

8. The General Clause or Standard in EC Contract Law Directives – A Survey on Some Important Legal Measures and Aspects in EC Law

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This survey follows other, more extensive presentations on EC (and comparative) labour law which deal with a subject which is much older than EC contract law. In this survey, EC contract law (outside labour law) is summarized with respect to general clauses and standards used. This is done using three key examples: abuse of rights or unfairness, good faith and a high standard of care and of loyalty. In section 1 below these examples are briefly described. Then three main questions are asked:

- What functions can general clauses and standards serve in EC Contract Law? This question has also been asked by Schlechtriem (mainly for national law) and Rebhahn and Collins (for labour law, in part national, in part EC labour law) (see below section 2);
- Whether (and how) the use of general clauses and standards on the EC level differs from that in national law (see below section 3);
- How general clauses can be structured and classified in order to make their application more consistent (see below section 4).

I. THE EXAMPLES: ABUSE OF RIGHTS, GOOD FAITH AND PUNCTILIO OF AN HONOUR THE MOST SENSITIVE

This survey concentrates on three examples which are perhaps representative of general clauses and standards in EC Contract Law:¹ abuse of rights

¹ At the SECOLA conference in Paris, on which this book is based, the task of describing these three general clauses or standards was assigned to three speakers, one general clause and standard each: Prof. Mestre (Aix-en-Provence), Basic Standard: Abuse of Rights as in Unfair Contract Terms; Prof. Roppo (Genova), Intermediate Standard: Good Faith and Collaboration as in the Commercial Agents Directive (Prof. Roppo was unfortunately unable to attend for family reasons); and Prof. Wouters (Leuven), High Standard of Care and Loyalty

(*Mißbräuchlichkeit*) or unfairness, a term used in both the (different language versions of the) Unfair Contract Terms Directive² and elsewhere in EC Law; good faith as in the Commercial Agents Directive;³ and a high standard of care and honesty (loyalty) as in the Investment Services Directive, now Markets in the Financial Instruments Directive.⁴ All three directives with their

as in the Investment Services Directive. The following is more an explanation of why these three examples were chosen than a summary of what the authors said at the conference.

² Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, *EC OJ* 1993 L 95/29; Art. 3 para. 1 reads: 'A contractual term which has not been individually negotiated shall be regarded as unfair, if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. In German: '... ist als mißbräuchlich anzusehen, wenn sie entgegen dem Gebot von Treu und Glauben ...'. For some commentaries see Grundmann, *Europäisches Schuldvertragsrecht – Das Europäische Recht der Unternehmensgeschäfte (nebst Texten und Materialien zur Rechtsangleichung)* (1999), at 2.10; Hondius, 'EC Directive on Unfair Terms in Consumer Contracts – Towards a European Law of Contracts', *Journal of Contract Law* 7 (1995) 34; Pfeiffer, in: Grabitz/Hilf (eds), *Das Recht der Europäischen Union, Vol. 2 – Sekundärrecht* (looseleaf), A5; Tenreiro, 'The Community Directive on Unfair Terms and National Legal Systems – The Principle of Good Faith and Remedies for Unfair Terms', *European Review of Private Law* 3 (1995), 273; Weatherill, 'Prospects for the Development of European Private Law through "Europeanization" in the European Court – The Case of the Directive on Unfair Terms in Consumer Contracts', *European Review of Private Law* 3 (1995), 307.

³ Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents, *EC OJ* 1986 L 382/17. Art. 3 para. 1 reads: 'In performing his activities a commercial agent must look after his principal's interests and act dutifully and in good faith'; Art. 4 para. 1 reads: 'In his relations with his commercial agent a principal must act dutifully and in good faith'. For some commentaries see Fock, 'EG-Handelsvertreterrichtlinie und gewerberechtliche Registrierungspflicht', *ZeUP* 2000 (2000) 106-118; Goyder, *EC Distribution Law* (1996), 59-172.

⁴ Council Directive 93/22/EEC of 10 May 1993 on Investment Services in the Securities Field, *EC OJ* 1993 L 141/27; amended in *EC OJ* 1995 L 168/7; 2000 L 290/27; now Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments, Amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and Repealing Council Directive 93/22/EEC, *EC OJ* 2004 L 145/1. The changes are not relevant for the following. The last version (now Art. 19 para. 1) reads as follows: '(Conduct of Business Obligations When Providing Investment Services to Clients). paragraph 1: Member States shall require that, when providing investment services and/or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interest of its clients and comply, in particular, with the principles set out in paragraphs 2 to 8'. Commentaries by: Egan/Rushbrooke/Lockett, *EC Financial Services Regulation* (1994); Ferrarini (ed.), *European Securities Markets – The Investment Services*

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general clauses and standards have already generated considerable case law by the ECJ.⁵ There is a host of other instances, for example the concept of misleading advertising and of the reasonably well-informed consumer,⁶

Directive and Beyond (1998); Grundmann, *European Company Law* (2005), § 22; Koller, in: Assmann/Schneider (eds), *Wertpapierhandelsgesetz – Kommentar*, 3rd ed. (2003), §§ 31 *et seq.*; Lastenouse, 'Les règles de conduite et la reconnaissance mutuelle dans la directive sur les services d'investissement', *Revue du Marché Unique Européen* (1995), 79; Wouters, 'EC Harmonization of National Rules Concerning Securities Offerings, Stock Exchange Listing and Investment Services', *Electronic Business Law Reports* (1993), 199 and 219; and already on the new version: Ferrarini, 'Contract Standards and the Markets in Financial Instruments Directive (MIFID): An Assessment of the Lamfalussy Regulatory Architecture', *European Review of Contract Law* 1 (2005), 19.

