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UNFAIR TERMS IN INSURANCE CONTRACTS

Abstract

The paper deals with the issue of unfair terms in regard to insurance contracts in the European context. It focuses in particular on Council Directive 93/13/EEC and on Article 2:304 of the Principles of European Insurance Contract Law. A list of abusive clauses in insurance contracts will also be analyzed.

Key words: Insurance, abusive clauses, unfair terms, Directive, consumer contracts, PEICL, principles, Europe

1. INTRODUCTION

Consumer contracts not individually negotiated are more and more common. Those contracts, concluded between parties of different economic strength, should be subject to scrutiny in order to set aside unfair terms included by imposition rather than by agreement.¹

The purpose of this paper is to address the issue of unfair terms with regard to insurance contracts in the European context. The paper will focus on Council Directive 93/13/EEC dealing with unfair terms in consumer contracts² and on Article 2:304 of

the Principles of European Insurance Contract Law (PEICL).³ A list of abusive clauses in insurance contracts will also be examined.

2. DIRECTIVE 93/13/EEC AND ARTICLE 2:304 OF THE PEICL

Because of disparities in the laws of Member States that address unfair terms of consumer contracts, the European Union adopted Directive 93/13/EEC on April 5, 1993 in order to protect consumers within the European Union from unfair contractual terms⁴. The Directive is one of the measures intended to establish the internal market⁵. The Pream-

National Bank", *The Modern Law Review*, Vol. 65, 2002, p. 763; Dean, Meryll "Defining Unfair Terms in Consumer Contracts – Crystal Ball Gazing? Director General of Fair Trading v First National Bank plc", *The Modern Law Review*, Vol. 65, 2002, p. 773; MacMillan, Catharine "Evolution or Revolution? Unfair Terms in Consumer Contracts", *The Cambridge Law Journal*, Vol. 61, 2002, p. 22; Reich, Norbert "The Implementation of Directive 93/13/EEC on Unfair Terms in Consumer Contracts in Germany", *European Review of Private Law*, Vol. 5, 1997, p. 165; Tenreiro, Mario "The Community Directive on Unfair Terms and National Legal Systems – The Principle of Good Faith and Remedies for Unfair Terms", *European Review of Private Law*, Vol. 3, 1995, p. 273; Dean, Meryll "Unfair Contract Terms: The European Approach", *The Modern Law Review*, Vol. 56, 1993, p. 581; Joerges, Christian "The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines – an Analysis of the Directive on Unfair Terms in Consumer Contracts", *European Review of Private Law*, Vol. 3, 1995, p. 175; De Nova, Giorgio "Italian Contract Law and the European Directive on Unfair Terms in Consumer Contracts", *European Review of Private Law*, Vol. 3, 1995, p. 221; De Moor, Anne "Common and Civil Law Conceptions of Contract and a European Law of Contract: the Case of the Directive on Unfair Terms in Consumer Contracts", *European Review of Private Law*, Vol. 3, 1995, p. 257; Hondius, Ewoud "The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States", *European Review of Private Law*, Vol. 3, 1995, p. 241; Weatherill, Stephen "Prospects for the Development of European Private Law Through 'Europeanisation' in the European Court – the Case of the Directive on Unfair Terms in Consumer Contracts", *European Review of Private Law*, Vol. 3, 1995, p. 307.

³ The text of the "Principles of European Insurance Contract Law (PEICL) is available at: <http://www.uibk.ac.at/zivilrecht/restatement/sprachfassungen/peicl-en.pdf>.

⁴ See paragraph 2, 3 and 10 of the Preamble and Article 1 of the Directive.

⁵ See paragraph 1 of the Preamble.

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¹ See Eggers, Peter Macdonald et al. *Good Faith and Insurance Contracts*, Informa Professional, London, 2004, p. 122.

