

Contemporary trends in the regulation of the control scope of covenants in European proposals and in Polish Civil Code project



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Introduction

The issue of the control over unfair terms is one of the basic issues of European harmonisation of private law, mainly due to Directive 93/13 of 13 April 1993 on unfair terms in consumer contracts, which was adopted and is being implemented into legal systems of member states of the European Union¹. However, the subject has not yet been exhausted, and the process of regulating the issue has not yet been terminated.

Fifteen years after the adoption of the aforementioned Directive, ie. on 8 October 2008, the European Commission published an official proposal for the Directive on Consumer Rights², the scope of which includes, among others, the issues stipulated in Directive 93/13 in force³. The proposal for a horizontal directive is a result of European review and of the national consumer law, ie. the one based upon directives, the substance of which is the protection of consumer rights⁴. From the political perspective, the proposal is significant, since in the event the proposal is adopted, member states will be obliged to implement the directive, which will have to include the requirement of the so-called full harmonisation stipulated in Article 4, which is a controversial issue.

According to the introductory memorandum, the proposal of the horizontal directive arose on the basis of the consultation method (eg. on the side of the European Parliament, member states, entrepreneurs, academics, practitioners), which was then included in the *Green Book* of 8 February 2007. According to the conclusion presented in the summary, the majority of people answering the questions posed were in favour of adopting the horizontal legal instrument applicable in domestic and cross-border contracts, based upon the so-called targeted full harmonisation, the essence of which should be revised and unified issues of basic consumer directives.

As far as the subject of the regulation of the proposal for the horizontal directive is concerned, including, in that respect, the scope of the present paper, ie. the unfair contract terms, of great importance is the fact of creating, the so-called academic projects, so to speak, parallel to the proposal of the horizontal directive in recent years, the aim of which is to encapsulate the *Acquis* Principles in force or to create proposals for common model European legal standards, which, if they did not constitute the code as a standard, universally binding act, they would at least be the so-called optional instrument⁵. In this context we mean, above all, the so-called *Acquis* Principles⁶ and the Draft Common Frame of Reference⁷⁸.

The importance of the above-mentioned drafts may become a fact, as the European Commission is working on the so-called political CFR. Due to the fact that the horizontal directive draft was created at a time similar to the above mentioned, their mutual influence in terms of substance cannot in fact be claimed. However, all of these directives grow from previous experience concerning the European contract law that is in force in the legal systems of the individual countries, from research and analyses carried out in the field, and they also refer to the judicature of the European Court of Justice⁹. Moreover, the aforementioned drafts may also be attributed common political and legal assumptions, especially in respect to the creation of consistent system of private law standards, at least in the field of consumer

law, which still constitutes the core of European legal harmonisation created by means of legal instruments composing the European law, as well as the correction of certain solutions basing upon the research based on the way of functioning of such instruments in legal affairs.

The criteria justifying the scope of the terms' control (the scope of the unfairness test)

Subjective criterion

The proposal for the directive on consumer rights is by definition limited to legal relationships of consumer nature and in that way the proposal is a continuation of the consumer protection policy, which was also the idea behind Directive 93/13 on unfair terms in consumer contracts. The subjective scope of the application of the regulation on unfair contract terms was slightly differently defined in the *Acquis* Principles, which, in that respect, are based upon the provisions of Directive 93/13, which is closely related to the method of creating the Principles¹⁰; they do not limit in general the scope of application of the regulation on unfair contract terms in subjective terms, but they introduce an objective limitation in certain provisions.

The authors of the *Acquis* Principles acknowledged that *Acquis communautaire* in force does not allow for the unification of all consumer

standards as a part of regulation on unfair contract terms. DCFR, on the other hand, suggests another method of regulation concerning unfair contract terms, both in relation to the regulation structure and its scope. In DCFR, a great majority of standards related to the issue of unfair contract terms is of universal nature, ie. they are independent of the nature of the parties of the contract. What is interesting is the fact that in DCFR the subjective issue influences the premises for acknowledging a given contractual provision as unfair, since three standards consist the so-called term unfairness test, ie. in consumer contracts (Article II

- 9:403), between the entrepreneurs (Article II - 9:405) and between non-entrepreneur parties (Article II - 9:404).