⁵ For the Unfair Contract Terms Directive see: ECJ 27 June 2000 – joint cases C – 240/98 through C-244/98 *Océano Grupo* [2000] ECR I-4941; ECJ 10 May 2001 – case C-144/99 *Commission/Netherlands* [2001] ECR I-3541; ECJ 22 Nov. 2001 – joint cases C-541/99 and C-542/99 *Cape/Idealservice* [2001] ECR I-9049; ECJ 24 Jan. 2002 – case C-372/99 *Commission/Italy* [2002] ECR I-819; ECJ 7 May 2002 – case C-478/99 *Commission/Sweden* [2002] ECR I-4147; ECJ 1 Oct. 2002 – case C-167/00 *Henkel* [2002] ECR I-8111; ECJ 21 Nov. 2002 – case C-473/00 *Cofidis/Fredout* [2002] ECR I-10875; ECJ 1 April 2004 – case C-237/02 *Hofstetter* [2004] ECR I-3403. ECJ 9 Sept. 2004 – case C-70/03 *Commission/Spain* [2004] ECR [not yet reported]. For the Commercial Agents Directive see: ECJ 12 Dec. 1996 – case C-104/95 *Georgios Kontogeorgas/Kartonpak AE* [1996] ECR I-6643; ECJ 30 April 1998 – case C-215/97 *Bellone* [1998] ECR I-2191; ECJ 13 July 2000 case – C-456/98 *Centrosteeel* [2000] ECR I-6007; ECJ 9 Nov. 2000 – case C-381/98 *Ingmar* [2000] ECR I-9305; ECJ 6 March 2003 – case C-485/01 *Caprini* [2003] ECR I-2371; ECJ 10 Febr. 2004 – case C-85/03 *Mavrona & Sia OE* [2004] ECR I-1573. For the Investment Services Directive see: ECJ 3 June 1999 – case C-417/97 *Commission/Luxembourg* [1999] ECR I-3247; ECJ 21 Nov. 2002 – case C-356/00 *Testa and Lazzari* [2002] ECR I-10797.

⁶ The concept of misleading advertising can be found in Council Directive 84/450/EEC of 10 September 1984 relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, *EC OJ* 1984 L 250/17; amended in *EC OJ* 1997 L 290/18 (now including comparative advertising). The question whether advertising is misleading depends on how the level of expertise of the target is defined. In this respect the concept of the reasonably well-informed consumer is paramount. See ECJ 13 December 1990 – case C-238/89 *Pal/Dalhausen* [1990] ECR I-4827, 4849; ECJ 6 July 1995 – case C-470/93 *Mars* [1995] ECR I-1923, 1944; ECJ 16 July 1998 – case C-210/96 *Gut Springerheide* [1998] ECR I-4657, 4694. Now this concept is also used in (draft) secondary legislation: unfair commercial practices directive: Directive concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7 EC and 98/27/EC.

the concept of justified or reasonable expectations as in the Product Liability Directive⁷ and also the Sales Directive,⁸ and so on.

1. Abuse of Rights, as in the Unfair Contract Terms Directive

The first example is abuse of rights. The example in contract law is Article 3 paragraph 1 of the Unfair Contract Terms Directive. Actually, the directive combines two different terms which differ slightly in the different language versions: Unfairness (in the English version) and abuse of rights (*Mißbräuchlichkeit* in the German version). However, in all language versions both fall within the definition of acting contrary to good faith. Article 3 consists of a general clause or standard contained in Article 3 paragraph 1 (where the terms mentioned can be found) and of a list of examples of unfair terms contained in the annex which is not formally binding, but to which Article 3 paragraph 3 makes reference and which is meant as an illustration. The general clause or standard is thus already structured because examples are given. However, it is generally accepted that the article, and the general clause or standard itself, is as well already structured quite clearly. Firstly, it is seen as the tool enabling value judgments contained in other EC Law measures to be taken into account.⁹ In the majority of cases this may not be particularly

⁷ Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, EC OJ 1985 L 210/29; amendment EC OJ 1999 L 141/20; for this directive see, for instance: Campbell (ed.), *International Product Liability* (1993); Cahn, 'Produkthaftungsgesetz', in: *Münchener Kommentar BGB*, vol. 5 (1997); Hill-Arning/Hoffman, *Guide to Product Liability in Europe – The New Strict Product Liability Laws, Pre-existing Remedies, Procedure and Costs in the European Union and the European Free Trade Association* (1994); Miller, *Product Liability and Safety Encyclopaedia* (looseleaf 1996).

⁸ 'Reasonable expectations' are one relevant criterion (among others) for the 'conformity with the contract' under Art. 2 para. 2 lit. d of the European Parliament and Council Directive 1999/44/EC of 25 Mai 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, [1999] EC OJ L171/12. For this directive see namely Bianca/Grundmann (eds), *EU Sales Directive – Commentary* (2002), and literature cited there. It may well be that this criterion can largely be structured by looking to market average, i.e. a criterion outside the legal order.

⁹ Nassall, 'Die Anwendung der EU-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen – Zugleich ein Beitrag zur Auslegung gemeinschaftsrechtlicher Generalklauseln', *Juristenzeitung* (1995), 689, 692-694; Weatherill, *op. cit.* in footnote 2, 307, esp. 311-322; and also Bueso Guillen, 'Die Kriterien der Mißbräuchlichkeit in der

important because most other EC Law measures are mandatory and clauses deviating from them are therefore avoided. Secondly, however, the mechanism to be applied also seems quite clear. The most important element in the negative value judgment (abuse of rights!) is where the party setting the standard terms deviates *considerably* from the default rules without giving compensation for doing so, instead of just moderately adapting the default rules to meet the particular needs of the relevant sector or business. In case of such deviation, the behaviour is presumed to be abusive unless compensation is given in other respects.¹⁰

The ECJ has interpreted the Unfair Contract Terms Directive several times already (see note 5), however not all judgments are about general clauses and standards. In *Idealservice* the court stressed that companies and associations are not consumers in the sense of the directive (clear wording of Article 2). In *Commission/Netherlands*, it reiterated that while legislation is not necessarily needed to transform a directive, case law is sufficient in this respect only if it is very clear and unambiguous so that the consumer can easily recognize his rights, which is certainly not the case where case law still has to develop. The possibility that the ECJ will give indirect effect to a directive is as well not sufficient in this respect. In *Cofidis*, the court basically held that a cut-off rule which prevents a national court from passing judgement on the abusive character of a standard term after the lapse of a certain time period is contrary to the scope of the directive, i.e. to protect the consumer irrespective of his

EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen', *Verbraucher und Recht* (1994), 309, 316-323; Tenreiro, *op. cit.* in footnote 2, 273, 279 *et seq.* (but as well comparative law solutions). See also on this particular general clause and standard: Klauer, 'General clauses in European Private Law and "Stricter" National Standards, The Unfair Terms Directive', *European Review of Private Law* 8 (2000), 187; Stein, *The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?* (1991); Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *Modern Law Review* 61 (1998), 11

¹⁰ In this sense: Grundmann (*op. cit.* in footnote 2) at 2.10 para. 9, 11-15. This is basically what the ECJ then decided in the cases *Océano Grupo* and *Hofstetter* (*op. cit.* in footnote 5): In the first case, the court itself characterized the clause as unfair (abusive) because it deviated considerably from what would have been the solution under the applicable rule of law. Thus there is (even more than) a presumption that any major deviation from default rules will lead to a verdict of unfairness. In the second case, the court decided that the same was not true when there was considerable deviation from the rule of law which would have applied without this clause but when, at the same time, some compensation was given as well. In this case, according to the ECJ, the national court had to weigh the advantages and disadvantages (see also below section 3), i.e. the presumption was rebutted.

knowledge of his rights and of his willingness to invoke them (the latter for fear to have to pay higher fees). In *Henkel*, the court applied the Brussels convention (now regulation) to the suit of a consumer association which sued on the basis of an individual claim (not public law!). It was held that the fall-back rule contained in Article 5 paragraph 3 (not paragraph 1) applied, because there was no contract relationship between plaintiff and defendant (but between the original parties). In *Commission/Italy*, the court decided that Article 7 paragraph 3 (in conjunction with paragraph 1 which asks for efficient and deterring remedies) had to be construed to mean that (contrary to what the Italian rules seemed to say) consumer associations had the right to sue professional associations which gave the advice to use certain standard terms, as well as the professionals already using them.

Four decisions are more directly related to general clauses and standards: Quite interesting is *Commission/Spain*. While the first part of the judgment deals with the interpretation *contra proferentem* (Article 5) which should apply only to individual law suits (and this was not made clear in Spain), the second is about general clauses and standards. A significant interpretation of the term of 'close [local] relationship' to the EC, which triggers the mandatory application of the Directive, was made. The ECJ held that such a general clause and standard may be exemplified by the national legislature, but not restricted by using more specific, well defined elements. Thus a European general clause and standard needs to remain as open as in the directive, apparently allowing leeway for the courts, namely the ECJ. In *Océano Grupo*, the court held that it could apply the general standard contained in Article 3 paragraph 1 itself, namely to a clause listed in the annex (moreover, the court stated for the first time here that courts must be able to raise the issue of unfairness of standard terms on their own initiative). Then in *Hofstetter*, the court introduced a distinction in this respect: The ECJ could apply the general clause and standard itself only in cases where a standard term contained only disadvantages for the consumer, not where it contained disadvantages and advantages given in compensation. The weighing of both was said to be necessary in this case and was said to be the task of national courts. Moreover the list in the annex was seen only as a presumption of unfairness of the clause, not as conclusive proof. In *Commission/Sweden*, the court then decided on how to 'transpose' the list in the annex. It held that the directive intended this list to guide the structuring of the general clause and standard contained in Article 3 paragraph 1 and therefore, while it did not have to be integrated in the law, it had to be visible to all (publishing it in the legislative materials was held to be sufficient in that particular case).

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Abuse of rights has, however, played a very prominent role in EC Law more generally, more than any other general clause or standard, and there are many interesting examples not directly related to the Unfair Contract Terms Directive. Here, the concept is no longer used to limit party autonomy and the setting of standard terms (clauses), but instead to limit rights conferred by law. In some cases, the concept used has been termed as that of good faith,¹¹ in others, i.e. company law, as abuse of rights. Here, the concept of abuse of rights has been used with respect to the right to vote and the competence of the shareholder meeting: According to the Second Company Law Directive,¹² the shareholder meeting must have the competence to decide on capital measures (increases and decreases) and the ECJ wants to apply this rule also in case of crisis. Indirectly, this rule also guarantees a right to vote to each holder of voting stock – unless his behaviour can be characterized as an abuse of rights which cannot, however, be easily inferred.¹³

The standard of abuse thus seems to be much stricter in the examples referred to last – abuse is the rare exception here, while the same cannot be said in the context of the Unfair Contract Terms Directive. It looks as if the use of the concept of ‘good faith’ instead the one of unfairness and abuse of

¹¹ See, for instance: ECJ 16 December 1960 – case 44/59 *Fiddelaar* [1960] ECR 535, 547; ECJ 19 June 1984 – case 71/83 *Russ* [1984] ECR 2417, 2431 and 2433; see Collins, ‘Good Faith in European Contract Law’, *Oxford Journal of Legal Studies* 14 (1994), 229, esp. 249–254; Meyer, *Bona fides und lex mercatoria in der europäischen Rechts tradition* (1994); justifying the application of general principles in this respect: Grundmann, ‘General Principles of Private Law and Ius Commune Modernum as Applicable Law?’, *Festschrift for Buxbaum* (2000), 213.

¹² Second Council Directive 77/91/EEC of 13 December 1976 on Coordination of Safeguards which, for the Protection of the Interests of Members and Others, are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 58 of the Treaty, in Respect of the Formation of Public Limited Liability Companies and the Maintenance and Alteration of Their Capital, With a View to Making Such Safeguards Equivalent, *EC OJ* 1977 L 26/1; amended in *EC OJ* 2003 L 221/13.