² Council Directive 93/13, 1993 O.J. (L095) 29 [hereinafter Directive]. With regard to the Directive 93/13, see Bruder, Florian "Burden of Proof and the Unfair Terms in Consumer Contracts Directive", *European Review of Private Law*, Vol. 15, 2007, p. 205; Alpa, Guido "A Glance at Unfair Terms in Italy and the United Kingdom (What an Italian Lawyer Can Learn from the English Experience)", *European Business Law Review*, Vol. 15, 2004, p. 1123; Macdonald, Elizabeth "Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations: Director General of Fair Trading v First

ble of the Directive emphasizes the need to remove unfair terms from contracts between the seller of goods or supplier of services and the consumer of them, so that sellers of goods and suppliers of services will be helped in their commercial activities, both in their home State and throughout the internal market.⁶

The rules introduced by the Directive apply only to contracts concluded between sellers or suppliers and consumers⁷ after 31 December 1994.⁸ According to Article 2 of the Directive, a 'consumer' is 'any natural or legal person who [. . .] is acting for purposes which are outside his trade, business or profession'⁹ and a 'seller or supplier' is 'any natural or legal person who [. . .] is acting for purposes relating to his trade, business or profession'.¹⁰ If neither party is a consumer, the Directive does not apply. Insurance contracts concluded between insurers and consumers are subject to the Directive.

The Directive does not apply to terms that have been individually negotiated.¹¹ Article 3.2 provides that a term is considered not individually negotiated where it has been drafted in advance and the consumer has not been able to influence the substance of the term, especially in case of a pre-formulated standard contract.

Even if a term has been individually negotiated, the rules set out by the Directive cover the rest of the contract if, following an overall assessment, the contract is a pre-formulated standard one¹². The burden of proof is on the seller or supplier to show that a standard term has been individually negotiated. An insurer, therefore, has to prove that the contract was individually negotiated. Simply having the choice of few terms or sets of terms is not equivalent to negotiation.¹³

A term not individually negotiated is unfair if, 'contrary to the requirement of good faith, it cau-

ses a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.¹⁴

Paragraph 19 of the Preamble and article 4.2, however, specify that an assessment of the unfair nature of the terms will not apply to the main subject matter of the contract or to the adequacy of the price and remuneration of the goods or services supplied in exchange¹⁵, provided these terms are in 'plain intelligible language'.¹⁶ Thus, terms relating to the subject matter or the price for goods or services can be assessed as being unfair if they are not intelligible.

With regard to insurance contracts, it follows that 'the terms which clearly define or circumscribe the insured risk and the insurer's liability' are not subject to the fairness assessment because 'these restrictions are taken into account in calculating the premium paid by the consumer'.¹⁷

Nevertheless, it is not easy to establish whether a term excluding a risk from insurance coverage falls within the subject matter of the contract, thereby avoiding coverage by the Directive's rules, or whether it simply waives liability, in which case it is subject to the assessment of the unfair nature. In this respect, it can be argued that an exclusion clause to be valid should be express and clear. Doubt has been expressed, however, about whether insurance policies 'can be drafted in language plain and intelligible to the man in the pub'.¹⁸ In general, exceptions and warranties or terms which describe the insured risk or the circumstances in which the insurer will have to indemnify the assured should not be subject to assessment as unfair

⁶ See paragraph 6 and 7 of the Preamble.

⁷ See paragraph 10 of the Preamble and Article 1 of the Directive.

⁸ See Article 10.1.

⁹ See Article 2(b).

¹⁰ See Article 2(c).

¹¹ See paragraph 12 of the Preamble and Article 3 of the Directive.

¹² See Article 3.2 of the Directive.

¹³ See Clarke, A. Malcom. *The Law of Insurance Contracts*, Informa Law, London, 2006, p. 592.

¹⁴ Article 3.1 of the Directive.

¹⁵ See Clarke, A. M. *Ibidem*, p. 591 that defines "core provisions" in insurance contracts those terms dealing with premium and cover.

¹⁶ Anyway, it has to be noticed that according to the Annex 1(I) terms that do not give the consumer the right to cancel the contract 'if the final price is too high in relation to the price agreed when the contract was concluded' may be regarded as unfair (emphasis added).