The discussed above subjective scopes of the results of the proposals in question initially indicate the concepts that lie at their root. Thus it may be concluded from the proposal on the directive on consumer rights that it is based upon the necessity of protection of the so-called weaker party of contract and it guarantees a consumer protection in relation to the scope regulated by the proposal solely due to the subjective premises stipulated in the directive, without reflecting upon the subjective arguments of the proposed regulation. It may be claimed that the authors of the *Acquis* Principles considered the axiology related to the object of the regulation on unfair contract terms in certain cases, unifying the consumer standards, at the same time, however, introducing a limitation resulting from the working methodology adopted in the *Acquis* Group.

Still, in a sense, the members of the DCFR team were the most diverged from the provisions of *Acquis communautaire* in force¹¹, and when suggesting model standards of the European private law they were governed mainly by the subjective scope of the regulation related to the nature of contract terms which are supposed to be the subject of a detailed control system; simultaneously, they considered the necessary framework of the European law standards that are now in

force. The proposal of the regulation included in the Polish project of the Civil Code is based upon the conclusions drawn from the analysis of Directive 93/13 on unfair terms in consumer contracts, from the project of the new directive on consumer rights and from the project of DCFR and *Acquis* Principles. The proposal aimed at removing inaccuracies included in the Civil Code, which is presently in force. The main problem with the control over unfair terms consists in the control of their content. As compared to the present regulation, the project introduces the control of the model content in professional trading, while in the so-called common trading, all contract terms are subject to the content control in relation to their unfairness.

However, the very indication of the subjective scope of a particular regulation does not yet determine the approval of a particular protection concept and its outcomes, since the clue is the already mentioned nature of the contract terms, which are subject to special regulation in relation to general control of the content of the legal relationship resulting from a contract. Considering the above, the subsequent part of the present paper will deal with the issues of the objective scope of control within the regulation frames of unfair contract terms.

Objective criterion

Under Article 30 of the draft horizontal directive, the draft's chapter pertaining to authorisations in the frames of control of contract terms applies to contractual clauses prepared/formulated beforehand by an entrepreneur or a third party to which a consumer has consented without entertaining the possibility to amend the contents thereof, in particular when such terms are a part of a standard contract formulated previously.

Article 1 mentioned above, defining the scope of the application of the said regulation does not refer to the notion of a term which has not been negotiated individually used in the motives and earlier in Directive 93/13 (Article 3.1). The above is made more specific in Article 30.2 on the grounds of which the circumstance that a consumer entertained the possibility to amend certain aspects of contract terms or of one specific provision, does not exclude the application of this chapter of the draft horizontal directive to other contract terms which shape the part of the contract.

Article 30.1 of the draft horizontal directive did not use the notion of a term which has not been negotiated individually (used in motive 45) as is the case in Article 3.1 and 2 of Directive 93/13, and moreover, the definition of the objective scope of application of the draft consumer rights directive included in mentioned Article 30.1 is of a closed nature, while in Article 3.2, Directive 93/13 treats the same definition rather as one of the cases of a non-negotiated nature of a specific clause *ipso facto* leaving the scope of other cases in which it ought to be assumed that a given term has not been negotiated individually, although traditionally on the grounds of Directive 93/13 it was assumed that it is a definition of the notion of a term which has not been negotiated individually which found such an expression in the majority of national public policies of EU member states¹².

Article 30.1 of the draft horizontal directive, similarly as Article 3.1 and 2 of Directive 93/13 (differently than in the motives) does not refer to the notion of the standard contract term itself, but to its descriptive definition as a contract term constituting an element of a standard contract, formulated beforehand. In relation to the above, it is necessary to draw attention to the fact that the difference in the formulation of Article 30.1 of the draft horizontal directive and of Article 3.2 of Directive 93/13 may be of significance precisely in reference to a standard contract term.

Based on the above, it is possible to hold that the scope of the application of the draft horizontal directive covers the standard and individual terms covered by the presumption of the nature that have not been negotiated. In relation to the standard terms, the effectiveness of the proof carried out under Article 33 of the draft directive is, therefore, rendered dependent on the demonstration of the individual nature of the contract term and the circumstances denying the imposed nature of the contract term, i.e. the fact that a consumer entertained the possibility of influencing the contents of a given term.

In defining the scope of the application, the draft horizontal directive in a clear way refers to the regulations of Directive 93/13, in particular expressing the so-called mixed approach to the regulation of the issue of unfair contract terms. Protecting the consumer, the draft horizontal directive does not at the same time provide for their full protection, i.e. also as regards contract terms which have been negotiated, which would be a consequence of the full adoption of the stance on the necessity to extend the protection also to the so-called weaker party to the contract.