¹³ ECJ 13 March 1996 – case C-441/93 *Pafitis* [1996] ECR I-1347 (1382 *et seq.*, n. 67–70) (no abuse of rights if a shareholder votes against restructuring and restructuring could possibly have been to his benefit as well); ECJ 12 May 1998 – case C-367/96 *Kefalas* [1998] ECR I-2843 (2869–2871, n. 19–29) (no abuse of rights if a shareholder votes against restructuring and does not content himself with the preemption right); ECJ 23 March 2000 – case C-373/97 *Diamantis* [2000] ECR I-1723 (1734 *et seq.*, n. 32–37). For these judgments see, for instance, Schmidt-Kessel, ‘Rechtsmißbrauch im Gemeinschaftsprivatrecht, Folgerungen aus den Rechtssachen Kefalas und Diamantis’, *Jahrbuch Junger Zivilrechtswissenschaftler* 2001 (2001), 61.

rights, and even the uncertainty about the core concept in the different language versions, was an expression of this difference in standard. The standard applied in the Unfair Contract Terms Directive is more demanding than that of (mere absence of) abusive behaviour.

2. Good Faith, as in the Commercial Agents Directive

The second example is good faith which, in a comparative survey, would probably be seen as the most important example.

It has already been mentioned that the ECJ speaks of good faith in some cases, i.e. where it wants to set limits for the use of rights conferred by (EC) law, while in others abuse of rights is the concept used.

In secondary law, the term of good faith is used elsewhere and with a different meaning: Article 3 paragraph 1 and article 4 paragraph 1 of the Commercial Agents Directive impose on both parties (the commercial agent and the enterprise whose goods are to be marketed) a duty to behave in good faith. Here it seems clear that the concept is aimed at supplementing the range of duties under the contract.¹⁴ On the other hand, no list of such duties – even non-binding – has been added. Nor does there seem to be a criterion for structuring the general clause or standard, similar to the one described for the Unfair Contract Terms Directive, where an abuse of rights would be presumed whenever one party considerably deviates from default rules.

The ECJ has interpreted the Commercial Agents Directive several times, although not as often as the Unfair Contract Terms Directive (see note 5), and these decisions are less relevant for general clauses and standards. According to *Mavrona*, commission agents do not fall within the scope of the directive, because they act on their own account (contrary to what the definition contained in Article 1 paragraph 2 says). In *Bellone*, the court specified that national law may make registration compulsory but may not make the application of any of the safeguards contained in the directive depend on this (no nullity of the contract). This was justified by pointing to Article 13 paragraph 2 and other rules (*e contrario*), also by invoking legislative history where such a proposal had been rebutted and by the fact that otherwise cross border impediments could be created. This judgement was reiterated in *Caprini*. In *Centrosteeel*, the ECJ asked the national court to impose this result in national

¹⁴ See, for instance: Franzen, *Privatrechtsangleichung durch die Europäische Gemeinschaft* (1999), 544-548; and also Remien, 'Die Vorlagepflicht bei Auslegung unbestimmter Rechtsbegriffe', *RebelsZ* 202 (2002) 503, 518 *et seq.*, 524 *et seq.*

law practice using the instrument of indirect effect. In *Kontogeorgas*, the ECJ held that the commercial agent had a right to remuneration under Article 7 paragraph 2 irrespective of whether his efforts were causal for the transaction or not, where a specific district was attributed to him, and that legal persons as clients were to be considered to belong to the district where they had their business activities. If these transcended one district additional elements would have to be considered, namely the place where the negotiations had taken place. Most famous is the decision in *Ingmar* where the ECJ held that Articles 17-19 apply also where the enterprise is US-American and Californian Law has been chosen. The court decided that these rules are to be applied in a mandatory way and that any other interpretation would lead to a distortion of competition between Member States (contrary to the intention of the EC legislature), both arguments being rather surprising in an international setting extending outside the Community.

3. High Standard of Duty of Care and Honesty or Loyalty (Punctilio of an Honour the Most Sensitive), as in Investment Services

The third example is that of the duty of care and honesty or loyalty which providers of investment services owe their clients under Article 11 of the Investment Services Directive, now Article 19 paragraph 1 of the Markets in Financial Instruments Directive (basically unchanged). The Directive uses the terms 'honestly', 'fairly' and 'in accordance with the best interest of its clients'. In fact, it would seem that reference is made to two different duties, one being the duty of care which applies in principle to any contractual relationship, the other being the duty of loyalty (or honesty) typical only for fiduciary relationships.¹⁵ Only this latter duty serves as our third example. It should also be mentioned that the Commercial Agents Directive subjects the commercial agent (but not the enterprise whose products are marketed) to this standard for certain aspects, i.e. not only to the good faith principle (see above).

The example is interesting for several reasons. First, it would again seem that a quite clear criterion can be found to structure this general clause or standard. It is virtually undisputed that the provider of investment services has to

¹⁵ For this distinction see (with respect to the Directive): Grundmann (*op. cit.* in footnote 2) at 4.20 para. 17 *et seq.*; and more generally and partly ground breaking: *Shlensky v. Wrigley*, 237 N.E.2d 776, 778-780 (Ill.App.Ct. 1968); Clark, *Corporate Law* (1986), 123-141; Shepherd, *The Law of Fiduciaries* (1981), 48-50; Weiss, 'Economic Analysis, Corporate Law, and the ALI Corporate Governance Project', *Cornell Law Review* 70 (1984), 1, 13-26.

provide his services in a particular way: whenever he gives advice, discloses material information or chooses a particular method of execution, he is asked to use the interests of the client as his sole guideline for action.¹⁶ Therefore, e.g. advice given may not be (even partly) motivated by one's own interest in fees.¹⁷ The rule goes still further and even expects the provider of investment services to avoid conflicts of interest wherever possible, i.e. to avoid any situation where there is a risk of self-interest and therefore a risk for the client that his interests are not the sole consideration.

The second point of interest is rather methodological in character. The rules of best conduct, of which the duty of loyalty is part, are subject now to the idea of a legislation by comitology. The core idea is that on level one (EC Commission, Council and Parliament) only core rules, namely general clauses and standards, are set and that more specific rules are left to a second level where professional expertise is represented; here, the standard setter can react more quickly to changing needs and implement experience made in the markets.¹⁸

There is less ECJ case law for this directive than for the other two, and what there is is not really on the general clauses and standards: In *Commission/Luxemburg*, the Grand Duchy was condemned for outright failure to transpose the directive. In *Testa and Lazzeri*, the ECJ stated that a definition (in this case that of management of individual portfolios) could not be extended by a Member State for the purpose of the directive (namely with respect to an application of the home country principle). The Member State could, however, introduce a parallel rule outside the scope of application of the directive (if this was made clear and without the effect that the home country principle of the directive applied).

