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INEQUALITIES IN BARGAINING POWER: ENSURING LEGAL CERTAINTY FOR SMES UNDER CESL

Bachelor Thesis

Supervisor: Margus Poola, M.A.

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
not been presented to any other
university of examination.

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Abbreviations

B2B	Business-to-Business
B2C	Business-to-Consumer
CESL	Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, of 11 October 2011
CISG	United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980
DCFR	Draft Common Frame of Reference
ECJ	European Court of Justice
pCRD	Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, of 8 October 2008
PECL	Principles of European Contract Law
SME	Small and Medium-Sized Enterprise
ULFIS	Convention to a Uniform Law on the Formation of Contracts for the International Sale of Goods, of 1 July 1964
ULIS	Convention Relating to a Uniform Law on the International Sale of Goods, of 1 July 1964
UPICC	UNIDROIT Principles of International Commercial Contracts of 2010

Introduction

Economic superiority of a trader, which may lead to abusive practices, is well-known issue in business relations between a consumer and a trader. However, since businesses cover even one-person undertakings, small and medium-sized enterprises (SMEs) may be equally vulnerable and dependent, as consumers, when concluding contracts with larger traders, and thus, encounter unfair exploitation because of their unequal bargaining power. In the course of the research, the author perceived that, not only in the books from time before drafting of Common European Sales Law (CESL), but also after the draft of the CESL, not many sources are discussing about the issues with SME protection or analysing SMEs' possible placing in the consumer definition.

The context of the study will be the CESL. The author of the thesis will narrow the focus of the study to standard terms, pre-contractual information duties and right of withdrawal. The relation between standard terms, or non-individually negotiated terms, and unfair terms, is overlapping but not the same in each case. In this regard, when it comes to pre-contractual information duties and unfair terms, these are dealt in both Business-to-Consumer (B2C), as well as, Business-to-Business (B2B) contracts in the CESL. However, the right of withdrawal provisions in the CESL concern solely consumers. This is why the author wants to especially examine the right of withdrawal. Secondly, the author of the thesis noticed during the research that the right of withdrawal in the context of the CESL is not that much discussed, even in relation to consumer provisions. The main goal of the thesis is to conclude whether CESL already provides enough amount of protection for SMEs or should the protection go even further, by analysing and discussing, what kind of protection they have or should have, and in which way they are or should be protected.

During the researching process, the author of the thesis noticed that the books and articles dealing with the CESL, are quite similar to each other concentrating mostly on the applicability and opt-into nature of the instrument. Moreover, the scope of these books and papers is strictly limited to private international law. In regard to this, the author is aiming to have a different scope compared to the previous papers that have been written in relation to the CESL. The author of the thesis will obtain this goal by widening the scope of the research from purely private international law, by incrementing the freedom to conduct business, as a fundamental right in Article 16 of the EU Charter of Fundamental Rights, to the study. The status of Article 16 'the freedom to conduct a business' in the Charter of Fundamental Rights of the European Union is peculiar since it is not

sourced from amongst the positive laws of international law, but rather stems from the constitutional traditions of the Member States of the EU.[1]

The research questions of my thesis are: **Do SMEs deserve more protection against inequality of bargaining power under the CESL? Should SMEs be protected as consumer in respect of pre-contractual information duties, standard terms and right of withdrawal? Is the definition of SME in Article 7(2) allowing too many enterprises to fall within the scope of CESL?** The author's hypothesis is that **the protection of SMEs is not sufficiently ensured in cross-border trade by application of the CESL.** Regarding the second research question CESL expressly covers not only preliminary agreements but also pre-contractual liability.[2] Articles 13 to 29, in Chapter 2, concerning pre-contractual information, and respectively, remedies to such breaches indicate that the negotiation phase between the parties is regulated as well.[3]

The author will begin the study by introducing the freedom to conduct business, originating from Article 16 of the EU Charter of Fundamental Rights, and respectively, restrictions to the freedom. After this, the thesis will continue to present the scope, as well as the applicability, of the CESL as an instrument. Then, the author of the thesis will proceed to analyse comprehensively pre-contractual information duties, standard terms and right of withdrawal. Later, the thesis will discuss about the size of an enterprise influencing to the bargaining position and some numerical data will be presented in relation to the definition of an SME. Consequently, the author will demonstrate the difficulties to define an SME by its obscure and hard to define boundaries to consumers and larger traders. At the end of the study, the thesis will consider the successfulness of the CESL as an instrument, and based also on this analysis, the author will finally draw some conclusions on appropriate protection of the SMEs possibly going further.

The draft regulation on a Common European Sales Law, published by the European Commission, is applicable to both Business-to-Consumer (B2C) and Business-to-Business (B2B) contracts.[4] Even though, the SMEs are the focus of the thesis, some degree of comparing between consumers and SMEs is necessary in order to examine the resemblances and the differences, and in which way these features possibly make SMEs different or similar, and whether the position that SMEs

[1] Peers, S. *et al.* The EU Charter of Fundamental Rights. A Commentary. Oxford, Hart Publishing 2014, p 438.
[2] DiMatteo, L. A. International Sales Law. A Global Challenge. New York, Cambridge University Press 2014, p 630.
[3] *Ibid*, p 631.
[4] *Ibid*, p 500.

currently have is justified. The author of the thesis will use qualitative research methodology throughout the work, and furthermore, will use mostly academic books and academic articles to conduct the study. Moreover, the study will contain comparing between the consumers, larger businesses and SMEs. Contrasting of civil law and common law traditions is needed in order to draw conclusions on the appropriate protection possibly going further in the case of SMEs. For the most part, the books to be used are falling within the scope of international private law with their titles mentioning sales law, contract law, business and commercial law. Then again, the articles to be used often are very specifically concerning the CESL. This variety of sources, without forgetting the EU Charter of Fundamental Rights and the sources related to Charter, give multifaceted perspectives to the study. Internet pages have been beneficial in regards to numeral kind of data of the SMEs, whereas, the case-law will be used to elucidate the concepts in a more in-depth manner.

1. Notions to the SME Protection

1.1. Conducting a Business Balanced Against Intervention to the Freedom

In principle, Article 16 of the EU Charter of Fundamental Rights, applies to all commercial and contractual activities whenever individual Europeans within the Union are concerned.[5] On the other hand, the reservation to this applies in a way that the commercial and contractual activities may be restricted by European law.[6] In relation to part of these freedoms, and contrastingly, it has a greater performative nature since it combines the entrepreneurial element with human relationships including impacts stemming from that combination.[7] The freedom to conduct a business can even be traced from the fundamental right of dignity in the Article 1 of the Charter of Fundamental Rights of the European Union which states that the human dignity is inviolable, and furthermore, must be respected and protected.[8] The connection between the human dignity and the freedom to conduct a business lies in the fact that the self-expression and self-sustainment are protected in practising economic activity.[9] According to the Article 16 of the Charter of Fundamental Rights, the freedom to conduct a business is recognised when it is in compliance with the Union law, and respectively, domestic laws and practices.[10] The fact that the contractual autonomy is part of the freedom to conduct business is established in the Charter of Fundamental Rights of the European Union.[11] The Explanations Relating to the Charter of Fundamental Rights is a beneficial tool in interpreting the fundamental rights such as the Article 16.[12] The Explanations provide that the case law of the Court of Justice recognises the freedom to exercise an economic or commercial activity and the contractual freedom as part of the article 16 of freedom to conduct a business.[13] Contrastingly, the right to trade is not mentioned in the Explanations, but is acknowledged by the Court of Justice.[14]

In the judgment of the case *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* of 1974, the European Court of Justice (ECJ) repeated the conclusion of

[5] Peers (2014), *supra* nota 1, p 441.
[6] *Ibid.*
[7] *Ibid*, p 438.
[8] *Ibid.*
[9] *Ibid.*
[10] Planzer, S. Empirical View on European Gambling Law and Addiction. Springer International Publishing Switzerland 2014, p 275.
[11] Peers (2014), *supra* nota 1, p 457.
[12] Planzer (2014), *supra* nota 10.
[13] *Ibid*, p 276.
[14] *Ibid*.

the case *Erich Stauder v City of Ulm* of 1969.[15] The court ruled that to an extent that human rights can be deduced from the constitutional traditions of the Member States, they are also contributing in composing the European legal order.[16] The Court of Justice concluded that the freedom to conduct a business belongs to the human dignity of individual Europeans within the European market and that their freedom in engaging in commerce and contractual autonomy are acknowledged.[17] Then, again in the case *Nold,* but also in the case *SpA Eridiana and others* of 1979, the Court acknowledged the meaning of the freedom to engage in economic activity as a fundamental right and the importance of safeguarding the freedom as it is an essential part to the Community interest.[18] Yet, in the case of *Sukkerfabriken Nykøbing Limiteret v Ministry of Agriculture,* the contractual freedom was dealt through the restriction to the freedom.[19] The Court stated that restrictive legal measures are allowed only when they confer pronounced power to a designated public authority to get involved with private contractual affairs.[20] Additionally, even if such intervention would be found necessary, it can only be exercised by certain predefined forms and procedures.[21]

With reference to trader protection, the principles of party autonomy and freedom of contract are central to individually negotiated contract terms.[22] The utmost purpose of the contractual terms is to determine the rights and liabilities of the contracting parties.[23] As a result terms and conditions would reflect the intention of the parties to a contract even after the negotiations.[24] What makes the information asymmetries so crucial is the opportunity to deceive the weaker party through false information in a way that amounts to a fraud.[25] When a person has the full legal capacity to act in an answerable and responsible manner but the contract results in disadvantageous outcome due to a misleading or vague information, the circumstances must be observed from a very different angle.[26] From the perspective of fundamental rights, the formation of contracts that have the result

[15] Peers (2014) *supra* nota 1, p 440
[16] *Ibid*.
[17] *Ibid*.
[18] *Ibid*.
[19] *Ibid*.
[20] *Ibid*.
[21] *Ibid*.
[22] Colombi Ciacchi, A. Contents and Effects of Contracts – Lessons to Learn from the Common European Sales Law. Switzerland, Springer International Publishing 2016, p 286.
[23] Wang, F. The Incorporation of Terms into Commercial Contracts: A Reassessment in the Digital Age. Journal of Business Law 2015, Issue 2, pp 87-119, p 87.
[24] *Ibid*.
[25] Onyeka, K. O. Online Peer-to-Peer Lending: Challenging Consumer Protection Rationales, Orthodoxies and Models? Journal of Business Law 2015, Issue 6, pp 484-508, p 503.
[26] Kötz, H. *et al*. European Contract Law. Oxford, Oxford University Press 1992, p 136.

of being fraudulent, is a breach towards private autonomy and contractual freedom of market actors, not only because of fraudulent behaviour results in misleading, but also because it is an intrusion to those freedoms guaranteed in the Article 16 of the Charter of Fundamental Rights of the European Union.[27] For an SME, through a misunderstanding, an unfair exploitation can be encountered by paying additional costs, delays in performance, along with other disputes.[28] The larger business from its point of view may yield in modification of the contract in such rare cases where the weaker party demands alteration of the contract.[29] The second option is that the larger business determinate to tolerate the actual consequences and losses of the ominous breach of contract.[30]

1.2. CESL and Connection to Pre-Contractual Information Duties, Standard Terms and Right of Withdrawal

The CESL covers the sale of goods, the supply of digital contents and related services.[31] It includes the formation, the effects of the contract, pre-contractual information, defects in consent, unfair contract terms and limitation periods.[32] In a substantial way, the CESL is influenced by the Draft Common Frame of Reference (DCFR) since the Expert Group, appointed by the European Commission, was requested to include the parts integral to contract law.[33] Afterwards these components were simplified, modified and reformed, and additionally, complements were made.[34] Along with the DCFR, the CESL follows other soft law instruments as well, namely Principles of European Contract Law (PECL) and the UNIDROIT Principles of International Commercial Contracts (UPICC).[35] To a great extent, a large amount of rules is captured from the CISG to the CESL.[36] It is up to the parties to a contract to decide whether they apply or not the CESL.[37] Thus, the CESL remains optional system for the contracting parties.[38]. This implies that the CESL does not automatically apply to sales contracts between the parties to a contract originating from