On the other hand, the scope of exclusion from under the control does not extend solely to standard terms, for the purpose of restricting the unilateral shaping of the content of a legal relationship by one of the parties on a *quasi* right-creating principle. For the issue here is a broader aspect, and namely restricting the abuse of the contractual position of one party (an entrepreneur) by the imposition of the contents of a legal relationship on the other party (a consumer). Hence, it is possible to assume that a standard contract term is covered by the scope of the application of the draft horizontal directive in each case whereas other contract terms are not subject to control if the entrepreneur proves its negotiated nature.

In keeping with the above-presented remarks regarding the regulation to be found in Article 30.1, the draft horizontal directive does not directly define when a given clause has not been negotiated or whether it has been negotiated. However, from the article quoted above, one must conclude that an entrepreneur ought to demonstrate that a consumer entertained the possibility to amend the contents of the clause proposed by the entrepreneur. If the consumer took advantage of such a possibility and a given clause had been amended, the evidence of such an amendment shall not be difficult to prove. However, the circumstance of the existence on the part of the consumer of the possibility to amend the contents of a given contract term which the consumer took no advantage of is problematic in terms of evidence.

I am of the opinion that the signing by a consumer of a statement formulated by an entrepreneur under which the consumer does not express the will to amend specific terms and conditions or the provisions thereof or when the consumer does not take advantage of such a possibility shall not be sufficient proof. The acceptance as proof of a consumer's own handwritten statement of a similar content, but with the simultaneous evidence for the circumstances that the consumer entertained a factual possibility to become acquainted with given contract terms, to understand their contents and legal effects, to ponder over them should they express such a wish or to discuss them or seek explanation, would not be excluded. Such a general wording of the draft directive, after all loaned from Directive 93/13, surely does not facilitate a coherent assessment of the different as well as the similar cases.

The *Acquis* Principles refer to the regulation of Directive 93/13 in chapter 6 pertaining to contract terms that have not been negotiated although they are not identical regulations. The objective scope of the application of this chapter already follows from the title of this part of the *Acquis* Principles to subsequently find its confirmation in Article 6:101.1 whereby the standard contract term was taken as one of the examples of non-negotiated clauses.

The *Acquis* Principles, following in the footsteps of Directive 93/13 and similarly to the draft horizontal directive, introduce a definition of a term that has not been negotiated (Article 6:101.2) and impose the burden of proof of the circumstance that the standard contract term has been individually negotiated on the proponent (Article 6:101.4). The definition of the term that has not been negotiated in the *Acquis* Principles refers to the definition in Directive 93/13, however without the subjective restriction (exclusively to a consumer). Moreover, it follows from Article 6:101.1 sentence 1 that the premise for the formulation of a given clause is one of the circumstances with bearing on the assessment of the adherer's possibility to influence the contents of a given clause and does not, as in e.g. the draft horizontal directive, constitute an independent circumstance, as if preliminary in terms of the issue of the possibility of the adherers bearing (in the draft directive - the consumer) on the contents of the term.

“However, the considerations on the grounds of the mentioned projects as well as on the grounds of the effects of the implementation of Directive 93/13 demonstrate the difficulties related to the application of this premise, in particular in terms of proof, especially in consumer contracts which leads to the looseness of the system and uncertainty in the application of the law. Modifying certain issues, the draft horizontal directive does not, however, make an attempt at solving the fundamental problems and in fact preserves the status quo in this scope as has been presented above”

The *Acquis* Principles also introduce a presumption of the formulation of a given term by an entrepreneur if it was set forth by a third party to the consumer contracts. Refuting this presumption is connected to the entrepreneur's duty to demonstrate that a given term has been introduced to the contract by a consumer. As indicated above, the *Acquis* Principles impose the burden of proof on the proponent that a standard contract term has been negotiated, ie. the other party's possibility to influence the contents of said clause¹³.

It is proof to the circumstance that in a given legal relationship, a standard contract term has ceased to be a standard, but has become a clause that has been individually negotiated, while the evidence for the non-negotiated nature of an individual clause burdens the party which may derive legal effects from this fact, ie. in principle the adherer.