II. THE FUNCTIONS OF GENERAL CLAUSES OR STANDARDS IN EC CONTRACT LAW

The functions described for national law – mainly in the contribution by Schlechtriem – or for European (and comparative) Labour Law can be found

¹⁶ Koller, in: Assmann/Schneider, *Wertpapierhandelsgesetz – Kommentar*, 3rd ed. (2003), § 31 WpHG, para. 8; Schwark, 'Die Verhaltensnormen der §§ 31 ff. WpHG', in: Hadding/Hopt/Schimansky (eds), *Das Zweite Finanzmarktförderungsgesetz in der praktischen Umsetzung* (1996), 109, 114 *et seq.*, 116 *et seq.*; and more generally for fiduciary relationships: Scoles/Halbach, *Problems and Materials on Decedents' Estates and Trusts* (1987), 713-735; Shepherd, *op. cit.* in footnote 15, 132-136. For English law which uses the term of 'Fairness' in this respect: Blair, *Financial Services – The New Core Rules* (1991), 6, 43.

¹⁷ Schwark, *op. cit.* in footnote 16, 116 *et seq.*

¹⁸ See, more in detail, Ferrarini, 'Contract Standards and the Markets in Financial Instruments Directive (MiFID)', *op. cit.* in footnote 4, 19, 27-33.

to a considerable extent again in the set of examples given here for general EC Contract Law.

1. Limiting Rights, Filling Gaps, Creating New Remedies

It is evident that the concept of abuse of rights (or unfairness) serves as a limit. It does so with respect to party agreements in the case of the Unfair Contract Terms Directive and to rights conferred upon one party by law in the case of voting rights and the other instances mentioned. The two examples differ in that in the second case a behaviour is characterized as being abusive only in cases where there is no sensible reason for the behaviour shown by the party in question. Conversely, in the first case already a considerable deviation from default rules, which may be quite sensible for the party in question, is seen as being abusive. The margin within which party agreement (in standard contract terms) is permitted is rather narrow, a behaviour is much more easily characterized as being abusive.

It is evident as well that the concept of good faith in the Commercial Agents Directive and also that of fairness (duty of loyalty) in the area of investment services serve as a tool by which ancillary duties are created and lacunae in the agreement are filled in the spirit of this agreement. Implied terms can be based on these concepts (gap filling device). Again there is a (double) difference of intensity. In the first case, gaps which have to be filled will mostly concern ancillary duties only, the core duties having been defined by the parties. In a principal agent relationship, however, which is not a spot contract but typically a long-term relationship (as in the area of investment services), often a large part of the program of duties can not be foreseen or detailed.¹⁹ The general clause or standard (the duty of loyalty) then reaches the very core of the relationship and most of the duties owed by the provider of investment services cannot be defined in specific terms (or only at enormous costs). Therefore in this instance, the general clause and standard is much more than a simple gap filling device for the creation of ancillary duties; it is or can be the most important basis for the primary duties of the parties. The second difference is the degree to which the interests of the other party have to be taken into account. In the first case, the obligated party must only take into account the other party's interest but is not bound to neglect his

¹⁹ Ground breaking for this problem and for first solutions to it: Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations', *Journal of Law and Economics* 22 (1979), 233; id., *The Economic Institutions of Capitalism* (1985), 43-63, 68-84.

own interests completely. Conversely, in the second case, this is exactly what is required – the ‘punctilio of an honour the most sensitive’.²⁰

Schlechtriem names two more functions, i.e. general clauses and standards on which additional remedies are based and general clauses and standards which would limit these additional remedies. Different from the functions discussed so far, these two additional functions cannot so easily be formed in EC Contract Law. The first reason for this is that in EC Contract Law, as in any EC secondary law, most remedies are laid down in national laws. EC Contract Law generally only lays down the duty as such (*Primäranspruch* in German terminology), not the remedy in case of violation (*Sekundäranspruch*). There are, however, exceptions. Firstly, there is the general principle, stated several times by the ECJ, that national laws must always contain remedies which are ‘efficient and deterring’ whenever they impose a duty in the course of transposition of EC legal measures.²¹ Secondly, in some respects the ECJ has produced concrete remedies, most prominently that of state liability in the case of failure to transpose directives.²² And thirdly, in one of the three examples examined here, the investment services area, it has been argued that protection of investor confidence (which is prescribed by the directive) is only possible if the Member State does more than introduce public law remedies, i.e. competences for the supervisory authority. National law must give the harmed (private) party a remedy as well, i.e. a remedy of damages and this would then be based exactly on this duty of Member States to introduce ‘efficient and deterring’ sanctions and on the principle that investor confidence should be protected.²³

²⁰ See Justice Cardozo in *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928): ‘Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.’

²¹ See ECJ 21 September 1989 – case 68/88 *Commission/Greece* [1989] ECR 2965, 2985; ECJ 10 July 1990 – case C-326/88 *Hansen* [1990] ECR I-2911, 2935.

²² See only ECJ 19 November 1991 – joint cases C-6/90 and C-9/90 *Francovich I* [1991] ECR I-5357; ECJ 5 March 1996 – joint cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029; ECJ 8 October 1996 – joint cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer et al.* [1996] ECR I-4845; already ECJ 2 December 1971 – Rs. 5/71 *Schöppenstedt* [1971] ECR 975.

²³ Koller (*op. cit.* in footnote 16), Vor § 31 WpHG, para. 17, 20; Cahn, ‘Grenzen des Markt- und Anlegerschutzes durch das WpHG’, *ZHR* 162 (1998), 1, 33; Schwark, *op. cit.* in footnote 16, 118-125.