¹⁷ See paragraph 19 of the Preamble. See also *Workshop 1, The Scope of the Directive: Non-negotiated Terms in Consumer Contracts (Art. 1§1, 3§1, 4§2)*, at 97, available at: http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/event29_02.pdf, where it is highlighted that 'low standards insurance should warn the consumer about this low standard and ... should be cheaper!'.
¹⁸ Clarke, A. M. *Ibidem*, p. 593.

terms.¹⁹ In any case, the main subject matter of the contract and the price/quality ratio may be taken into account in assessing the fairness of other terms.²⁰

As to the standard of good faith, according to paragraph 16 of the Preamble, it should be intended as a means that permits an overall evaluation of the different interests involved. In considering good faith, regard shall be given to the strength of the bargaining position of the parties and to the fact that the consumer had an inducement to accept the term.²¹ The fact that goods or services were sold or supplied to the special order of the consumer is also relevant.²² The seller or supplier that deals fairly and equitably with the consumer and that takes the consumers' legitimate interests into consideration may satisfy the requirement of good faith.²³

Further, Article 4.1 sets out other standards to be considered in assessing the unfair nature of a term. Such standards include consideration of the nature of the goods and services²⁴ for which the contract was concluded and all the circumstances attending such conclusion and all the other terms of the contract or of another contract upon which it is dependent.

In the case of written consumer contracts, the terms must be drafted in plain and intelligible language. Otherwise, if there is doubt about the meaning of a term, the interpretation most favourable to the consumer will prevail.²⁵

With regard to remedies that are available in the event of unfair terms, Article 6.1 of the Directive sets out that Member States have to provide, under their national law, that unfair terms shall not be binding on the consumer. If the rest of the contract can continue in existence without the unfair terms, then it will remain in force and bind the parties upon the other terms.²⁶

Member States also have to ensure that the consumer does not lose the protection provided by the Directive if the law chosen to govern the contract is that of a non-Member country, so long as the contract has a close connection with the territory of a Member State.²⁷

Moreover, Article 7 of the Directive requires Member States to have 'adequate and effective means' to prevent the continued use of unfair terms in consumer contracts. Paragraph 2 of the above-mentioned Article requires Member States to have provisions that enable persons or organizations having a legitimate interest under national law in protecting consumers, to bring an action according to the national law concerned before a court or an administrative authority for a decision as to whether contractual terms drawn up for general use are unfair.²⁸ Individuals or organizations may take action separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.²⁹

Article 8 gives Member States the option of adopting or retaining provisions more stringent than those of the Directive in order to afford consumers a maximum degree of protection.³⁰

Having analyzed the rules introduced by the Directive, it is worthwhile examining those set out in Article 2:304 of the Principles of European Insurance Contract Law (PEICL) on abusive clauses that are specific to insurance contracts.³¹ This

¹⁹ See Eggers, Peter Macdonald et al. *Ibidem*, p. 123; Clarke, A. M. *Ibidem*, p. 594.

²⁰ See paragraph 19 of the Preamble.

²¹ See paragraph 16 of the Preamble.

²² See *Ibidem*.

²³ See *Ibidem*.

²⁴ See also paragraph 18 of the Preamble.

²⁵ See Article 5 of the Directive and paragraph 20 of the Preamble.

²⁶ See also paragraph 21 of the Preamble.

²⁷ See Article 6.2 of the Directive and paragraph 22 of the Preamble.

²⁸ See also paragraph 23 of the Preamble.

²⁹ Article 7.3 of the Directive.

³⁰ See also paragraph 12 of the Preamble.

³¹ According to Article 1:102, the PEICL 'shall apply when the parties, notwithstanding any limitations of choice of law under private international law, have agreed that their contract shall be governed by them'. With regard to the PEICL, see Basedow, Jürgen et al. *Principles of European Contract Law (PEICL)*, Sellier European Law Publishers, Munich, 2009; Heiss, Helmut. "The Common Frame of Reference (CFR) of European Insurance Contract Law", in *Common Frame of Reference and Existing EC Contract Law*, Reiner Schulze ed., Munich, 2008, pp. 229, 242; Hinchliffe, Peter "Review of Principles of European Insurance Law", *Era Forum*, 2008. available at: <http://www.springerlink.com/content/0x417gr061763786/fulltext.pdf>; Basedow, Jürgen

Article is modeled on Articles 3, 4 and 6 of Directive 93/13/EEC. It does not contemplate application of the rules to the general category of consumers but to 'the policyholder, the insured or the beneficiary'.