[27] Peers (2014), *supra* nota 1, p 440.
[28] Wang (2015), *supra* nota 23.
[29] Kötz (1992), *supra* nota 26.
[30] *Ibid*.
[31] Gullifer, L. *et al*. English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale. Oxford, Hart Publishing 2014, p 238.
[32] DiMatteo (2014), *supra* nota 2, p 702.
[33] *Ibid*, p 500.
[34] *Ibid.*
[35] *Ibid*, p 630.
[36] *Ibid.*
[37] *Ibid*, p 500.
[38] *Ibid.*

different States.[39] On the contrary, businesses have to expressly opt into the CESL.[40] Article 11 of the CESL requires that where the parties choose the CESL to apply to their contractual relations, meanwhile, no other law shall apply to their relations.[41] Hence, by choosing the CESL as applicable law, the States' mandatory contract laws are excluded.[42] In case the contracting parties do not choose the CESL, then the national law will apply.[43] However, it is said that the description of the CESL is misleading since it does not offer any alternative or choice as a regulation.[44] It merely excludes the national law which is the default regulation.[45] Another aspect is that since the CESL does not deal with all matters related to contracting, national provisions will continue to regulate issues which fall outside the scope of the CESL.[46]

The CESL serves as a directly applicable second contract regime.[47] Hence, it does not require amendments to the domestic contract laws, which are, so called, 'first' contract regimes.[48] The distinction is that the CESL, as a second regime, is identical all over the European Union compared to the pre-existing domestic contract laws.[49] Thus, it can be described as European contract law regime.[50] By its existence, it establishes a level playing field with the Member States' contract laws.[51] Whenever the contracting party is from a Member State and a small or medium-sized enterprise (SME) or a consumer, the CESL is applicable.[52] An express agreement of the contracting parties is needed.[53] The agreement where parties choose to apply the CESL is

[39] *Ibid.*
[40] *Ibid.*
[41] Gardiner, C. The Proposed Common European Sales Law: A New Direction for European Contract Law? Dublin University Law Journal 2013, pp 183-215.
[42] *Ibid.*
[43] Lando, O. Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law. European Review of Private Law 2011, 19 (6), pp 717-728, p 719.
[44] Letowska, E. Is the Optional Instrument (the Common European Sales Law) Consistent with the Principle of Subsidiarity (Article 5 TEU). Journal of European Consumer and Market Law 2013, 2 (1), pp 28-32, p 31.
[45] *Ibid.*
[46] Hawthorne, L. Contract Law – A Deluge of Norms in Search of Principles: The Common European Sales Law and the South African Consumer Protection Act. Studia Universitatis Babes-Bolyai Jurisprudentia 2013, Issue 1, pp 59-90, p 63.
[47] Ostrow, E. For the Purposes of This Regulation: Denying Protection to The Small Business through the Application of the CESL. American University International Law Review 2013, 29 (1), pp 255-286, p 258.
[48] Penadés, J. P. *et al.* European Perspectives on the Common European Sales Law. Switzerland, Springer International Publishing 2015, p 53.
[49] *Ibid.*
[50] Eidenmüller, H. What Can Be Wrong with an Option – An Optional Common European Sales Law as a Regulatory Tool. Common Market Law Review 2013, 50. Special Issue, pp 69-84, p 69.
[51] *Ibid*, p 76.
[52] Ostrow (2013), *supra* nota 47, p 257.
[53] Stuyck, J. CESL or CRD – Which Instrument Will Win the Race for the Best System of Cross Border Sales in Europe? Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica 2012, Volume 53, p 188.

necessary and has strict requirements.[54] Furthermore, in B2C contracts the trader has to draw attention to the designed use and give all the information of the prominent features.[55] The author of the thesis states that this obligation to provide information is necessary also in the case of SME, especially when the usage of the CESL is not dominating. Hence, an SME encounters a new situation when it proceeds to use the CESL, and can be seen as vulnerable as a consumer. The CESL seems to pay attention to the position of SMEs.[56] Still, further inspection demonstrates that no unambiguous specification is made between a trader and an SME.[57] Many of the rules in the CESL protect solely consumers.[58] To be more specific, there are rules that are mandatory for the benefit of consumers but are non-mandatory in contracts where both contracting parties are traders.[59] In fact, the CESL as an optional instrument appears to be more powerful in the case of B2C, than in B2B transactions.[60]

Surprisingly, even though the CESL appears to be more substantial in B2C contracts, the consumer protection is not the main principle of the CESL, but rather it is the enhancement of the cross-border trade in the EU.[61] In fact, by an 'Action Plan on a More Coherent Contract Law', the Commission broadened their vision from purely consumer based protection to removing barriers in the scope of businesses, and in this way, encouraging the engagement to cross-border sales.[62] Due to this changed conception, the Commission wanted to safeguard the protection to both, B2C and B2B contracts.[63] On second thought, the Commission highlights the uniform degree of consumer protection.[64] It is the confidence of consumers to shop abroad that the Commission has wanted to enhance by providing a set of minimum rights whenever a consumer makes a purchase in the territory of EU.[65] The author of the thesis states that there exists a confrontation between consumer protection and cross-border trade, where clearly the facilitation of cross-border trade serves more the interests of the SMEs in B2B contracts. The author of the thesis adds that this is surprisingly positive remark for the good of SMEs, but unfortunately, this emphasis is not apparent

[54] Hawthorne (2013), *supra* nota 46, p 61.
[55] *Ibid.*
[56] Colombi (2016), *supra* nota 22.
[57] *Ibid*.
[58] Gullifer (2014), *supra* nota 31, p 244.
[59] *Ibid*.
[60] Gardiner (2013), *supra* nota 41.
[61] Bisping, C. Legislative Comment. The Common European Sales Law, Consumer Protection and Overriding Mandatory Provisions in Private International Law. International & Comparative Law Quarterly 2013, 62 (2), pp 463-483.
[62] Beale, H. The CESL Proposal: An Overview. Juridica International 20 (1), 2013, p 21.
[63] *Ibid.*
[64] Eidenmüller (2013), *supra* nota 50, p 72.
[65] Beale (2013), *supra* nota 62.

in the provisions of the CESL, which are clearly more focused on consumer protection. The author of the thesis adds that, in line with the vision to strengthen cross-border trade, the SMEs' protection has not actually fulfilled, when it comes to the amount of provisions in the CESL, and thus, the provisions safeguarding the interests of SMEs should be more comprehensive. In relation to the very beginning of the study, going even further with the protection of SMEs would not violate the freedom to conduct business or contractual autonomy, as that objective is in accordance with the Union law. The CESL can be seen as predefined contract regime to place limitations to contractual freedom and the freedom to conduct business.

Going more deeply to the consumer protection in general, it signifies the body of laws in protecting consumers' interests.[66] Fundamentally, consumer protection denotes the prevention of individuals from engaging in excessive risks at the individual transaction levels.[67] Harm towards a consumer indicates the failure in those transaction levels. Mostly, they are likely to occur either at the origination stage, or in the substance of a transaction.[68] The fact that makes a consumer and an SME similar is that the failure in a transaction level is as detrimental to the welfare of an SME as it is to the welfare of a consumer.[69] The failure in transaction level affects not only the welfare as an outcome but it hinders already the ability of a weaker party to enhance their welfare.[70] This is a feature characteristic to pre-contractual stage of transactions and alludes the necessity in safeguarding measures to, for instance, disclose information.[71] The aspects that need to be taken into consideration are bargaining power and knowledge, and they do especially refer to a pre-contractual stage of transactions.[72] The author of the thesis acknowledges that an SME, as an enterprise, has in its objective to enhance the welfare, and also, the ability to enhance its welfare. The author adds that these circumstances support the protection of SMEs, as enterprises. Moreover, the author concludes that the failure in transaction level is fundamental obstacle to the operation of the SMEs as well. Thus, the author agrees that bargaining power, knowledge and information disclosures are important aspects to this protection of SMEs. Behaviour in pre-contractual stage should be assessed even if the contract is not concluded.[73]

[66] Onyeka (2015), *supra* nota 25, p 498.
[67] *Ibid*.
[68] *Ibid*.
[69] *Ibid.*
[70] *Ibid*, p 499.
[71] *Ibid.*
[72] *Ibid*.
[73] Cravetto, C. *et al.* Non-Sense of Pre-Contractual Information Duties in Case of Non-Concluded Contracts. The European Review of Private Law 2011, 19 (6), pp 759-786, p 780.

In regard to this, the idea of both contracting parties being in an equal footing, and being able to collect necessary information and based on that negotiate an advantageous bargain, is not correct any more.[74] Partly, these information asymmetries stem from technical and societal development.[75] The only way to restore the balance of power in contracting seems to be to found pre-contractual information duties.[76] Hence, it is the mission of the law to judge whether the risk is to be decreased.[77] The usefulness of the pre-contractual information duties is based on the assumption that the informational position of the weaker party can be improved, and in addition, the weaker party has the ability to adopt information.[78] The ideal is that afterwards the weaker party is having an equal balance when it comes to the information they have.[79] In relation to the usefulness of the pre-contractual information duties and improving the informational position of SMEs, the author of the thesis concludes that SMEs have, at least, the ability to adopt information as SMEs do have weaker bargaining position similar to consumers. The author of the thesis adds that as the fact that the behaviour already in pre-contractual stage has to be assessed, regardless of whether the contract has actually been concluded, indicates that pre-contractual information duties are of great importance and that SMEs do also need this protection.

In relation to enhancement in informational position of a weaker party, pre-contractual information duties are portrayed as a hallmarks of the modern EU consumer law.[80] The function of pre-contractual transparency is to offer a level playing field for parties and to assist consumers in making more informed and rational choices.[81] Providing the information is a means to balance the inequality in bargaining power.[82] However, the outcome of balancing this inequality is dependent also on the weaker party's side as the assumption is that they, regardless of their weaker position, are rational entities aiming at making rational choices.[83] Self-evidently, the trader has a great impact in this regard, as their task is to provide a certain optimum of information, instead of a maximum of information.[84] In practice, fulfilling the information duties in a succinct manner

[74] Twigg-Flesner, C. The Cambridge Companion to European Union Private Law. New York, Cambridge University Press 2010, p 187.
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*
[80] Giliker, P. Pre-Contractual Good Faith and the Common European Sales Law: Compromise Too Far. European Review of Private Law 2013, 21 (1), pp 79-104, p 96.
[81] *Ibid,* p 97.
[82] *Ibid,* p 98.
[83] *Ibid*.
[84] *Ibid.*

ensures the accuracy, preciseness and conciseness of information.[85] The contracting parties may have equal information when it comes to the content and scope of the contract.[86] The trouble lies in the fact that the weaker party concludes the disadvantageous contract in the shortage of alternatives.[87] Meanwhile, often the weaker party does not desire to disband the contract in its entirety but rather the solely singular clause which is unfavourable to him.[88] Again, the larger business party to the contract may principally aim to shift as many risks as possible on the weaker party.[89] The author of the thesis states that, when it comes to SMEs, very likely they conclude a disadvantageous contract in the shortage of alternatives. The author explains this by the minimum knowledge, in entering contractual relations, that an SME may have. The author states that because of this head start, probably the way of fulfilling the information duties can follow a less strict demands in case of SMEs. The author continues that in the situation where an SME enters in business affairs in a shortage of alternatives, consequently, SMEs yield to the disadvantageous contract, despite the singular unfavourable clause. Thus, the author concludes that despite the fact whether an SME has minimum knowledge, when they are entering contractual relations does not change the fact that they are in the need of more ample protection.

The Section 2 of the CESL deals with the pre-contractual information to be given by a trader dealing with another trader.[90] Article 23 deals with the duty to disclose about goods and related services. Paragraph 2 lists circumstances which are relevant as to whether the supplier has to disclose any information.[91] Facts - such as: supplier's special expertise; the cost to the supplier of acquiring the relevant information; the ease with which the trader could have acquired the information by other means; the nature of the information; the likely importance of the information to the other trader; and good commercial practice in the situation concerned - shall be taken into consideration, when deciding whether the supplier has the duty to disclose information.[92] The author of the thesis states that these circumstances do diminish the meaning of duty to disclose information for the disadvantage of an SME as most of them give the entitlement for the supplier to, in fact, not disclose information. Solely, the special expertise of the supplier and good

[85] *Ibid.*
[86] Kötz (1992), *supra* nota 26.
[87] *Ibid*.
[88] *Ibid*.
[89] *Ibid,* p 137.
[90] European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284.
[91] Kötz (1992), *supra* nota 26, p 137.
[92] *Ibid.*

commercial practice are defences for an SME to use. The author of the thesis states that while the special expertise can actually be a useful defence for the SME to use, the good commercial practice can be left to be a vague conception and not a useful circumstance in practice. The author states that as the Article 23(2) gives, in this way, responsibility to the weaker trader, the issue, whether SME's informational position can be improved, can be doubted. This view is in connection with the general assumption that SMEs as enterprises already possess certain minimum knowledge when they are entering in contractual relations.