2. Minimum Clauses, Categorization and Mandatory Principles Subject to Structured Derogation

Prof. Rebhahn's and Prof. Collins' papers point to the fact that most general clauses and standards in EC Law really have to be conceived as minimum clauses. One important exception is where equal treatment is required and therefore more favourable national rules – such as quota or affirmative action – are in principle also forbidden. In principle, there is no 'more equal' under EC Law.²⁴ (Mandatory) categorization has, as Prof. Collins points out, become a core business in EC legislation with the Common Frame of Reference Process.²⁵ The ECJ has, however, taken the view in virtually all cases that it is not national law which fills a category to be found in EC Law. Among the examples mentioned in this article are the cases *Mavrona* (commission agents are not commercial agents) and *Testa and Lazzeri* ('management of individual portfolios').²⁶ The famous *Tessili/Dunlop* case which the ECJ decided in the opposite sense has remained an exception.²⁷ And certainly the

²⁴ The leading cases (containing also some minor exceptions) are: ECJ 17 October 1995 – case C-450/93 *Kalanke* [1995] ECR I-3051 (3076-3078); ECJ 11 November 1997 – case C-409/95 *Marschall* [1997] ECR I-6363. According to the latter, in case of equal qualification, there has to be 'an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate.' For a discussion, see, for instance, Charpentier, 'L'arrêt *Kalanke* – Expression du discours dualiste de l'égalité', *Rev. Trimestrielle de Droit Européen* (1996), 281; Colneric, 'Frauenförderung nach der *Kalanke*-Entscheidung des EuGH', *Arbeitsrecht der Gegenwart* (1997), 69; Kilpatrick, 'Gender Equality: A Fundamental Dialogue', in: Sciarra (ed.), *Labour Law in the Courts: National Judges and the European Court of Justice* (2001), 31; Lenz, 'Konsequent und auf der Linie der Mehrheit – Zum Urteil *Marschall* des EuGH', *Neue Juristische Wochenschrift* (1998), 1619; Peters, 'The Many Meanings of Equality and Positive Action under European Community Law – A Conceptual Analysis', *European Law Journal* 2 (1996), 177.

²⁵ The idea has been introduced by and is described in: Communication of the Commission to the Council and the European Parliament – a more coherent European Contract Law, Action Plan of 12 February 2003, COM(2003) 68 final = EC OJ 2003 C 63/1; short survey and some comments by Collins, 'The "Common Frame of Reference" for EC Contract Law: A Common Lawyer's Perspective', in: Meli/Maugeri (eds), *L'armonizzazione del diritto privato europeo* (2004), 107; Karsten/Sinai, 'The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law', *Journal of Consumer Policy* 26 (2003), 159; Staudenmayer, 'Der Aktionsplan der EG-Kommission zum Europäischen Vertragsrecht', *EuZW* (2003), 165.

²⁶ See further examples in Remien, *op. cit.* in footnote 14.

²⁷ EuGH 6 October 1976 – case 12/76 *Tessili/Dunlop* [1976] ECR 1473 (1487).

standard of unfairness, as interpreted in the *Hofstetter* case (above), is paradigmatic for the concept of mandatory principles subject to structured derogation.

III. GENERAL CLAUSE OR STANDARD IN EC DIRECTIVES – A DUAL SHIFT OF POWER?

The most important consequences of using general clauses and standards on the EC level – i.e. mainly in EC directives – would seem to be twofold: one is that potentially decision-making power is shifted from legislature to judiciary; the other is that there may as well be a shift from national law (national judges) to European Law (the ECJ).

1. A Shift of Power from Legislature to the Courts?

The first potential consequence is one which has been quite extensively discussed for national law.²⁸ In this book, this topic has been assigned to Judge Edward, a judge at the ECJ.²⁹ To summarize his contribution: he primarily criticizes a legislature that often does not so much give additional decision-making power to the ECJ, but instead transfers problems to the court which the legislature itself could not solve for political reasons. This would mean that the use of general clauses and standards is not guided by segregating two types of situations: those where flexibility and intimate knowledge of the particular case are particularly important and where therefore judges may be better equipped to decide and general clauses and standards may be useful; and the other situations where the relevant criteria can be clearly defined and formulated and therefore where more precise rules would increase legal security. In the three examples examined here, it could be argued that exactly this step, this type of segregation, can be found, at least in principle. In the Unfair Contract Terms Directive, the legislature combined a definite list with a general clause or standard, thus structuring the criteria and at the same time leaving enough flexibility to handle even unusual cases (see below section 4). It is true that

²⁸ See the contribution by Spinosi-Jauffret, 'Théorie et pratique de la clause générale en droit français et dans les autres systèmes juridiques romanistes', in this volume, 23 (25, 34); Röthel, *Normkonkretisierung im Privatrecht* (2004), *passim*; see as well Roth, 'Generalklauseln im Europäischen Privatrecht – Zur Rollenverteilung zwischen Gerichtshof und Mitgliedstaaten bei ihrer Konkretisierung', *Festschrift für Drobniig* (1998), 135.

²⁹ See contribution by Edward, 'Shifting Power from Legislation to Judges and from the Central Level to the National Level', in this volume, p. 79.

the core mechanism described above (text accompanying note 10) could have been formulated more clearly. Further, with respect to the other two examples – good faith as in the Commercial Agents Directive and the duty of loyalty as in the EC rules on investment services – EC Law at least does not seem to deviate significantly from the approach in national laws. Good faith as a gap filling device is well known for ancillary duties in national law – albeit under the name of ‘implied terms’. The duty of loyalty seems to be a concept which is most prominent in common law, which normal legislatures do seem to need in this area of the law, and which therefore, even in rather liberal economic theory, is found to be a necessary device where ignorance of the future is inevitable.

In Europe, however, there is one important additional aspect which does not appear in the same way in national laws: it is still not clear whether the ECJ is really equipped to adjudicate on general clauses and standards. Smits fears that the necessary coherence of legal tradition is missing.³⁰ There may also be a serious problem of capacity, as the court has only two chambers, a problem which would increase still further if general clauses and standards played a significant role in a European Code. The question is, whether under such circumstances, enough case law can build up – otherwise flexibility would be reached only at the cost of arbitrary and unpredictable results. On the other hand, if one considers the case law by the ECJ on Article 3 paragraph 1 of the Unfair Contract Terms Directive, the future may look a bit more positive. The ECJ seems to have given clear guidelines in two or three decisions (see above and below).