Likewise the Directive, Article 2:304(1) PEICL provides that a contract not individually negotiated shall not be binding on the policyholder, the insured or the beneficiary, if, 'contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in his rights and obligations arising under the contract to his detriment'. In evaluating the unfair nature of a term consideration must be given to the nature of the insurance contract, all the other terms of the contract and the time the contract was concluded.

According to the third paragraph of the Article, the assessment could not concern the adequacy in value of the cover and the premium, or 'terms that state the essential description of the cover granted or the premium agreed', unless these terms are not in plain and intelligible language.

The contract shall remain in force and bind the parties if it is capable of continuing in existence without the unfair term. Otherwise, 'the unfair term shall be substituted by a term which reasonable parties would have agreed upon had they known the unfairness of the term'.³²

The rules defining a contract not individually negotiated, governing the assessment of the unfairness of contracts with some terms individually negotiated and regulating the burden of proof of the contract's negotiation are identical to those of the Directive.

Finally, the Annex of the Directive contains an 'indicative and non-exhaustive'³³ list of terms that may be considered unfair. Not all of these terms are relevant to insurance contracts; therefore, it is worth drawing up a more specific list. Unfair terms in insurance contracts may be:

- '[t]erms that mislead the insured consumer about the contract'.³⁴ This category may include terms 'with which the consumer had no real opportunity of becoming acquainted before the conclusion of the contract',³⁵ terms hidden in long documents, with small print (so called 'unfair surprises')³⁶ and terms limiting the insurer's obligation to 'respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality'.³⁷

- '[t]erms that excuse improper performance of contractual obligations'.³⁸ Among other things this category refers to terms excluding or limiting liability for delay in handling and paying claims.³⁹ In general, terms that inappropriately exclude or limit the legal rights of the insured with respect to the insurer in the event of total or partial non-performance or inadequate performance by the insurer of any of the contractual obligations⁴⁰ fall within this category. The category also includes terms that oblige the insured to fulfill all his obligations even when the insurer does not perform his.⁴¹

- '[t]erms erecting barriers to redress'.⁴² This category may include terms that exclude or hinder the insured's right to take legal action or exercise any other legal remedy⁴³, terms enabling

"Insurance Contract Law as Part of an Optional European Contract Act", *Lloyd's Maritime and Commercial Law Quarterly*, Vol. 498, 2003; Basedow, Jürgen "Transjurisdictional Codification", *Tulane Law Review*, Vol. 83, 2009, pp. 995-996; Storme E. Matthias, "An Optional Instrument for Insurance Contract Law: the Point of View of Legal Practice", European Parliament, Policy Department, 2010, available at: <http://www.europarl.europa.eu/document/activities/cont/201004/20100430ATT73923/20100430ATT73923EN.pdf>; Castle, Jacquetta "The Principles of European Insurance Contract Law: Towards a European Insurance Contract?", *Inversion*, Nr. 7/2009, pp. 19-24, available at: http://www.robinsimonllp.com/upload/pub/RSLLP_Inversions%2072010-03-24-17-58-33.pdf.

³² Article 2:304(2) PEICL.

³³ Article 3.3 of the Directive.

³⁴ Clarke, A. M. *Ibidem*, p. 598.

³⁵ Annex 1(i) of the Directive.

³⁶ See Clarke, A. M. *Ibidem*, p. 598.

³⁷ Annex 1(n) of the Directive. See also Clarke, A. M. *Ibidem*, p. 598, making reference to the following clause: '[a]ll terms of the contract of insurance are contained in this policy'.

³⁸ Clarke, A. M. *Ibidem*, p. 598.

³⁹ *Ibidem*, p. 598.

⁴⁰ See Annex 1(b) of the Directive.

⁴¹ See Annex 1(o) of the Directive.