The standard terms in a contract are default provisions originating from a statute or judicial decision and they are placed into contracts in lack of any other contract term.[93] In principle, the default rules are prescribed to conform for the interests of both parties.[94] Even so, the larger business is concerned of his own interests.[95] When a stronger entrepreneur resorts to the default rules for his own benefit, they may appear to be 'unfair' to the weaker party.[96] In this way, the author of the states that the relation between standard terms, or so called, non-individually negotiated terms, and unfair terms, is somewhat intertwined. Moreover, the author of the thesis states that the problem with the standard terms is, that the reason why larger traders use them, is that their objective is to shift risks when it comes to the contract, and as an outcome, the risks are actually shifted. The debate on the issue of shifting the risks is ambiguous. There has to be strong presumption that the larger business knows what the distribution of risks would be in order to consequently and meaningfully shift the risks.[97] On second thought, no matter how standardised contract, it is always subject to law's mandatory rules.[98] The author of the thesis states that this emphasis on the minimum protection that the law is ought to provide, diminishes need for protection in case of SMEs, where the protection can already be doubted. A problematic fact is that the doctrines such as duress, misrepresentation, mistake, rescission, legality and interpretation are acknowledged as circumstances leading the contract to be, in fact, unenforceable.[99] Conversely, standard contracts often are treated as any other contract.[100] Nevertheless, their inherent nature includes the idea of being one-sided to benefit one party, while hamper the other.[101]

[93] *Ibid.*
[94] *Ibid*.
[95] *Ibid*.
[96] *Ibid*.
[97] *Ibid.*
[98] Twigg-Flesner (2010), *supra* nota 74, p 156.
[99] Hawthorne (2013), *supra* nota 46, p 61.
[100] *Ibid.*
[101] *Ibid.*

The CESL deals mainly with non-individually negotiated terms which are often known as standard terms.[102] According to Article 7, paragraph 1, a contract term is not individually negotiated whenever the contract terms is supplied by one party but the other party has not been able to influence when it comes the content of the term.[103] Furthermore, the paragraph 2 adds that the term is not individually negotiated by the other party if the weaker party has made a choice of a term by the among a selection of terms.[104]

Model forms are presented as a one solution to the issue of standard terms.[105] In this regard, bodies such as the International Chamber of Commerce provide model forms.[106] However, these model forms are not encompassing as they tend to exclude the crucial matters which the general applicable law at any rate does regulate.[107] To solve this problem, sets of principles are available for use which the Principles of European Contract Law or the UNIDROIT Principles of International Commercial Contracts offer.[108] However, those sets of principles, connected to International Chamber of Commerce, do not safeguard the interests of a weaker party either. When the parties to a contract have agreed to incorporate the set of principles or the model contract, the bigger business may strive to alter them.[109] Needless to say, the party with a greater bargaining power does not explicate the modification, and furthermore, it may be burdensome for the weaker party to find in the small print.[110] Consequently, an SME has a reasonable presumption that contract is in accordance with the model form or is in conformity with the PECL or the UPICC.[111] As well, the weaker party can reasonably assume that the other party discloses all relevant information in accordance with the principle of good faith.[112] Contrarily, it is exactly the created, and afterwards inserted, alterations and even exclusions that deprive the protection provided by the model form or the selected set of principles.[113] The weaker party do not predict and recognise the opportunist behaviour of the bigger business party which is supposed to be the sophisticated,

[102] Gullifer (2014), *supra* nota 31, p 246.
[103] European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284.
[104] *Ibid.*
[105] Beale, H. A Common European Sales Law (CESL) for Business-to-Business Contracts: Pros and Cons. Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica 2012, 53 (2), pp 133-152, p 137.
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid,* p 138.

experienced party to a contract.[114] Evidently, the SME will not afterwards have the opportunity to incorporate safeguards into the contract.[115] To conclude, the incorporation of a model form or a set of internationally approved principles as a part of the contract, is not a solution to promote the interests of SMEs.[116] Therefore, the only solution to control the situation is to have mandatory rules against unfair terms.[117] The author of the thesis agrees with this view, and concludes, that the protection provided by the model forms appears to be insufficient, as those forms can be altered and excluded just as the contract terms, in their traditional meaning, can be modified and deleted. The author adds that more comprehensive mandatory rules appear to be the most efficient way of safeguarding the control against unfair terms.

Yet, the effective benefit of standard terms would be diminished, if on each occasion the acceptability of the standard terms would be examined, and consequently, individually negotiated.[118] The standard terms become apparent after the industrial revolution of nineteenth century.[119] The standardisation of production of goods and services lead, respectively, to standardisation of terms in relation to the goods and services in trade.[120] Heretofore, standard contracts have become rather a norm and they appear to be a rule in the contemporary commerce.[121] Afterwards, the importance of judicial monitoring of contracts were concentrated on, especially when it comes to the quality and intensity of the monitoring.[122] Non-individually negotiated terms are important in rationalising affairs between, for instance, a larger business and an SME. Evidently, the standard terms simplify procedures in business relations.[123] In fact, standard terms were meant to be helpful to disentangle the differences among various contract laws.[124] However, this turned out to be a pure delusion as contracts will anyway be subject to the applicable law.[125] Standard terms can, moreover, assist in uncovering the costs in conducting business.[126] In addition, they keep the costs, and as a result, prices, low.[127] Negotiating the terms

[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid,* p 137.
[117] *Ibid.*
[118] Hesselink, M. W. CFR & Social Justice. Munich, European Law Publishers 2008, p 37.
[119] Kötz (1992), *supra* nota 26, p 137.
[120] *Ibid*.
[121] Hawthorne (2013), *supra* nota 46, p 61.
[122] Brüggemeier, G. *et al.* Fundamental Rights and Private Law in the European Union. Volume II: Comparative Analyses of Selected Case Patterns. New York, Cambridge University Press 2010, p 12.
[123] Kötz (1992), *supra* nota 26, p 137.
[124] Twigg-Flesner (2010), *supra* nota 74, p 156.
[125] *Ibid.*
[126] Kötz (1992), *supra* nota 26, p 137.
[127] *Ibid*.

of each contract individually increases extra costs and inconveniences to both contracting parties.[128] Even more cumbersome for both parties to the contract would be to go court to interpret and confirm the terms.[129] It must be noted that even if contractual claims would be eligible to bring before the courts, the weaker parties seldom have the wealth, information or exposure to defend their rights. When an SME has a weaker bargaining power, and in addition, cannot afford legal advice, the risks for the disadvantage of this party with a weaker bargaining power are significantly increased.[130] The author of the thesis admits that a solution where the larger trader should negotiate a great amount of terms to an SME, is exaggerated. The author adds that the standard terms do belong to business, and in this way, it is the unjust behaviour that needs the control. Thus, the author is in the opinion that the control is needed against those standard terms which appear to be unfair.

Already, during the drafting work of the CESL, there was a discussion whether the CESL should regulate the problem with unfair terms in the contract, only in B2C contracts, or also in B2B contracts.[131] The Expert Group acknowledged the need for regulating unfair terms in case where traders are concerned.[132] This is partly because, especially in distance contracts, the identifying of the other party is not straightforward.[133] Chapter 8, Section 3 of the CESL deals with unfair terms in contracts between traders and those rules appear to be relatively benevolent.[134] Contrastingly, unfair terms in contracts between a trader and a consumer, in Section 2, are much more encompassing and extensive.[135] For instance, Article 82 of the Section 2 concerns the duty of transparency in terms of non-individually negotiated terms.[136] It stipulates that whenever non-individually negotiated terms are used in a contract between a trader and a consumer, the trader has the obligation to secure that those terms become apparent.[137] More closely, it means accessibility and perceptibility, that the trader has to supply to the consumer.[138] However, no such provision is in the CESL, in Section 3, applying to unfair terms in contracts between traders.[139]

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[128] *Ibid*.
[129] *Ibid*.
[130] Beale (2012), *supra* nota 105, p 138.
[131] Pisulinski, J. The Content and Structure of the CESL. Annales Universitatis Scientarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica 2012, Volume 53, pp 169-186, p 177.
[132] *Ibid.*
[133] *Ibid.*
[134] Gullifer (2014), *supra* nota 31, p 246.
[135] *Ibid*.
[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid*.
[139] *Ibid*.

The conclusion, made based on the lack in Section 3, is troublesome since it leads to a possible deduction that such provision is not necessary when contracting parties are both traders.[140] If the CESL acknowledges that an SME may be in a weaker position compared to stronger contracting trader party, a contradicting conclusion, that the larger company would be allowed to use indeterminate language or conceal the terms in relation to an SME, is perplexing.[141] The author of the thesis states that the result cannot be that SMEs should tolerate concealing of contract terms which the absence of corresponding provision to the 82(2) in the CESL indicates. Thus, the author adds that the protection against unfair terms is not exaggerated, and in this way, the protection should be taken further to be more encompassing. The underlying problem with unfair terms, found in standard contracts, is that in reality the weaker party does not have an opportunity to have the contract terms negotiated individually.[142] Instead, he has to agree, or alternatively, decline the offer of the trader.[143] This is also known as so called 'take it or leave it technique'.[144] Often, the other party approves the offered terms because it is not sensible to spend time or money to get the terms altered or to seek other traders whose terms would be more favourable in one way or another.[145] Many times, the costs that stem from negotiating, obtaining relevant information or actively seeking for a more advantageous offer would not be in proportion to the desired outcome.[146] SMEs may want to evade accessory expenditure which is deemed to be disproportionate.[147] It is questionable whether this is justified the same way as with consumers, or whether traders should be capable of enduring some degree more.[148]

When it comes to the right of withdrawal in the CESL, Chapter 4 concerns the right to withdraw in distance and off-premises contracts between traders and consumers.[149] According to the Article 40(1) of the CESL the consumer can exercise his right of withdrawal from the contract, without providing any reason to it, and no cost shall appear to the consumer.[150] According to Article 43 of the CESL the effect of a withdrawal is that it terminates the obligations of the both parties that the

[140] *Ibid*.
[141] *Ibid*.
[142] Pasa, B. *et al.* The Harmonization of Civil and Commercial Law in Europe. Budabest, Central European University Press 2005, p 46.
[143] *Ibid*.
[144] *Ibid*.
[145] Kötz (1992), *supra* nota 26, p 137.
[146] *Ibid*.
[147] *Ibid,* p 143.
[148] *Ibid*.
[149] European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284.
[150] *Ibid.*

contract utters them to have.[151] Consumer can exercise the right of withdrawal of 14 calendar days which is so called cooling off period.[152] The right of withdrawal is a unilateral declaration of will and in order to exercise that right, it must be communicated to the trader.[153] Notable is that the right of withdrawal is designed for solely distance and off-premises contracts.[154] The limited scope to the right of withdrawal originates from the special features of these contracts.[155] In relation to the right of withdrawal, an SME can be as vulnerable as a consumer is, since in a distance contract, the weaker party does not have the opportunity to inspect goods, and moreover, to meet, negotiate and agree on contractual terms.[156] Respectively, in an off-premises contract, the weaker party may find himself in a situation, where he is acquiring the products without wanting them.[157] The author of the thesis concludes that the SME suffers as well in the situation where it cannot see or inspect the goods in order to conclude the contract. In this regard, the right of withdrawal promotes greater good as well, as it corrects imprudent decisions for better deal's sake.[158] EU consumer policy emphasises the post-contractual withdrawal as well.[159] It is an emergency exit for a weaker party to annul irrational decisions.[160] Notable is that in Spanish legal system, the right of withdrawal actually is observed as pre-contractual information duty to be fulfilled by the trader.[161] Based on this information, the consumer would be able to decide freely and appropriately whether he wants to enter into the contract.[162] The author of the thesis states that this position is remarkable as it, not only emphasises the importance of withdrawal provisions, but also the meaning of pre-contractual information duties.