2. A Shift of Power from National Law to EC Law?

A discussion has arisen, mainly in Germany, on a further point. Many authors doubted that the ECJ is competent to structure and apply the general clauses and standards contained in EC Directives. Some important authors feel that this is principally within the competence of national courts. The argument is that otherwise a large-scale harmonization would take place (allegedly contrary to Article 5 paragraphs 2 and 3 EC). Moreover the ECJ would not be able to structure such general clauses and standards, it would not have the competence to ‘apply’ the law and there are not enough value judgments in any field of law on

³⁰ See Smits, ‘The Future of European Contract Law: on Diversity and the Temptation of Elegance’, in: Faure/Smits/Schneider (eds), *Towards a European Ius Commune in Legal Education and Research* (2002), 257.

the EC level.³¹ An important monograph then generally agreed in principle, but introduced a distinction: Each general clause and standard on the EC level should be scrutinized as to whether in legislative history, in the wording or in other neighbouring legal measures, enough indications could be found to justify the formulation of the general clause and standard. Only in such a case was the ECJ seen to be competent.³² However, this was also the starting point for a later important inquiry³³ which, however, in most instances, reached the opposite conclusion, accepting in most cases that the ECJ was in fact competent. This is a very German discussion. It is, however, important³⁴ – not only because the extreme first-mentioned position does not seem to be acceptable under the later case law of the ECJ, but also from a theoretical point of view:

The example most discussed was probably Article 3 paragraph 1 of the Unfair Contract Terms Directive. This is precisely the point on which the ECJ had to decide most (all cases cited in note 5) and clarified quite extensively. The four decisions concerning the directive and general clauses and standards in it suggest the following: In *Commission/Spain*, the ECJ allowed the national legislature to exemplify a general clause and standard contained in an EC directive when transposing it, but prohibited the national legislature from using more specific, well defined elements and thus potentially restricting the scope of such a general clause and standard. Thus a European general clause and standard needs to remain as open as in the directive, apparently giving

³¹ Most prominent in this area: Canaris, *Handelsrecht* (2000), § 17 I 4; Roth, *op. cit.* in footnote 28. These authors in principle would probably not (yet) see system in harmonization. For system building in European Law: Grundmann (ed.), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts – Gesellschaftsrecht, Arbeitsrecht, Schuldvertragsrecht* (2000); Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (2003); and implicitly since 2001: Communication of the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final = EC OJ 2001 C 255/1; and Communication of the Commission to the Council and the European Parliament – A More Coherent European Contract Law, Action Plan of 12 February 2003, COM(2003) 68 final = EC OJ 2003 C 63/1.

³² Franzen, *op. cit.* in footnote 14, 504-574.

³³ Remien, *op. cit.* in footnote 14.

³⁴ I personally argued quite clearly for a competence of the ECJ in principle in all these cases – perhaps even partly ignoring the discussion which came up in the late 1990s. See, for instance, Grundmann, *op. cit.* in footnote 2, at 2.10 para. 22, at 3.80 para. 10; in this sense also Klauer, *op. cit.* in footnote 9, 187; Weatherill, *op. cit.* in footnote 2, 307, 327 *et seq. et passim*; and implicitly Tenreiro, *op. cit.* in footnote 2, 273, 280 *et seq.*

leeway for interpretation by the courts. It would seem logical that leeway can be given only to the ECJ in the first instance, because it would not seem plausible that a national court could restrict the general clause and standard when the ECJ prohibited a national legislature from doing this. In fact, the ECJ had applied already the general clause and standard contained in Article 3 paragraph 1 of the Directive in the *Océano Grupo* case. In this case, the standard contract term deviated considerably from what would have been expected under the applicable rule of law. Such a deviation seems to constitute a presumption or even conclusive evidence of the unfairness of the clause in the opinion of the court. This is a clear statement that structuring the general clause and standard contained in an EC Directive is primarily the task of the ECJ. And this is also so if the ECJ then states that it may transfer the power back to national courts in certain instances. This is what the ECJ then did in *Hofstetter*. Here it was stated that the ECJ would apply the general clause and standard itself only in cases where a clause contained only disadvantages for the consumer, not where it was necessary to strike a balance between disadvantages and advantages given in compensation, which was said to be the task of national courts. Moreover the list in the annex was seen only as a presumption of unfairness of the clause, not as conclusive evidence. All these statements mean some additional structuring of the general clause and standard by the ECJ. There is no longer any presumption of unfairness if compensation is given, then the advantages and disadvantages must be weighed. And of course, in this instance the list is no longer persuasive, because the list does not (and cannot) deal with the possibility of compensation. What the ECJ basically stated when referring the case back to national courts was that it considered the task of weighing advantages and disadvantages to be a matter of fact – such as a court of last instance finds in many national law cases. Finally, the ECJ decided in *Commission/Sweden* that, of course, the list contained in the annex was an important guideline for structuring the general clause and standard contained in Article 3 paragraph 1 of the Directive. Therefore a national legislature, while not being obliged to transpose it as a rule of law, nevertheless had to make this list easily available when transposing the directive. The reason is that only in this way could the correct structuring of the general clause and standard contained in Article 3 paragraph 1 of the Directive be prepared in national practice (while the final say remains with the ECJ).

After these decisions, it does not seem in line with the case law of the ECJ that sole or primarily national courts are competent to structure general

clauses and standards set at the EC level and decide on the relevant criteria. Even the last important example, in which the much more liberal contribution by Remien argued the competence of the national courts, has meanwhile been decided differently by the ECJ.³⁵ Also from a theoretical point of view, the only acceptable approach would seem to be to place the competence on the ECJ, who then can transfer it back where this seems suitable for the purposes of its jurisdiction. None of the above arguments against such a competence seem convincing. There are many more indications of value judgments in EC Secondary Law than is often believed and the ECJ can develop them also on its own initiative (this power of the court is precisely what general clauses and standards are usually about). The argument that subsidiarity does not allow too broad a harmonization is itself too broad. In cases where there are clear grounds for more flexibility and general clauses and standards are therefore introduced, it would have to be tested for such a standard as a whole, whether a homogeneous interpretation by the ECJ would give a considerable advantage over a diverging interpretation in different Member States. Otherwise legislation on the EC level may not be permitted, but elsewhere the competence of the ECJ can not be doubted. And the argument that the ECJ does not 'apply' the law is not conclusive either: It is normal for courts of last instance not to 'apply' the law in the same way as other courts do, for instance not to review the facts.