⁴² Clarke, A. M. *Ibidem*, p. 598.

⁴³ See Annex 1(q) of the Directive.

the insurer to put forth a technical defense⁴⁴, terms that require 'proof satisfactory to the insurer' and that permits the insurer to make unfair demands on the claimant insured.⁴⁵ Also clauses that reverse the burden of proof against the insured should be assessed as unfair.⁴⁶ Attention should also be given to an arbitration clause since the insured may be at a disadvantage compared to the insurer in an arbitration.⁴⁷

- terms giving the insurer the right to dissolve the contract *ad libitum* where the same right is not granted to the consumer, or terms that permit the insurer to retain the sums paid for services not yet supplied by him, if it is the insurer himself who dissolves the insurance contract.⁴⁸

- terms that enable the insurer to terminate the contract without reasonable notice unless there are serious grounds for doing so.⁴⁹ In such a case it is likely that the insured would be unable to find alternative insurance coverage.⁵⁰

- terms that permit the insurer to vary the terms of the insurance contract unilaterally without a valid reason specified in the contract.⁵¹ This category may also include premium increases during the term of the policy.

- terms that require an insured who breaches the contract to pay a 'disproportionately high sum in compensation'.⁵²

Unfairness may also result from the vagueness of certain terms or from the fact that the insurance policy is silent on some points.⁵³

⁴⁴ Clarke, A. M. *Ibidem*, p. 598, referring to a term that requires 'notice of loss in an unduly short period of time'.

⁴⁵ *Ibidem*, p. 598.

⁴⁶ See *Ibidem*, p. 599.

⁴⁷ See *Ibidem*, p. 599.

⁴⁸ See Annex 1(f) of the Directive.

⁴⁹ See Annex 1(g) of the Directive.

⁵⁰ See Clarke, A. M. *Ibidem*, p. 599.

⁵¹ See Annex 1(j) of the Directive. See also Clarke, A. M. *Ibidem*, p. 599, making reference to terms enabling the insurer to vary the premium unilaterally or to assign the contract to another insurer.

⁵² See Annex 1(e) of the Directive

⁵³ See *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, p. 24, available at: http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/uct03_en.pdf, giving the example of

In addition, it should be noted that the Commission Regulations No 3932/92 of 21 December 1992⁵⁴ and No 358/2003 of 27 February 2003⁵⁵ provided a list of clauses in standard policy conditions to which the exemption from article 81(1) of the Treaty⁵⁶ did not apply because they impose undue restrictions on the parties.⁵⁷ These regulations expired on 31 March 2003 and on 31 March 2010 respectively.⁵⁸

a contract silent or vague as to the obligations to pay the premium, so that the policyholder may not know how to fulfill his obligations and the consequences for their insurance coverage if he fails to pay the premium.

⁵⁴ Commission Regulation 3932/92 of 21 December 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, 1992 O.J. (L 398) 7.

⁵⁵ Commission Regulation 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, 2003 O.J. (L 053) 8.

⁵⁶ See Article 101 of the Treaty on the Functioning of the European Union (formerly Article 81 of the Treaty establishing the European Community). Article 101(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition. As an exception to this rule, Article 101(3) provides that the provisions contained in Article 101(1) may be declared inapplicable in case of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not impose restrictions which are not indispensable to the attainment of these objectives and do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

⁵⁷ See paragraph 5 of the Preamble of the Commission Regulation 3932/92.

⁵⁸ The new insurance Block Exemption Regulation [Commission Regulation 267/2010, 2010 O.J. (L 83) 1, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector] was adopted on 24 March 2010 and it will expire on 31 March 2017. The new Regulation renews the exemptions for two of the four categories of agreements exempted in the previous Block Exemption Regulation, namely those on joint compilations, tables and studies and those on common coverage of certain types of risks (pools). Access to past statistical data is essential in order to technically price risks and therefore the Commission considered the cooperation in this area necessary. As to the common coverage of certain types of risks, the Commission, taking into account that individual insurers may be unwilling or unable to insure the entire risk alone, considered that risk sharing for these