Paragraph (p) of Article 2 of the CESL defines the distance contract.[163] Distance contract is any contract, between the trader and the consumer, under an organised sales scheme, but the simultaneous physical presence of the trader is missing, or when the trader is a legal person, the

[151] Dannemann, G. *et al*. The Common European Sales Law in Context. Interactions with English and German Law. Oxford, Oxford University Press 2013, p 330.
[152] Stuyck (2012), *supra* nota 53, p 195.
[153] Penadés (2015)*, supra* nota 48, p 58.
[154] Onyeka (2015), *supra* nota 25, p 499.
[155] Penadés (2015)*, supra* nota 48, p 55.
[156] Onyeka (2015), *supra* nota 25, p 499.
[157] *Ibid*, p 54.
[158] Twigg-Flesner (2010), *supra* nota 74, p 188.
[159] Onyeka (2015), *supra* nota 25, p 499.
[160] *Ibid.*
[161] Penadés (2015), *supra* nota 48, p 64.
[162] *Ibid.*
[163] European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284.

natural person operating behalf of the trader.[164] Correspondingly, the consumer uses exclusively one or more means of distance communication at the time of the conclusion of the contract.[165] The off-premises contract, on the other hand, is defined in paragraph (q) of the Article 2.[166] Again, any contract between a trader and a consumer is an off-premises contract, but the contract is concluded in the simultaneous physical presence of the trader, or if the trader is a legal person, the natural person representing the trader.[167] Concurrently, the consumer concludes the contract with other contracting party in a place which is not premises of the trader, or the contract is concluded in accordance with the offer made by the consumer in the same circumstances.[168] The contract can also be concluded on the business premises of the trader or in a place which is not a business premise of the trader, whenever means of distance communication are used forthwith, after the consumer was personally and individually addressed, and the requirement, of the physical presence of the trader or person representing the trader, is met.[169] Furthermore, the contract can be concluded during the time of an excursion, when the organiser of the event is the trader, or respectively, the natural person representing him.[170] In this regard, advertising and selling goods or providing digital content or related services to the consumer, is the objective or influence of the excursion.[171]

When it comes to the right of withdrawal in the context of CESL, it does as an instrument share responsibilities in its articles, not only to a trader, but also to a consumer. The Article 41(3) of the CESL thrusts the trader the obligation, without delay, to communicate the consumer the confirmation of receipt of the withdrawal on a durable medium.[172] The Article 41(3) CESL applies to situations where the trader has given the consumer the option to withdraw electronically on its Internet web page of his business.[173] Nevertheless, it is the consumer whose responsibility is to ensure that the right of withdrawal is carried out in compliance with Article 41(5) of the CESL.[174] In other words, the consumer bears the burden of proof in this matter.[175] This legislative solution of the European legislator is defended by the fact that even in the case of the so called weaker

[164] *Ibid*.
[165] *Ibid*.
[166] *Ibid.*
[167] *Ibid.*
[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid*.
[171] *Ibid*.
[172] Penadés (2015), *supra* nota 48, p 58.
[173] *Ibid*.
[174] *Ibid*.
[175] *Ibid*.

party, it is the duty of the person exercising his right, to prove that he has the actual right to resort the right of withdrawal.[176] Article 44(1) of the CESL requires the business to return the payment to the person who desires to withdraw from the contract.[177] The business has to return the payment without undue delay and not later than 14 days from the day when the business has received the notice to withdraw from the contract.[178] Notable is that according to Article 44(2) of the CESL the supplementary costs, due to the fact that the consumer has chosen on his own initiative other more expensive delivery than the standard delivery, are not to be reimbursed by the trader.[179] Furthermore, the duty to send back or hand the goods over to the trader, or to a person authorised by a trader, is the obligation of the consumer, providing that the trader has not offered to collect the goods.[180] The consumer has to fulfil this obligation without undue delay and not later than 14 days from the date when the consumer informed the trader about the decision to withdraw from the contract.[181]

Also, the trader must bear the costs whenever the trader has not communicated that he has to bear the costs since it is a breach of duty to inform.[182] In this situation, the consumer will not be liable if the value of the goods is diminished.[183] Likewise, in accordance with the CESL, the trader has some protection compared to the consumer. The Article 44(3) of the CESL states that when the sale of goods is concerned and when the trader has not himself provided that he will collect the goods, the trader has the right to withhold the reimbursement until the time he receives the goods back or an evidence from the consumer that the consumer has sent the goods back.[184] Evidently, the right of withholding is not granted to the consumer.[185] Furthermore, the Article 45(5) of the CESL states that where the consumer desires to withdraw from the contract, after requesting expressly for the provision of related services to commence when the withdrawal period is running, the consumer has to pay to the trader the amount which is proportional to what has been provided before exercising the right of withdrawal.[186] The author of the thesis remarks that these examples demonstrate that, in fact, the provisions found in the CESL, share a great amount of responsibilities

[176] *Ibid*.
[177] Dannemann (2013), *supra* nota 151.
[178] *Ibid.*
[179] *Ibid.*
[180] Penadés (2015), *supra* nota 48, p 60.
[181] *Ibid*.
[182] Dannemann (2013), *supra* nota 151, p 328.
[183] *Ibid.*
[184] Penadés (2015), *supra* nota 48, p 59.
[185] *Ibid*.
[186] Dannemann (2013), *supra* nota 151, p 338.

to both trader and consumer. In regard to this, the author questions, why there are no similar provisions between trader and SME, as the CESL also gives duties to the consumer rather than allowing protection in the form of passivity for the consumer. The author of the thesis states that the same treatment for SMEs is justified as the provisions with a trader and a consumer are not too protective for consumers either.

Indeed, Article 45(2) of the CESL states that it is the consumer who bears the direct costs deriving from the return of the goods provided that the trader has not agreed to cover the costs.[187] The author concludes this to be an important paragraph since the consumer has to bear the direct costs from sending the goods back. The author adds that the return costs are likely to fall for the consumer to bear in case of withdrawal from a contract. On 8 October 2008, the Commission published a Proposal for a Directive on Consumer Rights (pCRD).[188] The draft pCRD was based on Green Paper of which objective was to review the consumer acquis.[189] In relation to the reception of this Green Paper to the pCRD, there was a lot of discussion, whether it should be trader or consumer who bears the costs of returning the goods of a purchase which has been made at a distance.[190] The consumer organisations were in the opinion that the exercise of the right of withdrawal should not cause costs for the disadvantage of the consumers, but rather, these costs, resulting from returning the goods, should be borne by the seller.[191] Contrastingly, business stakeholders and Member States argued that if seller would be the one to bear the costs, this result would, more broadly, lead to abuse and unreasonableness.[192] In fact, they highlighted those possible resulting issues that much that they did not recognise the nature of the distance contract as a very peculiar contract.[193] The parties to the debate argued the possible consequences of various sales techniques.[194] Firstly, by taking these dissenting opinions, of the Green Paper concerning the pCRD, into the study, the author wants to address the controversies to the right of withdrawal in general. In fact, the right of withdrawal is not just a consumer law rule but a general contract law principle since the usage of that right is based on structural imbalance.[195] Secondly, the pCRD is

[187] *Ibid*, p 328.
[188] Howells, G. *et al.* Modernising and Harmonising Consumer Contract Law. Munich, Sellier. European Law Publishers GmbH 2009, p 1.
[189] V. Bar. *et al.* Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Munich, Sellier. European Law Publishers GmbH 2009, p 37.
[190] Howells (2009), *supra* nota 188, p 267.
[191] *Ibid.*
[192] *Ibid.*
[193] *Ibid.*
[194] *Ibid*
[195] Schulze, R. New Features in Contract Law. Munich, Sellier. European Law Publishers 2007, p 126.

important for the research as the CESL has, for the most part, adopted all the provisions of the pCRD.[196] The author of the thesis states that because of the peculiarity of the distance and off-premises contract, similar provisions are needed to protect SMEs. Moreover, the author of the thesis agrees that the right of withdrawal is not only a consumer protection issue, but from a wider perspective, it is general contract law principle, and thus, the solution where no such provisions are when it comes to SMEs is not exactly justified.

1.3. Size of an Enterprise Influencing on Overall Superiority

A trader is any natural or legal person who concentrates to operate in the scope of his trade, business, craft or profession.[197] Often, an SME is a family business where the same person or many persons are responsible for the management and ownership of the business.[198] Article 7 of the CESL describes an SME as a trader.[199] It has to employ fewer than 250 persons and the annual turnover cannot exceed 50 million Euros or an annual balance sheet total not exceeding 43 million, or the corresponding amount in the currency other than Euro.[200] Evidently, the author states that the definition of an SME is, in fact, very technical. The definition does not consider that, after all, it is the limited resources that make the position of SMEs unique in the variety of businesses.[201] Because of this weakness, SMEs are forced to agree to the law of the larger companies.[202] Consequently, the difficulty lies in the definition of the SME.[203] The definition is technical, and furthermore, burdensome to apply in practice.[204] However, this is a practical inconvenience that can be overcome, and in fact, is characteristic for any object requiring for categorical protection.[205] Parties to a contract with weak position, due to their dependence, inexperience and unequal bargaining power, are in the need of this categorical protection, and in this way, subjects of social justice in private law.[206] The author of the thesis agrees that the protection with SMEs is a matter of social justice, just the same way as it is with the consumers, and as a conclusion, SMEs do

[196] Dannemann (2013), *supra* nota 151, p 339.
[197] Lando (2011), *supra* nota 43.
[198] Moussis, N. Small and Medium Enterprises in the Internal Market. European Law Review 1992, 17 (6), pp 483-498, p 484.
[199] European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284.
[200] Lando (2011), *supra* nota 43, p 721.
[201] Ostrow (2013), *supra* nota 47, p 257.
[202] *Ibid*.
[203] Hesselink (2008), *supra* nota 118, p 38.
[204] Gardiner (2013), *supra* nota 41.
[205] Hesselink (2008), *supra* nota 118.
[206] *Ibid,* p 29.

deserve more protection. In relation to this, it is irrational to limit judicial power of control solely to the contracts, where the other party is a consumer.[207] The author of the thesis agrees that it would be inappropriate to limit the protection solely to consumers. In this regard, certain more flexible idea should be used when the contracting parties are commercial entities with different bargaining powers.[208] The author remarks that this need for more flexible idea between commercial entities with unequal bargaining powers reveals that the commercial entities are not on equal footing, and that no satisfying solution has been found. Hence, certain degree of protection focused on SMEs is appropriate and the burdensomeness in determining who are the so called 'weak parties', shall not form a hindrance to the formation of their protection.[209] One possibility would be to leave the decision to the courts to decide which traders are weak enough to be entitled to more encompassing protection.[210] Even so, it must be emphasised that unfair behaviour is always unjust, no matter what the size or power of the trader is.[211]

In relation to this classification of being a weak trader, according to the survey, conducted by the Gallup Organization as a result from the request of the European Commission in 2011, microenterprises with nine or fewer employees were found to be deterred from cross-border trading compared to larger companies.[212] The survey conducted by the Gallup Organization, indicated that the microenterprises themselves are approving of the CESL as an optional instrument.[213] Over seventy percent of the companies, which participated in the survey, would prefer to apply the CESL in their cross-border transactions.[214] Contrastingly, after the publication of the proposed CESL, the Law Commission and the Scottish Law Commission released their advice to Government of the UK.[215] The Law Commissions doubted the adaptability of the CESL in relation to commercial contracting, but was more approving to its applicability to consumer sales.[216] Article 7 of the CESL stipulates that the CESL applies only when the seller of goods or the supplier of a digital content is a trader.[217] In case where both the parties are traders, the other

[207] Kötz (1992) *supra* nota 26, p 143.
[208] *Ibid*.
[209] *Ibid*.
[210] *Ibid*.
[211] *Ibid*.
[212] Ostrow (2013), *supra* nota 47, p 256.
[213] *Ibid.*
[214] *Ibid.*
[215] Devenney, J. *et al.* The Omission of Personal Property Law from the Proposed Common European Sales Law. The Hamlet Syndrome… Without the Prince? Journal of Business Law 2015, Issue 8, pp 607-619, p 611.
[216] *Ibid.*
[217] European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284.

party must be an SME.[218] However, according to Article 13(b), it is up to a Member State to decide whether it wants to extend the applicability of the CESL to the parties who are traders but neither of them being an SME.[219] What makes the scope of CESL peculiar, is that by drafting it, the Commission recognised the issue, especially within SMEs, in shuttling with various jurisdictions in their business affairs.[220] After all, it is the differences in contract laws which result in transaction costs and legal obstacles in cross-border transactions.[221] For SMEs, the barrier, which is caused by the underlying differences by the legal systems, can be described to be psychological one.[222] Consequently, the legal certainty, for the weaker parties to a contract, suffers.[223] However, it is not only the problems in understanding the foreign laws and figuring out the content of them which are the pivotal issues when it comes to SMEs, but also the terms of contract.[224] Larger businesses can encounter a psychological barrier too but they have a better ability to endure it.[225] Firstly, the larger businesses are not necessarily engaged in selling cross the borders but rather open a subsidiary in the buyers' country.[226] Moreover, it is more likely that the larger businesses, in fact, have knowledge of foreign laws.[227] An important fact is that the larger traders generally do enter larger transactions where notable values are concerned or the transaction is a combination of various similar contracts.[228] On the whole, if larger business has to resort obtaining legal advice about foreign law, the cost obtaining it will be relatively small compared to infrequent transactions.[229]