IV. STRUCTURING THE GENERAL CLAUSE OR STANDARD AND SYSTEMIZING THE LEVEL OF PROTECTION

One major problem, perhaps the one which most authors consider to be the most important when discussing general clauses and standards, is how to strike the balance between flexibility, openness to new needs and utilizing of the expertise of the courts on the one hand; and the need for legal security and the democratic legitimacy on the other – the last aspect speaking in favour of a solution where the democratically chosen legislature at least decides on the

³⁵ In ECJ 12 March 2002 – case C-168/00 *Simone Leitner/TUI* [2002] ECR, I-2631, the court held that it could as well interpret the term of 'damages' contained in this directive: It interpreted it in a sense which would include also damages for immaterial losses (lost amenities). For a beautiful illustration of how even here, value judgments can be taken from elsewhere in Community Law, see the contribution by Collins, 'Social Rights, General Clauses, and the Acquis Communautaire', in this volume, 111 (137-139).

overall guidelines. Two aspects of this problem should be discussed at least briefly as a kind of conclusion to this short survey:

1. Adding the Criteria of How to Structure the General Clause and Standard

The first aspect is that of specifying the relevant criteria in the legislative process. There are at least two 'procedural' devices available. They allow for the flexibility of the general clause and standard while also adding considerably to legal security and democratic legitimation.

The first is directly related to the subject matter. An example is the general clause and standard in the Unfair Contract Terms Directive. This clause seems to be much more structured by the mere fact that an illustrative list is added. In the case of the directive, it is illustrative, not binding. According to the ECJ, this has at least two consequences: This list has to be easily available to the public and generally inclusion in the list leads to a presumption of unfairness, at least in the typical case, i.e. where there are no relevant aspects not taken into account in the examples in the list. The most important point would seem to be whether compensation is given in some other aspect. A list can also be arranged in yet another, more structured, way: containing clauses which are *per se* (i.e. always) unfair and others where – as in the Directive, as interpreted by the ECJ – there is a refutable presumption of unfairness. This is the approach under German Law. What is important is that in addition to the list there is the flexibility to consider other situations. Even for these other cases, the basic criterion seems clear: a presumption of unfairness is the consequence of considerable deviation from the default rule which otherwise would apply, or from a model which (absent default rules) would seem to be accepted in the business circles affected. The more general lesson to draw from this seems to be the following: General clauses and standards keep their core advantage – of flexibility – even where the legislature adds illustrations of cases which it would normally consider to fall under the general clause and standard – the more the better, at least in highly disputed and practically important areas where a lot of case law can be found. In summary, the EC legislature combined a specific list with a general clause or standard, thus giving the criteria structure and whilst allowing sufficient flexibility to deal with unusual cases.

The second device is about different periods in time. The last mentioned combination may be best achieved through the interaction between legislature (periodic test of democratic legitimation) and the expertise gathered. The latter can be the case law of courts or the practical expertise of supervisory

authorities. An example for the latter would be the comitology approach in highly complex areas such as financial services, where democratic legitimation does not seem to result in sufficiently efficient rules and where therefore expert input would be very welcome also in theory (there are many other areas in the modern business world, such as competition law, capital markets, accounting etc.). The core idea would be that the process between general rule and democratic legitimation on the one hand and illustration and concrete expertise on the other should best be organized over a period of time.

2. Establishing an Order of the Different Levels of Protection Guaranteed by General Clauses and Standards

Another tool for making the application of general clauses and standards more predictable without necessarily reducing their flexibility is to concentrate more on the criteria and their relative importance, i.e. on discussing and creating a certain hierarchy between them. Some important conclusions could perhaps already be drawn from the three examples examined here. There seems to be a first level where only reckless behaviour is excluded. The concept used is that of abuse of rights, as in the cases concerning the Second Company Law Directive (abuse of rights was, however, negated in the cases decided). The term abuse of rights is used – at least in the German version – also in Article 3 paragraph 1 of the Unfair Contract Terms Directive, however, combined with a good faith standard (even in the German version). Here, this concept, which in the English version is termed as unfairness of the standard contract term, demonstrates a more demanding standard. The standard contract term has to remain fairly close to what are morally good standards, as fixed in default rules. Good faith is in fact a concept on which other functions are based, namely gap filling and the specification of ancillary duties which are needed for the good performance of the contract. Again, the standard would seem to be what is a morally good standard, as fixed in default rules or rather as any rule which business morals would typically see as suited to this case. If one wanted clarity in the terms, it would nevertheless be helpful to name the one concept (in the Unfair Contract Terms Directive) clearly different from the other (in the Commercial Agents Directive). Gaps are filled as well – larger gaps in this case – by the concept of a duty of loyalty or honesty ('act honestly and fairly'). This duty is more demanding in two respects. It is much more wide-ranging in that not only are ancillary duties typically defined, but also the primary duties are based on this concept. It is more demanding in that the standard to be reached is that the interests of the other

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party are not only taken into account, but that these interests serve as the sole guideline for one's own action (altruistic standard).

It was basically this hierarchy of standards – from not very demanding to very demanding, from excluding only exceptional behaviour to creating positive duties to act even in the interests of the other party – which begs the question as to whether the standards could be classified (see note 1) as follows: basic standard – abuse of rights (as in the Unfair Contract Terms Directive and elsewhere); intermediate standard – good faith and collaboration (as in the Commercial Agents Directive); and high standard of care and loyalty (as in the Investment Services, now Market in Financial Instruments Directive). This is a question which seems to be of particular importance for general clauses and standards in EC Contract Law and which therefore requires further discussion, from all sides. Despite important first steps, the structuring of general clauses and standards still needs additional discussion and clarification in theory and in practice before this instrument can be used extensively in a future European codification.