In particular, according to Article 7 of the Commission Regulation 3932/92 and to Article 6 of the Commission Regulation 358/2003, the exemption did not apply in case of standard policy conditions with clauses:

- permitting the insurer to maintain the policy if he cancels part of the cover, increases the premium without the risk or the scope of the cover being changed, or otherwise alters the policy conditions without the express consent of the policyholders;
- permitting the insurer to modify the term of the policy without the express consent of the policyholder;
- imposing on the policyholder in the non-life insurance sector a contract period longer than three years;
- imposing a renewal period of more than one year in case the policy is automatically renewed unless notice with warning is given;
- requiring the policyholder to accept the reinstatement of an insurance policy which has been suspended because of the disappearance of the insured risk, if he is again exposed to a risk of the same nature;
- requiring the policyholder to obtain coverage from the same insurer for risks different from the one insured;
- requiring the policyholder, in case of disposal of the object of insurance, to make the acquirer take over the insurance policy;
- excluding or limiting the cover of a risk if the policyholder uses security devices, or installation or maintenance undertakings not approved in confor-

types of risks is necessary in order to ensure insurance coverage. On the contrary, agreements on standard policy conditions and security devices have not been renewed by the new Insurance Block Exemption Regulation. In particular, according to paragraph 3 of the Preamble, the new Regulation does not grant an exemption for the establishment of standard policy conditions and the testing and acceptance of security devices because the Commission's review of the functioning of Regulation 358/2003 revealed that it was no longer necessary to include such agreements in a sector specific block exemption regulation. Since they are not specific to the insurance sector, their inclusion would have resulted in unjustified discrimination against other sectors which do not benefit from a block exemption regulation. Further, the Review highlighted that they can also give rise to certain competition concerns. Therefore self-assessment has been regarded as more appropriate.

mity with the relevant specifications agreed by associations of insurance in one or several other Member States or at the European level.⁵⁹

Moreover, the Commission had the power to withdraw the benefit of the exemption if the standard policy conditions contain clauses different from those listed above, which create, to the detriment of the policyholder, a significant imbalance between the right and obligations arising from the contract.⁶⁰

Further, Annex I of Directive 2005/29/EC of the European Parliament and of the Council on unfair business-to-consumer commercial practices in the internal market⁶¹ sets out some aggressive

⁵⁹ See Article 6(1)(k) of the Commission Regulation 358/2003.

⁶⁰ See Commission Regulation 3932/92, art. 17 and paragraph 19 of the Preamble; Commission Regulation 358/2003, art. 10(b) and paragraph 26 of the Preamble.

⁶¹ European Parliament and Council Directive 2005/29, 2005 O.J. (L 149) 22. With regard to the Directive 2005/29, see Bernitz, Ulf et Weatherill, Stephen. *The Regulation of Unfair Commercial Practices Under EC Directive 2005/29: New Rules and New Techniques*, Hart Publishing, Oxford, 2007; Howells, Geraint et al. *European Fair Trading Law: The Unfair Commercial Practices Directive*, Ashgate, Hampshire, 2006; Willet, Chris "Fairness and Consumer Decision Making Under the Unfair Commercial Practices Directive", *Journal of Consumer Policy*, Vol. 33, 2010, p. 247; Anagnostaras, Georgios "The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?" *Common Market Law Review*, Vol. 47, 2010, p. 147; Collins, Hugh "Harmonisation by Example: European Laws Against Unfair Commercial Practices", *The Modern Law Review*, Vol. 73, 2010, p. 89; Keirbilck, Bert "Towards a Single Regulatory Framework on Unfair Commercial Practices", *European Business Law Review*, Vol. 20, 2009, p. 507; Tesouro, Claudio et Russo, Francesco "Unfair Commercial Practices and Misleading and Comparative Advertising: An Analysis of the Harmonization of EU Legislation in View of the Italian Implementation of the Rules", *Competition Policy International*, Vol. 4, 2008, p. 193; Shears, Peter "Overviewing the EU Unfair Commercial Practices Directive: Concentric Circles", *European Business Law Review*, Vol. 18, 2007, p. 781; Meyer, Olaf "The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques"-Results of the Conference Which Took Place on 3 March 2006, at Oxford University", *European Review of Private Law*, Vol. 15, 2007, p. 169; Abbamonte, Giuseppe B. "The Unfair Commercial Practices Directive: An Example of the New European Consumer Protection Approach", *The Columbia Journal of European Law*, Vol. 12, 2006, p. 695; Stuyck, Jules, Terryn, Evelyne et van Dyck, Tom "Confidence Through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market", *Common Market Law Review*, Vol. 43, 2006, p. 107; Handig, Christian "The Unfair Commercial Practices Directive