The *Acquis* Principles introduce the definition of a standard contract term despite its absence in Directive 93/13. For under Article 6:101.3, the standard contract term is a term which has been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties. From this definition it follows that the premise for the drafting of a clause beforehand constitutes an autonomous basis for the assessment. Due to the reference to a non-negotiated nature of a contract term, it is possible to conclude that it is a reference to its definition in which, in turn, the drafting of a term beforehand has a bearing on the assessment of the adherer's possibility to influence the contents thereof. It is a definition referring to the definition of the standard contract term from Article II -1:108 of the DCFR, although, the systematics of the DCFR regulations has such a result that the similar definitions are more legible. For in the DCFR, the definition of the standard contract term is the first definition whereas that of a term that has not been negotiated individually is a subsequent one.

In this latter scope, it is necessary to refer to Article II -1:110 which similarly as the *Acquis* Principles renders the non-negotiated nature of the clause dependent on the lack of a possibility for one party to influence the contents thereof and, in particular, due to its being formulated previously while regardless of the fact whether it is a standard contract term or not. The DCFR regulation (Article II - 1:110.4), similarly as the draft horizontal directive in relation to consumer contracts, imposes the burden of proof on an entrepreneur of the negotiated nature of a contract term whereas in the scope of the standard contract terms, the proof of a given term having been negotiated individually has been imposed on the party that quotes this circumstance (Article II – 1:110.3), ie. in practice, on the proponent,

similarly as in the *Acquis* Principles regulation. Furthermore, the DCFR similarly as the draft consumer rights directive, excludes the negotiated nature of the term in the case when the other party chose one of the clauses it was imposed on (Article II – 1:110.2).

The Polish project of the regulation of the control of terms departs from the definition of an individually negotiated clause within its scope including all the terms and provisions of an act in law concluded with a consumer or in the frames of so-called ordinary trade and commerce. The part regulating the standards is assumed to constitute a supplement to the provisions regulating the control of the contents of unfair terms. The project starts from an assumption that the category of standards has lost its central significance, especially in the case of consumer relationships. The notion of a standard retains its importance in professional transactions in which the qualification of a given term as a standard constitutes the premise for the control of the contents as regards unfairness.

Recapitulation

From the considerations above, it follows that in the above-presented scope, the draft horizontal directive, slightly departing from the solutions adopted in Directive 93/13, refers also to the regulation included in the DCFR whereas the *Acquis* Principles, in the above-given aspects of the regulation regarding the subjective scope departing from Directive 93/13, uphold its regulations in the objective scope. However, all the projects stand by the necessity of assessment of a given term as regards their non-negotiated or negotiated nature. However, the considerations on the grounds of the mentioned projects as well as on the grounds of the effects of the implementation of Directive 93/13 demonstrate the difficulties related to the application of this premise, in particular in terms of proof, especially in consumer contracts which leads to the looseness of the system and uncertainty in the application of the law. Modifying certain issues, the draft horizontal directive does not, however, make an attempt at solving the fundamental problems and in fact preserves the status quo in this scope as has been presented above.

In view of the above, it is necessary to draw attention to the proposals which do not refer to this premise. The issue here is the French concept, mentioned above, within the frames of which control in consumer contracts covers all clauses and the circumstance that they have been or have not been negotiated is not taken into account. Taking into consideration certain differentiation depending on the consumer's influence (or, more broadly, a party) on the contents of a clause, it is possible to refer to proposals which command to take this circumstance into account at the assessment of the nature of a given term in terms of fairness or unfairness¹⁴ with the appropriate construction of a general control clause.

In this concept, it is not necessary to examine the issue of imposing a given term onto a consumer, ie. the control covers all clauses in consumer contracts (apart from those determining the main content of a contract), but the control is carried out on the bases of a fairness test which also includes the negotiated or non-negotiated nature of a given contract term. In contracts between entrepreneurs, the negotiated nature of a given contract term could exclude the control its contents on the basis of an unfairness test, which would not exclude the possibility of controlling this contract term on the basis of the general provisions on the limits of the contents of a contract.

In the legal relationships between entrepreneurs, the emphasis could be placed on the control of the standard contract terms (non-defining the main contents of an agreement, similarly as in consumer agreements) and so due to the legitimacy of restricting quasi right-creating activities whereby the standard can be only a term which has not been subject to negotiations since in the case to the contrary, it becomes an individual and negotiated clause. The question of the adoption of an appropriate solution pertaining to the standard contract term itself would be of significance in this scope. From the practical point of view, the definition of a standard as a contract term formulated beforehand with the view of its multiple use is insufficient for a synonymous manifestation of a standard nature of this term.