The definition of an SME provides much space. Therefore, even SMEs are often divided in different definitions. In Finland and in Estonia, small enterprises are businesses which employ less than 50 people and whose annual turnover does not exceed EUR 10 million.[230] The so called microenterprises are enterprises which employ less than 10 people and whose annual turnover or

[218] Lando (2011), *supra* nota 43, p 720.
[219] *Ibid*, p 721.
[220] Ostrow (2013), *supra* nota 47, p 257.
[221] Gardiner (2013), *supra* nota 41.
[222] Beale (2013), *supra* nota 62.
[223] Low, G. *et al.* The Proposed Common European Sales Law: Have the Right Choices Been Made: Introduction to a Special Issue. Maastricht Journal of European and Comparative Law 2012, 19 (1), pp 3-6, p 3.
[224] Beale (2012), *supra* nota 105, p 138.
[225] Beale (2013), *supra* nota 62.
[226] *Ibid.*
[227] *Ibid.*
[228] *Ibid.*
[229] *Ibid.*
[230] Eesti Väike- ja Keskmiste Ettevõtjate Assotsiatsioon. Vke definitsioon. www.evea.ee/index.php/vaikeettevotlusest-2/vke-definitsioon (9.2.2017). Tilastokeskus. Concepts. Small and Medium Size Enterprises. www.stat.fi/meta/kas/pienet_ja_keski_en.html (26.4.2017).

balance-sheet total does not exceed EUR 2 million.[231] In Finland, there are 283 290 enterprises.[232] The percentage of 98,9 of them are small enterprises which have less than 50 people as employees.[233] The amount of microenterprises in Finland, that have less than 10 employees, is 93,4 %.[234] Moreover, of all private-sector employees, 65 % work for medium-sized enterprises.[235] The SMEs have a great significance in Finnish employment and the economy since they produce approximately 50 % of the combined turnover of all enterprises in Finland.[236] Additionally, their export revenue rate in Finland is estimated to be more than 16 %.[237] Generally, the SMEs are certain foundation to the European economy which provides jobs and enhances economic growth.[238] In Europe, 99 % of all enterprises are SMEs.[239] Thus, micro, small and medium-sized enterprises are considered as the engine of the European economy.[240] They create jobs, general entrepreneurial spirit and innovation in the EU.[241] Because of this, they are meaningful for the benefit of competitiveness and employment.[242]

With different consumers, they can be treated in different ways depending for instance their differing levels of experience and expertise.[243] The same applies in the case of SMEs.[244] Creation of a scenario is a relevant factor in establishing the level of knowledge.[245] It can be very abstruse whether two farmers, who have the same-sized farms but different educational background, are in the same situation.[246] By further examination, it may become apparent that one has college

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[231] Eesti Väike- ja Keskmiste Ettevõtjate Assotsiatsioon. Vke definitsioon. www.evea.ee/index.php/vaikeettevotlusest-2/vke-definitsioon (9.2.2017). Tilastokeskus. Concepts. Micro Enterprise. www.stat.fi/meta/kas/mikroyritys_en.html (26.4.2017).
[232] Yrittäjät. The small and medium-sized enterprises. www.yrittajat.fi/en/about-federation-finnish-enterprises/small-and-medium-sized-enterprises-526261 (9.2.2017).
[233] *Ibid*.
[234] *Ibid*.
[235] *Ibid*.
[236] *Ibid*.
[237] *Ibid*.
[238] Eurostat. Small and Medium-Sized Enterprises (SMES). ec.europa.eu/eurostat/web/structural-business-statistics/structural-business-statistics/sme?p_p_id=NavTreeportletprod_WAR_NavTreeportletprod_INSTANCE_vxlB58HY09rg&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_pos=1&p_p_col_count=4 (18.2.2017).
[239] European Commission. What is an SME? ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_fi (18.2.2017).
[240] European Commission. Enterprise and Industry Publications. The New SME Definition. User Guide and Model Declaration. www.eusmecentre.org.cn/sites/default/files/files/news/SME%20Definition.pdf (20.4.2017).
[241] *Ibid.*
[242] *Ibid.*
[243] Onyeka (2015), *supra* nota 25, p 504.
[244] Gullifer (2014), *supra* nota 31, p 244.
[245] Onyeka (2015), *supra* nota 25, p 504.
[246] Gullifer (2014), *supra* nota 31, p 244.

background whereas the other farmer had merely more than five years of schooling.[247] Such secondary information may become relevant from the point of view of prediction in business affairs.[248] The specifics or details of the case has to be considered and taken into consideration.[249] Where professional advice is sought after, this would annul the need for consumer protection for the SMEs.[250] However, now the adoption of information is much more plentiful compared to situation before and this should be now factored in.[251]

When it comes to the question of definition of an SME according to the Article 7(2) of the CESL, the relative size of an SME seems to be more useful than a definite number of employees and the business revenue, as well as, net worth.[252] In fact, much larger companies than those described in the Article 7(2) would need equivalent protection against company with superior bargaining power.[253] Surprisingly, many times the bargaining power is dependent on the uniqueness and quality of the good.[254] Based on this idea, when it comes to the Article 7(2) of the CESL, it can be concluded that the size of a company is necessarily not a good measure.[255] In fact, the whole dominating concept of bargaining power can be reversed if a small company has a one of a kind patented product compared to a much larger company pursuing in manufacturing or distributing the product that the SME possesses.[256] Another diminishing factor to the size measure is that the company size is not a solid and permanent feature, but in the course of a contract, the SME can grow over the SME status, or a larger company can downsize to an SME.[257] On the whole, the size measure in definition of an SME appears to be impractical and does not solve informational and bargaining power asymmetries.[258] Probably, the contract law's general principles and doctrines offer a better alternative to grasp informational and bargaining power issues.[259] Consequently, the sales law would be left to detect the areas and transactions which the general contract law doctrines would then handle in a more efficient way.[260] The author of the thesis concludes that not too many

[247] *Ibid*.
[248] *Ibid*.
[249] Kötz (1992), *supra* nota 26, p 143.
[250] Beale, H. *et al.* Cases, Materials and Text on Contract Law. 2nd ed. Oxford, Hart Publishing 2010, p 793.
[251] Kötz (1992), *supra* nota 26.
[252] Ulrich, M. CISG vs. Regional Sales Law Unification. With a Focus on the New Common European Sales Law. Munich, Sellier. European Law Publishers GmbH 2012, p 40.
[253] *Ibid.*
[254] *Ibid.*
[255] *Ibid.*
[256] *Ibid.*
[257] *Ibid.*
[258] *Ibid.*
[259] *Ibid.*
[260] *Ibid.*

enterprises fall within the scope of the Article 7(2) in the CESL as even larger companies than defined in the Article 7(2) are in the need of protection. Even though, the definition enables a lot of SMEs fall within the scope of definition, these can all be separated from larger business which have much more resources and choices in cross-border trade. The author notifies that the size of an enterprise is not a solid feature, but rather, it can grow or shrink. In this regard, the author concludes that SMEs do deserve more protection against inequality in bargaining power under the CESL.

2. SME Position

2.1. Distinction to Consumers

Under the previous chapter, the difficulties and peculiarities in the notion of an SME, its similarity to a definition of a consumer, what is detrimental in relation to standard terms, pre-contractual information duties and right of withdrawal, have been examined. Whereas, the trader is a natural or legal person acting for purposes relating to his trade, business, craft or profession, traditionally, a consumer has been defined as a natural person purchasing goods or services to his personal or family needs.[261] Contrarily, professional needs are excluded.[262] The author of the thesis states that placing an SME to this definition is troublesome as purchasing goods and services are excluded in the scope of consumer protection. The author concludes that an SME should even not be placed to the same definition with consumer. Moreover, the author states that as the amount of protection among consumers can be doubted, SMEs should not be placed in the same definition and the exact same protection with the consumer. In the Draft Common Frame of Reference (DCFR), the SMEs are entirely separated from the definition of a consumer.[263] Then again, balanced against a common understanding that two equally powerful commercial actors do not need any adjusting measures in their affairs, it cannot be presupposed that an SME would be in equal footing with a trader.[264] It is not clearly acknowledged that the consumer and commercial contracts would be subject to very different regimes.[265] In an English contract law case *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd.* [1988], it was established that a company can be dealt as a consumer when the transaction is clearly not carried out in the course of business.[266] The company in question was a freight forwarding and shipping agency company which concluded a sales contract together with a finance company in order to purchase a motor car.[267] This car was ought to be used, by a company director, to both, personal and business driving.[268] The nature of not being an integral part was determined based on the fact that the purchase of the car in question did not take place on regular basis.[269]

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[261] European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284.
[262] Pasa (2005), *supra* nota 142, p 5.
[263] Hesselink (2008), *supra* nota 118, p 36.
[264] Beale (2010), *supra* nota 250.
[265] Kötz (1992), *supra* nota 26, p 143.
[266] Roach, L. Card & James' Business Law. 4th ed. Oxford, Oxford University Press 2016, p 226.
[267] Beale, H. Chitty on Contracts: Volume 1. General Principles. Thirty-First Edition. UK, Sweet & Maxwell Ltd 2012, p 1055.
[268] *Ibid.*
[269] Onyeka (2015) *supra* nota 25, p 498.

The court decision was based on estimating the degree of regularity.[270] The court held that the activity was merely incidental even though previous history showed that several cars were bought for business use.[271] The author states that, even though, the court decision in question was lenient towards the company's purchases of cars, still, the starting point in the case is quite strict if the consumer status is determined based on the continualness of the buying. The author provides an explanation by comparing the decision to the CESL instrument which precisely is designed for trading. Thus, the case does not probably provide up-to-date conception whether an SME could be considered as a consumer. The CESL is a good example of not providing that clear distinction between the position of a consumer and an SME. Partly, the distinction is difficult to draw, and as a result, apply.[272] A relatively steep line could result in an outcome which would have a great risk to appear to be as an arbitrary one.[273] On the other hand, the fact that with the CESL, when it comes to SMEs, the question of protection seems to always revolve around the prolongation of it.[274] The author of the thesis states that whereas the drawing a radical distinction between a consumer and an SME has the risk of resulting in an arbitrary outcome, even the going further with the rules in the CESL would make the position and protection of the SMEs better. Thus, the author suggests that the protection of the SMEs should be done by prolonging the protection further without making a strict line between SME and consumer. The author adds that this prolongation of protection is necessary in the case of pre-contractual duties, standard contract terms and right of withdrawal.

A very fundamental question is whether a different level of knowledge can be presumed to an SME when compared to a consumer.[275] On the whole, this dependence on existing circumstances does not support any conceptual clarity in the issue.[276] According to economic and social sciences, the consumer would be a passive actor among the mass production systems and distribution.[277] As these operators possess the economic superiority, the consumers are exposed to the external influence from the market. Self-evidently, this exposure is reflected to consumers' choice.[278] In situation with SMEs different kind of widespread outcomes in the internal market are likely to

[270] Young, M. Understanding Contract Law. Taylor & Francis e-Library 2009, p 113.
[271] *Ibid.*
[272] *Ibid*.
[273] *Ibid*.
[274] Twigg-Flesner, C. Research Handbook on EU Consumer and Contract Law. Cheltenham, Edward Elgar Publishing, Inc. 2016, p 286.
[275] Onyeka (2015), *supra* nota 25, p 504.
[276] Hesselink (2008), *supra* nota 118.
[277] Pasa (2005), *supra* nota 142, p 5.
[278] *Ibid*.

occur.[279] From the viewpoint of SMEs, barriers originating from differences in domestic contract laws in cross-border transactions may shun them entering new markets and engaging in cross-border trade.[280] In fact, SMEs are much more risk-averse than the larger businesses.[281] Partly, this is because they cannot afford of taking the same level of risks than larger businesses.[282] It is generally accepted that consumers do lack the tendency, information and resources to bring disputes arising from unfair standard terms before the courts.[283] In this regard, the author of the thesis claims that SMEs may have somewhat greater wealth to challenge contractual disputes in the courts. Besides, it is alleged that an SME is not as carefree, oblivious, confident or weak when it comes to SME's bargaining position.[284] Thus, from trader it can be expected that he reads the general conditions and can be more cautious when it comes to the standard terms and the contingencies and risks linked to them.[285] On the other hand, there may be differences among the SMEs.[286] For instance, shopkeeper could be the same as the consumer when it comes to understanding the standard terms and he may not have an actual opportunity to really influence on better terms.[287] An owe or stipulator as a consumer are facts that can create a dependence to the stipulator and terms generated by him.[288] On the other hand, the question, in which way would an SME react on adopting the CESL to its business affairs with another SME as a contract party, is an interesting one since its own terms could be challenged in the same way as bigger businesses'.[289] These deliberations reveal the difficulties in determining the position of an SME, in relation to the determination of the SME size in the previous chapter. The fact whether an SME is or not cautious when it comes to, for example, standard terms, is not something that the size of the enterprise can indicate. Thus, the size of an SME appears to be a bad measure in determining the bargaining power of it.