commercial practices that could also be relevant to unfair terms. One such practice is requiring a consumer who wishes to claim on an insurance policy to produce documents that are not relevant to the claim.⁶² Another is demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer.⁶³ If such practices are allowed by contractual clauses they might be regarded as unfair terms.

Lastly, a not-so-recent study on unfair terms in certain insurance contracts carried out for the Commission by the Centre du Droit de la Consommation of the University of Montpellier revealed that the most common unfair terms are those which, because of their ambiguity or vagueness, give the insurer the right to appraise the content of the contract.⁶⁴ Terms permitting the insurer to delay the payment of the claim are also frequent.⁶⁵ The study highlights differences between the Member States: for example, terms permitting unilateral cancellation by the insurer after an accident are contained in Italian, German, Belgian and French contracts but not in Spanish, Portuguese, Irish and Netherlands contracts.⁶⁶ Terms requiring an unreasonable notice to terminate the contract are common in Italian, German, Belgian and Greek insurance contract but not all in French, Spanish, Portuguese, Irish, Luxembourgish and Dutch contracts.⁶⁷

SUMMARY

The European Union adopted Directive 93/13/EEC on April 5, 1993 in order to protect consumers within the European Union from unfair contractual terms. The Directive applies only to terms that have not been individually negotiated, with regard to consumer contracts. According to Article 3.1 of the Directive and to Article 2:304(1) PEICL, a term not individually negotiated is unfair if, 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. An assessment of the unfair nature of the terms, however, will not apply to the main subject matter of the contract or to the adequacy of the price and remuneration of the goods or services supplied in exchange, provided these terms are in plain intelligible language. Concerning insurance contracts, it follows that the terms which clearly define the insured risk and the insurer's liability are not subject to the fairness assessment. Nevertheless, it is not easy to establish whether a term excluding a risk from insurance coverage falls within the subject matter of the contract or whether it simply waives liability. In general, exceptions and warranties or terms which describe the insured risk should not be subject to assessment as unfair terms. Unfair terms shall not be binding on the consumer. If the rest of the contract can continue in existence without the unfair terms, then it will remain in force and bind the parties upon the other terms. A list of terms that may be considered unfair could include, in particular, terms that mislead the insured consumer about the contract, terms that excuse improper performance of contractual obligations, terms erecting barriers to redress, terms giving the insurer the right to dissolve the contract ad libitum where the same right is not granted to the consumer, terms that enable the insurer to terminate the contract without reasonable notice unless there are serious grounds for doing so, terms that permit the insurer to vary the terms of the insurance contract unilaterally without a valid reason specified in the contract and terms that require an insured who breaches the contract to pay a disproportionately high sum in compensation.

– A Milestone in the European Unfair Competition Law?", *European Business Law Review*, Vol. 16, 2005, p. 1117.

⁶² See European Parliament and Council Directive 2005/29, Annex 1, paragraph 27.

⁶³ See *Ibidem*, Annex 1, paragraph 29.

⁶⁴ *Study on unfair terms in certain insurance contracts*, Centre du Droit de la Consommation, University of Montpellier, July 1995 (cited in *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts*, at 27, 39, available at http://ec.europa.eu/consumers/cons_int/safe_shop/unf_terms/uct03_en.pdf [hereinafter *Report from the Commission*]).

⁶⁵ See *Report from the Commission*, *supra* note 64, at 39.

⁶⁶ *Ibidem*, p. 39.

⁶⁷ *Ibidem*.