Limitation Clauses in Business Contracts: Transparency", in A. BURROWS and E. PEEL (eds.), *Contract Terms*, Oxford, Oxford University Press, 2007, 195-198; J. CARTWRIGHT, *Contract Law*, Oxford, Hart Publishing, 2007, 169-170.

that they show due regard to the interests of the other party, considering the specific situation of certain consumers."[178] One cannot constrict an entity to its capacity of consumer/customer and protect them through an exhaustive list of detailed rules; other values have to be taken into account as well.[179] The P.CESL thus contains both a general principle of good faith and fair dealing (article 2) and a general principle of cooperation (article 3). According to the preamble to the CESL *"the principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of the parties as set out in the specific rules. The concrete requirements resulting from the principle of good faith and fair dealing should depend, amongst others, on the relative level of expertise of the parties and should therefore be different in business-to-consumer transactions and in business-to-business transactions. In transactions between traders, good commercial practice in the specific situation concerned should be a relevant factor in this context."*

24. *Clear parallel with national approaches.* The P.CESL subsequently puts these general principles into operation by introducing more specific provisions which find themselves in a *lex specialis* relation towards that general principle. Whereas these specific rules are extensive, fairly detailed and often categorical for contracts concluded with consumers, they remain fairly open, vague and limited in number for B2B-contracts. The resemblances between the P.CESL and the national approaches are striking (to not surprising, since the P.CESL is drafted with the national approaches in mind). Let me give three examples.

Article 23 imposes a pre-contractual information duty upon a company that wishes to supply goods or services to another company. Whereas the proposal contains a detailed list of elements on which a consumer has to be informed, such is not the case if the customer is another company. In a B2B-contract, the information duty is not considered to be absolute and automatic. In order to determine the extent of the information duty, the expertise of both companies, the nature of the information, good commercial practices, etc. have to be taken into account.

The P.CESL introduces a general prohibition of unfair terms in contracts between traders (article 86).[180] *In order to assess whether a contract term is unfair the nature of the goods or services, the prevailing circumstances at the time of the conclusion of the contract, etc. are taken into account. There is no grey and black list of terms which are presumed resp. considered to be unfair in all circumstances as this is the case for contracts concluded with consumers.*

According to article 104 P.CESL, in a contract between traders, the seller is not liable for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity. If the buyer is specialized, chances are that courts will more easily accept that he should have known the defect. If the customer is a consumer he is always considered to be unknowing; the trader will only be able to exonerate himself for a lack of conformity if he can prove that the consumer knew of the lack of conformity and accepted it (article 99 (3)).

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178 Green Paper on the Review of the Consumer Acquis COM (2006) 744 final, Brussels, 8 February 2007,

179 M. HESSELINK, "European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice", *European Review of Private Law* 2007, 330-332.

180 Cfr. Article II-9:405 DCFR.

25. *Contextualization.* As the Commission pointed out in the last sentence, one of the main advantages of applying norms to ensure protection of weaker contract parties is that they allow for contextualization, for a concrete assessment of whom is the stronger and whom is the weaker party in a contractual relationship.[181] Contrary to the categorical approach towards consumer protection sometimes taken by specific consumer legislation (cf. supra), the traditional approach of the member states towards B2B-contracts allows for contextualization and only confers protection upon persons and entities who effectively find themselves in a weaker position than their counterparty.[182] The examples in the previous paragraph are numerous. SMEs are not protected merely by the fact of being an SME; all relevant circumstances are taken into account when assessing the bargaining position of the SME in its dealings with another company. Elements such as business sophistication, size, monopoly power, shortage, the public nature of an industry, nature of the contract which is concluded, duration of the contract, etc. are taken into account.[183] This allows for distinguishing between different SMEs and thus solves the problem of SMEs being a very diverse category.[184]

It is not unimaginable that in certain circumstances an SME has a stronger bargaining position than a LE it is dealing with. Recently, the European Law Institute has therefore advocated to abandon the restriction to SMEs and therefore to apply the B2B-rules of the D.CESL in all commercial transactions, irrespective of the size of the parties involved.[185]

26. *Contextualization versus internal market?* However, since the interpretation of the principle of good faith and of fair commercial practices can differ extensively from one country to another and the CESL will have to be enforced through national courts, critics have raised the question whether the CESL will really be able to remove obstacles to the internal market if it heavily relies on principles of good faith and good commercial practices. It will not be possible to safeguard the internal market without a true European interpretation of these principles.[186] Question is however whether such is really desirable, especially in the area of

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181 T. HARTLIEF, *De vrijheid beschermd*, Oegstgeest, E.M. Meijers Instituut, 1999, 41; P. LE TOURNEAU and M. POUMADÈRE, « Bonne foi », *Rép. Civ. Dalloz* 2009, 5.

182 N. HULS, "Sterke argumenten om zwakke contractpartijen te beschermen", in T. HARTLIEF and C. STOLKER, *Contractvrijheid*, Deventer, Kluwer, 1999, 402.

183 K. CSERES, « Competition and contract law », in A. HARTKAMP, M. HESSELINK, E. HONDIUS, C. MAK and E. DU PERRON, *Towards a European Civil Code*, Alphen aan de Rijn, Kluwer, 2011, 215; F. VERMANDER, "De aanvullende werking van het beginsel van de uitvoering te goeder trouw van contracten in de 21ste eeuw: inburgering in de rechtspraak, weerspiegeling in de wetgeving en sanctionering", *TBBR* 2004, 577.

184 For a comparable point of view, see M. HESSELINK, *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 – Final version – 5 July 2007*, 4-5 and 18, available at http://www.pedz.uni-mannheim.de/daten/edz-ma/ep/07/EST17293.pdf.

185 See Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM (2011) 635 final, available at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf. See also O. LANDO, "Comments and questions Relating to the European Commission's Proposal for a Regulation o a Common European Sales Law", *European Review of Private Law* 2011, 720-721.

186 L. BERNSTEIN, « An (Un)Common Frame of Reference : An American Perspective on the Jurisprudence of the CESL », forthcoming in *Common Market Law Review* 2012, electronic copy available at http://ssrn.com/abestract=2067196, 13; S. TROIANO, "To What Extent Can the Notion of 'Reasonableness'

B2B-contracts, where the interpretation of good faith and good commercial practices not only differs from one country to another, but also from one sector to another.

27. *A consumer law for professionals?* It is in light of all the forgoing that it is, in my view, particularly unfortunate to label the CESL rules as a 'consumer law for professionals'. By labeling them as such, one creates a wrong impression, as these rules do not constitute a separate body of rules which deviate from general contract law, but are an integral part of general contract law and are no more than a precision thereof.[187] In other words, the protection of weaker companies against more powerful companies is no more then a consequence of the application of general contract law rules in a B2B-context.

Help to Harmonize European Contract Law? Problems and Prospects from a Civil Law Perspective", *ERPL* 2009, 749.

187 E. TERRYN, "Codificatie in het economisch recht", in B. TILLEMAN and E. TERRYN, *Beginselen van Belgisch privaatrecht*, XIII, *Handels- en economisch recht*, part 1, *Ondernemingsrecht*, volume A, Mechelen, Kluwer, 2011, 61-62.