[279] Gardiner (2013), *supra* nota 41.
[280] *Ibid.*
[281] Beale (2013), *supra* nota 62.
[282] *Ibid.*
[283] Devenney (2015), *supra* nota 215, p 617.
[284] Gullifer (2014), *supra* nota 31, p 244.
[285] *Ibid*.
[286] *Ibid*.
[287] *Ibid*.
[288] *Ibid*.
[289] Beale (2012), *supra* nota 105, p 146.

2.2. Successfulness of the CESL as an instrument

The CESL originates from general contract law principles.[290] Generally, when it comes to contract laws, the trend has been that the regulators choose the disclosure to be the default measure in protecting consumers.[291] By this method, the prevailing imbalance between the market participants regarding information can be diminished through relevant disclosures, and thus, informed choices can be made by the market participants.[292] More broadly, information duties on traders can be seen as an instrument to improve the overall quality of the goods and services in the EU, and as a result, promote competition and innovation.[293] The author of the thesis states that the making of informed choices in case of SMEs is as important, as it is to consumers. When it comes to the goods and services that the different traders offer, the informed choice necessitates information about the particular qualities of the goods and services.[294] Evidently, as the informed consumers choose the best and most inexpensive offer, the bad offers will vanish.[295] The role of the CESL in this regard is that the uniform rules, such as the CESL, are needed to protect and promote the health, security and interests of the weaker party.[296] Besides, it is essential for the fair competition in the internal market.[297] EU policy acknowledges the necessity for SME protection.[298] In the context of assessing the DCFR, the European Parliament pondered, whether the DCFR acknowledges contract law only as a private law tool between parties who have equal and strong bargaining power, or does it recognise the need for 'social justice' to serve parties with weaker bargaining position, such as consumers, SMEs or victims of discrimination.[299] In fact, phrasing of the question reveals that other parties than consumers are in the need of protection.[300] More broadly, without such uniform rules, the existence of different contract laws could be burdensome for companies in cross-border trading.[301]

Despite the affirmative objective of the CESL, in the Reasoned Opinion filed by the German Bundestag in December 2011, the Bundestag utters the CESL to be a fundamentally unsuccessful

[290] Devenney (2015), *supra* nota 215, p 612.
[291] Onyeka (2015), *supra* nota 25, p 501.
[292] *Ibid*.
[293] Twigg-Flesner (2010), *supra* nota 74, p 188.
[294] *Ibid.*
[295] *Ibid.*
[296] Pasa (2005), *supra* nota 142, p 7.
[297] *Ibid*.
[298] Hesselink (2008), *supra* nota 118.
[299] Gullifer (2014), *supra* nota 31, p 243.
[300] *Ibid*.
[301] Ostrow (2013), *supra* nota 47, p 257.

attempt for an alternative encompassing pan-European contract law.[302] Furthermore, the CESL is criticised because of its opt-into nature as it can decrease its purpose as harmonised set of provisions.[303] After all, partially one reason for redundant transaction costs are the differences in transaction costs.[304] It is claimed that the opt-into nature agitates businesses to avert the cross-border market until other parties are exposed to the first-mover costs by adopting the regime.[305] Hence, the CESL would pose remarkable risks towards traders who are the first users.[306] In addition, the CESL appear to be another contract law among other domestic contract laws.[307] Thus, its value could merely be serving an additional instrument.[308] Inevitably, by adopting the CESL and because of its inherent nature, it will compete with the national laws implementing the consumer acquis.[309] Balancing the interests and obligations of the parties to a contract has served the utmost objective to protect consumers.[310] Inevitably, the attempt to provide coherent protective legislation has proved to be scattered.[311] However, in private law branch it has introduced new values and norms related to honesty, fair dealing and risk-sharing.[312] At least positive development can be seen in the fact that the willingness to make improvements is making headway.[313]

The drafters of the CESL can be separated to neo-liberalists who are advocates of the private autonomy, and on the other hand, to the supporters of social justice who contest the so called 'law for big business'.[314] Hence, the author of the thesis states that the CESL can be seen to obtain some auxiliary value by combining two diverse perspectives. For instance, the CISG has a different focus on protection in comparison to the CESL.[315] Despite, or as a result of the CESL having resemblances with the CISG, the CISG can be seen as a rival regime to the CESL.[316] However,

[302] Heidemann, M. European Private Law at the Cross Roads: The Proposed European Sales Law. European Review of Private Law 2012, 20 (4), pp 1119-1138, p 1123.
[303] Ostrow (2013), *supra* nota 47, p 259.
[304] Low (2012), *supra* nota 223.
[305] Educate, M. The Common European Sales Law's Compliance with the Subsidiarity Principle of the European Union. Chicago Journal of International Law 2013, 14 (1), pp 317-346, p 320.
[306] *Ibid.*
[307] Ostrow (2013), *supra* nota 47, p 259.
[308] *Ibid*.
[309] Stuyck (2012), *supra* nota 53.
[310] Hawthorne (2013), *supra* nota 46, p 61.
[311] *Ibid.*
[312] *Ibid.*
[313] *Ibid.*
[314] Gullifer (2014), *supra* nota 31, p 243.
[315] *Ibid,* p 273.
[316] European Parliament. Directorate-General for Internal Policies. Policy Department Citizen's Rights and Constitutional Affairs. Unfair Contract Terms Provisions in CESL, 2012. www.europarl.europa.eu/RegData/etudes/note/join/2012/462448/IPOL-JURI_NT(2012)462448_EN.pdf (25.4.2017), p 4.

the CISG does not address unfair contract terms.[317] The author of the thesis is in the opinion that this is a favourable fact when it comes to the value of the CESL compared to the CISG. Despite the fact that the CESL contains rules against unfair terms, there have been concerns that there will be low participation of the CESL as there have been in the case of other opt-in models such as the UPICC, the PECL and in the UK, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS).[318] These concerns are actual, at least, in the case of B2B contracts.[319] The problem already with the PECL was that it refrained from making a distinction between consumer and commercial contracts.[320] Accordingly, the rules, initially meant for consumer protection, were expanded to commercial contracts and this resulted in generally undetermined protection for all and the support that it offered was not encompassing.[321] The academic DCFR followed this same approach of the PECL, and then again, CESL resembles DCFR.[322] In the case of the PECL, this extended applicability of mandatory protective rules to commercial contracts was criticised as needlessly impeding the contractual freedom in commercial contracts because it contradicts the legal tradition and commercial practice.[323] The success of application of the CESL, in both B2B and B2C contract, lies in removing the international character requisite in its application.[324] This would also have a positive effect on decreasing transaction costs between businesses.[325] On the other hand, one of the contracting parties may encounter adversities on pursuing the other party to opt into the CESL, if there is no general consciousness on its feasibility as a new set of harmonised rules.[326] Regarding to this, the European Commission supposes that attractiveness of the CESL is the key to its adoption by the businesses.[327] Lamentable fact is that the amount of traders willing to adopt the CESL is quite scarce.[328]

As the CESL should be transparent, the CESL does not succeed to provide legal certainty.[329] The author agrees with the view by concluding that the CESL probably does not have sufficient

[317] Hawthorne (2013), *supra* nota 46.
[318] Lando (2011), *supra* nota 43, p 720.
[319] *Ibid*.
[320] Twigg-Flesner (2010), *supra* nota 74, p 152.
[321] *Ibid.*
[322] *Ibid.*
[323] *Ibid.*
[324] Eidenmüller, H. Legislative Comment. The proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law. Edinburgh Law Review 2012, pp 301-357.
[325] *Ibid.*
[326] Lando (2011), *supra* nota 43, p 720.
[327] Eidenmüller (2013), *supra* nota 50, p 72.
[328] Educate (2013), *supra* nota 305.
[329] Pisulinski (2012), *supra* nota 131, p 182.

conspicuousness. On a wider level, this woeful circumstance does not help the strengthening of the internal market by the EU.[330] Furthermore, even the Commission does not impart what are the factors which makes the rules of the CESL attractive from the viewpoint of the businesses.[331] The author of the thesis adds that the protection of SMEs appears to be feeble when it comes to standard terms, pre-contractual information duties and right of withdrawal. The CESL could apply more powerfully in case where both parties choose not to apply a national law.[332] In other words, it would be an opt-out instrument.[333] One step further, the CESL could be mandatory at the level of cross-border trade.[334] Presently, the CESL can be said to, in fact, narrow the protection of SMEs by restricting the definition of a consumer.[335] This can be problematic in case where a national law treats SME as a consumer.[336] It is self-evident, that as a result, larger companies are avid on choosing exactly the CESL to the detriment of the SMEs.[337] Nevertheless, what is important to notice is that since the express choice for the CESL implies an explicit separate statement from the consumer, the same applies in the case of an SME.[338] This explicit statement is usually independent from the agreement to enter into the contract.[339]

2.3. Appropriateness of Going Further with the Protection

The CESL, as an instrument, appears not to be that a successful set of rules and the need for prolonged protection was recognised by the author. In analysing the needed protection, philosophical approaches can be found useful in order to determine the appropriate protection for SMEs. Even though, these theories are often presented in the context of B2C contracts, these approaches appear to be advantageous in perceiving status of SMEs as well. The rational choice theory, maintaining a libertarian view, highlights the maximising of their welfare as an ultimate goal.[340] Moreover, by their choices a person, by acting economically rational way, will choose from number of choices the one that generates him market efficiency the most.[341] Quite contrary to protection in pre-contractual stage, the rational choice theory purports the promotion and

[330] Educate (2013), *supra* nota 305.
[331] Eidenmüller (2013), *supra* nota 50, p 72.
[332] Lando (2011), *supra* nota 43, p 720.
[333] *Ibid*.
[334] Heidemann (2012), *supra* nota 302.
[335] Ostrow (2013), *supra* nota 47, p 260.
[336] *Ibid*.
[337] *Ibid*.
[338] Stuyck (2012), *supra* nota 53, p 193.
[339] Bisping (2013), *supra* nota 61.
[340] Onyeka (2015), *supra* nota 25, p 500.
[341] *Ibid*.

protection of consumer interests by conferring them the responsibility to make a rational choice.[342] Therefore, there are different objectives between consumer protection and consumer responsibility.[343] Thus, regulatory measures such as information disclosure are seen more as an intervening tool.[344] What is problematic in the trend used by regulators to prefer the disclosure method is that solely the quality and extent of information are observed.[345] As a result, the issue on comprehension of the information of a weaker party seems to remain untouched.[346] It can be deduced that providing abundant information will not be the key to promote the interests of the weaker party.[347] In fact, this behaviouralism implies that plentiful amounts of information do not itself guarantee fairness.[348]

It is concluded that less information may be better as the weaker contracting party may get confused by excess information.[349] In case of excess amount of information, an individual reacts to it in a selective manner by concentrating only on key terms.[350] Often, the key terms which the weaker party notices are not the ones which does not require supplemental attention.[351] Thus, the quantity of information does not facilitate the decision making of a contracting party unless it is easily comprehensible and accessible.[352] Nevertheless, too much information may even lead to consumers making incorrect choices.[353] Vice versa to the rational choice approach, according to the behavioural research, decisions by the consumers are made by emotion, can result in irrational choices, and furthermore, personal welfare is not accumulated.[354] By implementing the rational choice theory to the SMEs, the author of the thesis doubts that the regulatory measures on information disclosure would intervene with the, so called, SME responsibility. The author of the thesis concludes that, after all, the most efficient way to try to balance the differences in bargaining power between an SME and a larger trader is to control the behaviour of the larger trader by placing pre-contractual information duties for the benefit of an SME.

[342] *Ibid*.
[343] *Ibid*, p 504.
[344] *Ibid*, p 500.
[345] *Ibid*.
[346] *Ibid*.
[347] *Ibid*.
[348] *Ibid*.
[349] Giliker (2013), *supra* nota 80, p 97.
[350] *Ibid.*
[351] *Ibid.*
[352] Onyeka (2015), *supra* nota 25, p 504.
[353] Giliker (2013), *supra* nota 80, p 98.
[354] Onyeka (2015), *supra* nota 25, p 502.