In this scope, one could think of an addition of the premise of an expression of a standard in writing (which is not and which is not to

be synonymous with the written form), ie. in the form of a printout or another type of a record. For this would still constitute the sanctioning of the practice in the scope of the creation of standard contract terms and, from the point of view of the application of the law, of significance for the admissibility of control of contract terms in terms of their unfair nature in contracts between entrepreneurs. The considerations presented above indicate that the issues related to the regulation of control of contract terms, including the standards, are still debatable while the debate is still open both on the European and national levels. ■

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1. EC Official journal of 24 April 1993, L 95, pp. 0029-0034.
2. COM (2008) 614 final.
3. Apart from Directive 93/13, the proposal for the directive on consumer rights also includes the provisions of the following Directives: 85/577 of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (Official Journal of 1985, L 166/51), Directive 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts (Official Journal of 1997, L 144/19), Directive 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Official Journal of 1999, L 171/12).
4. The basis of the proposal for the horizontal directive was the so-called Action Plan on a More Coherent European Contract law (COM (2003) 68 final, Official Journal of 2003, C 63/1). See eg. G Howells, R Schulze, Overview of the Proposed Consumer Rights Directive, in: G Howells, R Schulze, Modernising and Harmonising Consumer Contract Law, Munich 2009, p. 4, note 9. One of the European projects, as a part of which a detailed report on the implementation of particular consumer directives into national legal systems was prepared, was the EC Consumer Law Compendium, which was published in a form of a book; see H Schulte – Nölke, Ch. Twigg-Flesner, M Ebers (eds.), EC Consumer Law Compendium. The Acquis and its transposition in the member states, Munich 2008.
5. See more Ch. Von Bar, H Beale, E Clive, H Schulte- Nölke, Introduction, in: Ch. von Bar, E Clive, H Schulte – Nölke in., Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition, Munich 2009, p. 36 et seq., H Schulte- Nölke, Scope and Role of the Horizontal Directive and its Relationship to the CFR, in: G Howells, R Schulze, Modernising and Harmonising Consumer Contract Law, Munich 2009, p. 29 et seq.
6. Abbreviated name of the Principles of the Existing EC Contract Law (Acquis Principles). See the publication in original and translated into Polish together with the introduction: M Pecyna, Kwartalnik Prawa Prywatnego of 3/2008, p. 809 et seq., especially: Principles of the Existing EC Contract Law (Acquis Principles). Contract I. Pre- Contractual Obligations, Conclusion of Contract, Unfair Terms, Munich 2007; Publication of Contract II in printing.
7. Abbreviated DCFR. See the complete version: Ch. von Bar, E Clive, Hans Schulte – Nölke et al. (eds.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition, Munich 2009.
8. On the relationship of the two proposals see also eg. F Zoll, Unfair Terms in the Acquis Principles and Draft Common Frame of Reference: A Study of the Differences between the Two Closest Members of One Family, Juridica International of XIV/2008, pp. 69-70, M Pecyna, Europejskie Prawo Umów, Wprowadzenie (Introduction to the explanation of the Acquis Principles – MP's and translator's note), Kwartalnik Prawa Prywatnego, of 3/2008, pp. 809-813.
9. See also M Pecyna, Nieuczciwe postanowienia umowne w projekcie dyrektywy o prawach konsumenta, Zasadach Acquis i DCFR. Różne środki do tego samego celu?, Transformacje Prawa Prywatnego 1-2/2009, p. 91 and next.
10. See G Dannemann, Introduction in: Principles of the Existing EC Contract Law (Acquis Principles). Contract I. Pre – Contractual Obligations, Conclusion of Contract, Unfair Terms, Munich 2007, p. XXVIII-XXIX, M Pecyna, Wprowadzenie do tłumaczenia Zasad Acquis, KPP of 3/2008, pp. 812-813.
11. DCFR Team. See the information on the structure and work of that group in: Ch. v. Bar, E Clive, H Schulte – Nölke (eds.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition, Munich 2009, p. 47 et seq.
12. See: M Ebers, Unfair Contract Terms Directive (93/13), w: H Schulte – Nölke, Ch. Twigg- Flesner, M Ebers (eds.), EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States, Munich 2008, s. 226, J Stuck, Unfair Terms w: G Howells, R Schulze (eds.), Modernising and Harmonising Consumer Contract Law op. cit., s. 116.
13. See: T Pfeiffer, M Ebers in: Principles of the Existing EC Contract Law (Acquis Principles). Contract I op. cit., p. 215-216.
14. See: The Law Commission and The Scottish Law Commission Report (LAW COM No 292), p. 31-32.