Nevertheless, the justification for the protection of SMEs may encounter other obstacles as well. Generally, the law has specifically protected categories of persons against unfavourable contracts concluded by, for instance, minors due to their inexperience in business affairs.[355] Basically, their judgement is impeded due to their age.[356] Not only minors, but also other groups of persons may require protection through some other idiosyncrasy.[357] For example, an ill health may be a circumstance where an individual is not capable of forming rational discernment when entering in contractual relations or executing transactions even if he would have the legal capacity.[358] Accordingly, compared to protection in relation to SMEs, the viewpoint is very different. Age or other mitigating circumstances appear to be remarkable hindrances to the balance in contractual relationship. Moreover, they have more traditional, definite and approved status when it comes to the imbalance in contracts. In relation to this view, the appropriateness of going further with the protection in case of SMEs could be cumbersome.

Moreover, even consumers do not need the highest possible level of protection.[359] Accordingly, SMEs should not be safeguarded to the fullest as the consumer.[360] The consumers are only interested in the degree of protection that is in proportion with the conflated costs that they have to bear.[361] The author of the thesis states that this offers a much stricter viewpoint to a protection of SMEs. If even a consumer is not interested in a level of protection that exceeds the necessary level of the needed, and the protection of SMEs generally is a vague area, the protection in relation to SMEs can be easily objected to. In connection with this view, the failure to create a maximum harmonisation of consumer sales law would not be such a lamentable adversity if it would not even be necessary.[362] The author of the thesis is in the opinion that as the consumers should not be protected to the fullest, even the SMEs should not have the same protection that the consumers are entitled to. However, the author adds that when it comes to the pre-contractual duties, provisions against unfair terms and right of withdrawal, these rights should be taken further in the case of SMEs. The author justifies this conception by the fact that the provisions provided in the CESL protect SMEs solely in an adequate manner, whereas when it comes to the right of withdrawal, SMEs are not protected at all.

[355] Kötz (1992), *supra* nota 26.
[356] *Ibid*.
[357] *Ibid*.
[358] *Ibid*.
[359] Eidenmüller (2013), *supra* nota 50, p 72.
[360] Gullifer (2014), *supra* nota 31, p 244.
[361] Eidenmüller (2013), *supra* nota 50, p 72.
[362] Gardiner (2013), *supra* nota 41.

The Law Commissions in its advice concluded that more endeavour should be directed, especially, to distance selling due to its nature of being an automated process.[363] This standardised system of acquisition and distribution itself creates an imbalance between the contracting parties.[364] It is a technicality of a contract, where the weaker party knows he has no actual chances to intervene, and thus, lacks the motivation to do so.[365] Accordingly, supreme effort should be allocated to establish when the contract is concluded, to the effect of a change in circumstances and a protection against unfair terms.[366] The Parliamentary Joint Committee considers regulatory measures on information disclosure to be insufficient.[367] Rather, those measures should be complemented by responsible conduct by the trader including acting in honest, fair and in professional manner towards interests of the weaker party.[368] Moreover, it is important is to address the weaker party's need for advice and information whenever those requests are timely, relevant and specific, sensible and well formed.[369] This suggestion is in connection with the principle of good faith. Compared to, for instance, to German law, the CESL does not focus that much on safeguarding the principle of good faith.[370]

In fact, German law is quite protective in this sense.[371] According to German law, the business can challenge the other party's standard terms and the duty to disclose will be imposed in the case where non-disclosure would be against the principle of good faith.[372] Then again, according to Dutch law, the court has a great power to refuse the enforcement when the behaviour of party to a contract breaches the principle of good faith.[373] The duty to inform and to act in good faith are, as ancillary obligations, related to the norms characteristic to civil law systems.[374] Conversely, not all laws acknowledge those ancillary obligations typical to commercial contracts.[375] Accordingly, it is misleading to claim they belong to the legal status quo.[376] The CESL restricts traders' behaviour when it comes to contract terms.[377] In Article 2 of definitions, in paragraph (b) of the

[363] Devenney (2015), *supra* nota 215, p 612.
[364] Pasa (2005), *supra* nota 142, p 25.
[365] *Ibid*.
[366] Devenney (2015), *supra* nota 215, p 612.
[367] Onyeka (2015), *supra* nota 25, p 504.
[368] *Ibid*.
[369] *Ibid*.
[370] Colombi (2016), *supra* nota 22.
[371] Beale (2012), *supra* nota 105, p 139.
[372] *Ibid.*
[373] *Ibid.*
[374] Twigg-Flesner (2010), *supra* nota 74, p 153.
[375] *Ibid.*
[376] *Ibid.*
[377] Colombi (2016), *supra* nota 22.

CESL, the principles of good faith and fair dealing are characterised as a standard of behaviour in business relations that includes consideration towards interests of the other contracting party.[378] Besides, openness and fairness are intrinsic aspects in this regard.[379] The author states that even though the emphasis on principle of good faith is not that predominant, it still together with the openness and fairness, one of the important principles to which the CESL is based on, and they mirror the constitutional values as well.

Conversely to the lenient approaches on obtaining information, the seeking of professional advice could annul the need for consumer protection for the SMEs.[380] This relates to an idea of reasonably sufficient notice which is beneficial for consumers in case of unconventional and arduous terms.[381] These so called reasonable steps can be described as a procedure, in which attention is drawn to an intricate part of the contract. Hence, after this procedure and through a signature, the terms and conditions would become incorporated in the contract regardless the fact whether the parties have, in fact, scanned or understood those terms.[382] Article 5, paragraphs 1 and 2 of the CESL, deal with the overall reasonableness vis-à-vis the nature and purpose of the contract, circumstances of the case and the general usages and practices of the trades or professions.[383] According to a traditional view, especially when it comes to B2B contracts, the emphasis is put on the binding nature of a signature, notwithstanding the fact whether the incorporated terms are really read and comprehended by the parties.[384] The traditional view and English law have some similarities. According to English law, the party to contract shall read the contract and ask questions before proceeding to an actual agreement.[385] As well, in order to avoid malicious behaviour of the stronger party, one needs to insert a term in the contract to hinder that act from happening.[386]

As shown, it is claimed that the even clearly written contractual terms are not always sufficient feature for an well-established B2C contract.[387] Thus, additional consideration would be required

[378] European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284.
[379] *Ibid.*
[380] Beale (2010), *supra* nota 250.
[381] Wang (2015), *supra* nota 23, p 105.
[382] *Ibid*.
[383] European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284.
[384] Wang (2015), *supra* nota 23, p 104.
[385] Beale (2012), *supra* nota 105, p 139.
[386] *Ibid.*
[387] Wang (2015), *supra* nota 23.

in contract drafting in order to get a fair result.[388] This is, especially, in consumer contracts where generally the consumers do not understand their legal rights in the first place.[389] No matter how diligent the consumer would be, he cannot form an informed choice due to the cognitive disadvantage.[390] He may have a restrained access to information and knowledge and facts of the sale of goods, digital contents and related services which are the subject-matter of the contract.[391] On the other hand, the consumer does not even read the standard terms of the supplier.[392] The author of the thesis questions, whether it is acceptable for an SME to disregard contract terms or can an SME disregard contract terms. This attitude among consumers is justified by the fact that even if the consumer would read those terms and conditions, presumably, he would not understand them.[393] Then again, if the consumer would understand the terms, he would still take an optimistic stand towards the contingencies and risks that exist in standard form contracts.[394] The result is that he has no actual authority to modify the conditions to benefit him.[395] Another aspect to the issue is that as some commentators claim, the superiority of a larger business is also psychological and intellectual.[396] The author of the thesis agrees that this can be considered as a permanent circumstance in the concept of superiority which presumably is difficult to alter. Consequently, the weaker party presupposes that the entrepreneur has much more knowledge on both law and conducting business, and thus, chooses a passive attitude rather than object the terms which are detrimental to him.[397]

[388] *Ibid*.
[389] *Ibid*.
[390] Pasa (2005), *supra* nota 142, p 25.
[391] *Ibid*.
[392] Gullifer (2014), *supra* nota 31, p 244.
[393] *Ibid.*
[394] *Ibid*.
[395] *Ibid*.
[396] Kötz (1992), *supra* nota 26, p 137.
[397] *Ibid*.

Conclusion

Generally, consumer protection has been directed to serve consumer interests. Nevertheless, as seen in the English case *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd.* [1988], a company was dealt as a consumer. The requisite in the case was that the transaction was not distinctly carried out in the course of business. This was because the purchase of the car in question did not take place in continuous basis. The case does not give that much credit for the protection of SMEs in the context of the CESL, as the CESL is aiming at correcting SME position in cross-border trade. The case seems to give an extremely strict viewpoint on the issue can a company be considered as a consumer and does probably not provide us an up-to-date conception to the matter of SME protection. After all, the EU policy recognises the need for SME protection, and for instance, even a shopkeeper can be equated to a consumer vis-à-vis understanding standard terms or influencing on better terms. Still, it seems to be inappropriate to protect the SMEs to the fullest as the consumers would be protected. However, as inappropriate would be to limit power of control only to consumers and deny the need for protection when it comes to SMEs.

Placing an SME to the definition of a consumer is burdensome as purchasing goods or services to professional needs are excluded in the scope of consumer protection. The author of the thesis states that an SME should even not be placed in the same definition with the consumer or not even the exact same protection. After all, even the amount of protection to be granted to consumers, can be questioned as well. However, the protection given to SMEs is a matter of social justice, just as it is with consumers. In this regard, the author of the thesis states that SMEs do deserve more protection. Easily the fact that the concepts of a consumer and an SME are not distinctly separated, results in a blurred distinction between consumer and SMEs which is actually why the CESL is criticised. According to a quick overview, the distinction in B2C and B2B contracts is made, but the closer look reveals that the specification is not clear. While the provisions provided by the CESL give solely adequate protection for SMEs in relation to pre-contractual information duties and standard terms, the protection for the SMEs by the right of withdrawal is lacking in its entirety.

The protection of SMEs has been focussed in extending the consumer protection to SMEs. This prolongation of protection could be taken even further with the pre-contractual information duties, unfair terms and the right of withdrawal. After all, if a strict line has the risk of being an arbitrary one, then at least the SME protection could be still taken further without drawing an exact

distinction. Thus, the author proposes that the protection of the SMEs should be done by prolonging the protection further without making a strict line between SME and consumer. Moreover, the SME shall not be placed on the definition of a consumer. The objective of an SME, as any other company, is to enhance their welfare.

Two-fold consequences, in achieving the welfare and the ability to enhance their welfare, indicate that the protection also towards SMEs is necessary. The fact that the behaviour in pre-contractual stage should be assessed even where the contract was not concluded indicates that the pre-contractual duties are a serious concern. The failure already at a pre-contractual stage of transactions forms a fundamental obstacle to the operation of SMEs. After all, the variety of SMEs is the engine of the European economy. The bargaining power, knowledge and information disclosures are prominent in this regard. The best way to try to restore the imbalance in bargaining power is by doing it on composing pre-contractual information duties. The author of the thesis states that the regulatory measures on information disclosure do not intervene with the, so called, SME responsibility.

The requisites are that the weaker party's informational position can be improved and that the weaker party has the ability to adopt information. At least, an SME has the ability to adopt information. However, the Article 23(2) lists the circumstances that must be taken into consideration in determining whether the supplier has to disclose any information. The list is quite lenient towards the supplier and gives responsibility to the other trader. In connection to this, it can be questioned by circumstantial facts whether SMEs informational position can be improved. This claim can be justified, as probably, an SME has at least certain minimum knowledge. However, from SMEs' point of view, relevant information disclosures diminish and correct the imbalance, and as a result, informed choices are made. From the perspective of internal market, the information includes information of the goods and services, and especially, of their quality. Consequently, the best bargains will stay in the market and the bad offers will disappear.

The protection towards a weaker contracting party means providing certain optimum of information instead of maximum of information. Additionally, the information duties must be fulfilled accurately, precisely and in a concise way. Probably, in case of an SME, the way of fulfilling the information duties can follow a less strict demands, as an SME can be supposed to have already certain minimum knowledge on entering business affairs. The author of the thesis

states, that more likely, in case of SMEs, an SME can conclude a disadvantageous contract in the shortage of alternatives. Consequently, the SME yields to the contract, despite the singular unfavourable clause.

It can be concluded that SMEs need the protection against unfair terms, the so called non-individually negotiated terms, which are known as standard terms, and are often perceived to be unfair ones. Hence, the relation of standard terms or non-individually negotiated terms and unfair terms in a contract is somewhat intertwined. The protection against unfair terms for the SMEs is not exaggerated. One good reason, is that especially in distance contracts the identifying of the other party can be cumbersome. Moreover, unfair behaviour is unjust in every case. The author of the thesis counts indeterminate language and concealing the terms to unjust behaviour. In addition, the author of the thesis states that the protection against unfair terms is necessary and the provisions regarding unfair contract terms in contracts between traders could be more extended and more comprehensive. The sets of principles do not promote the interests of SMEs as they can be altered as well by the trader with superior bargaining power. In this regard, the most efficient way of control is to impose mandatory rules against unfair terms.

Probably, the current judicial decision found in the CESL, when it comes to unfair contract terms between traders, is justified on the fact that standardisation of terms is supposed to simplify procedures in business, and in this way, more compact provisions in the case of traders do confer for a benefit of conducting business. In this way, a solution where the trader should negotiate great amount of terms individually to an SME seems unnecessary. In conclusion, standard terms are part of the business and it is the unfair terms that belong to the unjust behaviour that needs to be controlled via mandatory rules.

Chapter 4 of the CESL concerns the right to withdraw in distance and off-premises contracts between traders and consumers. Due to the special feature of distance and off-premises contract, similar provisions between traders could be appropriate. As well as a consumer does not have an opportunity to see or inspect the goods for the basis to conclude the contract, there is no doubt, that the same circumstances would not apply to an SME. In addition, the standardised system of acquisition and distribution in itself cause an imbalance between the parties to a contract. The author of the thesis supports this argument by noticing that even the rules concerning the right of withdrawal between traders and consumers are not too protective but the responsibilities are

distributed also to a consumer. The author of the thesis concurs with the Law Commissions that more effort has to be directed to distance selling. Besides, the right of withdrawal is not only a consumer protection issue, but from a broader perspective, it is general contract law principle, and thus, the solution where no such provisions are when it comes to an SME is not exactly justified.

The author of the thesis states that SMEs are not on the same footing with larger companies in the level of cross-border trade, as they are not equally powerful commercial actors. Even though, a lot of enterprises can be included in the definition of an SME, they can all be separated from larger businesses which have much more choices and resources to participate in cross-border trade. In this regard, the author of the thesis states that SMEs do deserve more protection against inequality in bargaining power under the CESL. Thus, the hypothesis of the thesis was confirmed, as the protection of SMEs is not sufficiently ensured in cross-border trade by application of the CESL.

According to the research, even more larger companies than defined in the Article 7(2) would need similar protection. Besides, the superiority appears to be more than the size, and that size is necessarily not a good measure to determine the bargaining position of an SME and whether an enterprise is entitled to SME protection. The size can grow or diminish which makes it problematic as well. Consequently, the author of the thesis is not concerned that too many enterprises would fall within the scope of the CESL, in the definition of the Article 7(2).

Going further with the SME protection would not violate the freedom to conduct business, including contractual autonomy, since it has to be in accordance with the Union law. In this regard, the CESL provides a comprehensive set of uniform contract law rules. The private contractual affairs can only be intervened by predefined forms and procedures. The author of the thesis concludes that the CESL, as a second contract law regime, defines the limitations to contractual freedom and the freedom to exercise an economic or commercial activity.

The formation of contracts that result to be fraudulent can be seen as an intrusion to the Article 16 of the Charter of Fundamental Rights of the European Union. Even though, the CESL does not succeed that well in emphasising the principle of good faith, the good faith and fair dealing, including openness and fairness, are principles that the CESL is based on. These mirror the utmost constitutional values of the European legal systems as well. Nevertheless, the CESL,

unfortunately, fails to provides legal certainty when it comes to pre-contractual information duties, unfair terms and right of withdrawal. Partly, this is because the usage of the CESL has not been exactly comprehensive.

List of Sources

Science books:

1. Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon, D., Vogenauer, S. Cases, Materials and Text on Contract Law. Second Edition. Oxford, Hart Publishing 2010.
2. Beale, H. Chitty on Contracts: Volume 1. General Principles. Thirty-First Edition. UK, Sweet & Maxwell Ltd 2012.
3. Brüggemeier, G., Colombi Ciacchi, A., Comandé, G. Fundamental Rights and Private Law in the European Union. Volume II: Comparative Analyses of Selected Case Patterns. New York, Cambridge University Press 2010.
4. Colombi Ciacchi A. Contents and Effects of Contracts – Lessons to Learn from the Common European Sales Law. Switzerland, Springer International Publishing 2016.
5. Dannemann, G., Vogenauer, S. The Common European Sales Law in Context. Interactions with English and German Law. Oxford, Oxford University Press 2013.
6. DiMatteo, L. A. International Sales Law. A Global Challenge. New York, Cambridge University Press 2014.
7. Gullifer, L., Vogenauer S. English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale. Oxford, Hart Publishing 2014.
8. Hesselink, M. W. CFR & Social Justice. Munich, European Law Publishers 2008.
9. Howells, G., Schulze, R. Modernising and Harmonising Consumer Contract Law. Munich, Sellier. European Law Publishers GmbH 2009.
10. Kötz, H., Flessner, A. European Contract Law. Oxford, Oxford University Press 1992.
11. Pasa, B., Benacchio, G. A. The Harmonization of Civil and Commercial Law in Europe. Budabest, Central European University Press 2005.
12. Peers, S., Hervey, T., Keffer, J., Ward, A. The EU Charter of Fundamental Rights. A Commentary. Oxford, Hart Publishing 2014.
13. Penadés, J. P., Velencoso, L. M. M. European Perspectives on the Common European Sales Law. Switzerland, Springer International Publishing 2015.
14. Planzer, S. Empirical View on European Gambling Law and Addiction. Switzerland, Springer International Publishing 2014.
15. Roach, L. Card & James' Business Law. Fourth Edition. Oxford, Oxford University Press 2016.
16. Schulze, R. New Features in Contract Law. Munich, Sellier. European Law Publishers 2007.

17. Twigg-Flesner, C. Research Handbook on EU Consumer and Contract Law. Cheltenham, Edward Elgar Publishing, Inc. 2016
18. Twigg-Flesner, C. The Cambridge Companion to European Union Private Law. New York, Cambridge University Press 2010.
19. Ulrich, M. CISG vs. Regional Sales Law Unification. With a Focus on the New Common European Sales Law. Munich, Sellier. European Law Publishers GmbH 2012.
20. V. Bar., C., Clive, E., Schulte-Nölke, H., Beale, H., Huet, J., Storme, M., Swann, S., Varul, P., Veneziano, A., Zoll, F. Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Munich, Sellier. European Law Publishers GmbH 2009.
21. Young, M. Understanding Contract Law. Taylor & Francis e-Library 2009.

Science articles:

22. Beale, H. A Common European Sales Law (CESL) for Business-to-Business Contracts: Pros and Cons. Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica 2012, 53 (2), pp 133-152.
23. Beale, H. The CESL Proposal: An Overview, Juridica International 2013, 20 (1), pp 20-31.
24. Bisping, C. Legislative Comment. The Common European Sales Law, Consumer Protection and Overriding Mandatory Provisions in Private International Law. International & Comparative Law Quarterly 2013, 62 (2), pp 463-483.
25. Cravetto, C., Pasa, B. Non-Sense of Pre-Contractual Information Duties in Case of Non-Concluded Contracts. The European Review of Private Law 2011, 19 (6), pp 759-786.
26. Devenney, J., Kenny, M. The Omission of Personal Property Law from the Proposed Common European Sales Law: The Hamlet Syndrome… Without the Prince? Journal of Business Law 2015, Issue 8, pp 607-619.
27. Educate, M. The Common European Sales Law's Compliance with the Subsidiarity Principle of the European Union. Chicago Journal of International Law 2013, 14 (1), pp 317-346.
28. Eidenmüller, H., Jansen, N., Kieninger E-M., Wagner G., Zimmermann, R. Legislative Comment. The proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law. Edinburgh Law Review 2012, pp 301-357.

29. Eidenmüller, H. What Can Be Wrong with an Option – An Optional Common European Sales Law as a Regulatory Tool. Common Market Law Review 2013, 50. Special Issue, pp 69-84.
30. Gardiner, C. The Proposed Common European Sales Law: A New Direction for European Contract Law? Dublin University Law Journal 2013, pp 183-215.
31. Giliker, P. Pre-Contractual Good Faith and the Common European Sales Law: Compromise Too Far. European Review of Private Law 2013, 21 (1), pp 79-104.
32. Hawthorne, L. Contract Law – A Deluge of Norms in Search of Principles: The Common European Sales Law and the South African Consumer Protection Act. Studia Universitatis Babes-Bolyai Jurisprudentia 2013, Issue 1, pp 59-90.
33. Heidemann, M. European Private Law at the Cross Roads: The Proposed European Sales Law. European Review of Private Law 2012, 20 (4), pp 1119-1138.
34. Lando, O. Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law. European Review of Private Law 2011, 19 (6), pp 717-728.
35. Letowska, E. Is the Optional Instrument (the Common European Sales Law) Consistent with the Principle of Subsidiarity (Article 5 TEU). Journal of European Consumer and Market Law 2013, 2 (1), pp 28-32.
36. Low, G., Smits, J. The Proposed Common European Sales Law: Have the Right Choices Been Made: Introduction to a Special Issue. Maastricht Journal of European and Comparative Law 2012, 19 (1), pp 3-6.
37. Moussis, N. Small and Medium Enterprises in the Internal Market. European Law Review 1992, 17 (6), pp 483-498.
38. Onyeka, K. O. Online Peer-to-Peer Lending: Challenging Consumer Protection Rationales, Orthodoxies and Models? Journal of Business Law 2015, Issue 6, pp 484-508.
39. Ostrow, E. For the Purposes of This Regulation: Denying Protection to The Small Business through the Application of the CESL. American University International Law Review 2013, 29 (1), pp 255-286.
40. Pisulinski, J. The Content and Structure of the CESL. Annales Universitatis Scientarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica 2012, Volume 53, pp 169-186.
41. Stuyck, J. CESL or CRD – Which Instrument Will Win the Race for the Best System of Cross Border Sales in Europe? Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica 2012, Volume 53, pp 187-201.

42. Wang, F. The Incorporation of Terms into Commercial Contracts: A Reassessment in the Digital Age. Journal of Business Law 2015, Issue 2, pp 87-119.

EU legal acts and international conventions:

43. European Commission. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284.
44. European Union. The EU Charter of Fundamental Rights, C 364/3, 18.12.2000.

Case law:

45. ECJ 12.11.1969, C-29/69 *Erich Stauder v City of Ulm.*
46. ECJ 14.5.1974 C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities.*
47. ECJ 16.1.1979 C-151/78 *Sukkerfabriken Nykøbing Limiteret v Ministry of Agriculture.*
48. ECJ 27.9.1979 C-230/78 *SpA Eridiana and others.*
49. England and Wales Court of Appeal (Civil Division), EWCA Civ 3 [1988] *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd.*

Other sources:

50. Eesti Väike- ja Keskmiste Ettevõtjate Assotsiatsioon. Vke definitsioon. www.evea.ee/index.php/vaikeettevotlusest-2/vke-definitsioon
51. European Commission. Enterprise and Industry Publications. The New SME Definition. User Guide and Model Declaration. www.eusmecentre.org.cn/sites/default/files/files/news/SME%20Definition.pdf
52. European Commission. What is an SME? ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_fi
53. European Parliament. Directorate-General for Internal Policies. Policy Department Citizen's Rights and Constitutional Affairs. Unfair Contract Terms Provisions in CESL, 2012. www.europarl.europa.eu/RegData/etudes/note/join/2012/462448/IPOL-JURI_NT(2012)462448_EN.pdf

54. Eurostat. Small and Medium-Sized Enterprises (SMES). ec.europa.eu/eurostat/web/structural-business-statistics/structural-business-statistics/sme?p_p_id=NavTreeportletprod_WAR_NavTreeportletprod_INSTANCE_vxlB58HY09rg&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_pos=1&p_p_col_count=4
55. Tilastokeskus. Concepts. Micro Enterprise. www.stat.fi/meta/kas/mikroyritys_en.html
56. Tilastokeskus. Concepts. Small and Medium Size Enterprises. www.stat.fi/meta/kas/pienet_ja_keski_en.html
57. Yrittäjät. The small and medium-sized enterprises. www.yrittajat.fi/en/about-federation-finnish-enterprises/small-and-medium-sized-enterprises-526261