Study on all mandatory rules applicable to contractual obligations in contracts for sales of tangible goods sold at a distance and, in particular online

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N°JUST/2015/RCON/PR/CIVI/0066 « Study on all mandatory rules applicable to contractual obligations in contracts for sales of tangible goods sold at a distance and, in particular online »

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[1] The French report has been written before the reform of French contract law, which happens on 10 February 2016 and which will be applicable from 1er October 2016. The final report mentions the texts of the reform.

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LIST OF ABREVIATIONS

MEMBERS STATES, DOMESTIC LAW AND JURISDICTION

AT	Austria	**ABGB:** civil code **ECG:** E-Commerce Act **KSchG:** Consumer code
BE	Belgium	**CEL:** Code Economic Law
BG	Bulgaria	**CA:** Commercial Act **CCA :** Consumer Credit Act **CPA :** Consumer Protection Act **DPA:** Discrimination Protection Act **ECA:** Electronic Commerce Act **EDESA:** Electronic Document and Electronic Signature Act **GA:** Gambling Act **OCA:** Obligations and Contracts Act **PCA:** Protection of Competition Act
CY	Cyprus	**CAP:** Cyprus Contract Law
CZ	Czech Republic	**CC :** Civil code
DE	Germany	**BGB :** Bürgerliches Gesetzbuch
DK	Denmark	
EE	Estonia	**LOA :** Law of Obligations Act
EL	Greece	
ES	Spain	**ART:** Act on Retail Trade **CatCC:** Catalan Civil Code **CPA:** Consumers Protection Act **CPrA:** Spanish Law of Civil Procedure **GCTA:** General Contract Terms Act

		ISSECA: Information Society Services and Electronic Commerce Act **RCPA:** Revised Consumer Protection Act **RSCT:** Register of Standard Contract Terms **SpCC:** Spanish Civil Code **SpCCom:** Spanish Code of Commerce **SSC:** Spanish Supreme Court **SSCJ:** Spanish Supreme Court Judgment **UCA:** Unfair Competition Act 10 January 1991
FI	Finland	**CPA:** Consumer Protection Act
FR	France	
HR	Crotia	**COA :** Civil Obligations Act **CPA:** Consumer Protection Act
HU	Hungary	
IE	Ireland	
IT	Italy	**It. Cons. Code :** Italian Consumer code **It. civil code :** Italian Civil code
LT	Lithuania	
LU	Luxembourg	
LV	Latvia	**CRPL:** The Consumer Rights Protection Law
MT	Malta	
NL	Netherlands	**BW:** Burgerlijk Wetboek (Dutch Civil Code)
PL	Poland	**CC :** Civil Code
PT	Portugal	**STJ** : Supremo Tribunal de Justiça

RO	Romania	
SE	Sweeden	
SI	Slovenia	**CO :** Code of Obligations **ZvPot :** Consumer protection Act
SK	Slovakia	**ActPC:** Act on Protection of Consumer, Act No. 250/2007 **ActPCDDS:** Act on consumer protection when selling goods or services on the basis of the distance contract or contract concluded away from business premises seller, Act. No 102/2014 Coll. as amended **CC: Civil Code, Act No. 40/1964** **CommC** : Commercial Code, Act No. 513/1991 **AEC:** Act on electronic commerce Act. No 22/2004 **CCA**: Act on consumer credit and other credits or loans for consumers, Act. No 129/2010 **CPC**: Act on civil procedure code Act. No 99/1963
UK	United Kingdom	**CRA:** Consumer Rights Act 2015 **LPCD(I)A**: Late Payments of Commercial Debts (Interest) Act

OTHER ABREVIATIONS

B2B: Business to business
B2C: Business to consumer
CISG : United Nations Convention on Contracts for the International Sale of Goods
CRD: Consumer Rights Directive
ECJ : European Court of Justice
MS: Member States

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A/ Pre-contractual period

B/ Period of formation of the contract

C/ Period of performance

D/ Termination and after termination

Abstract

The aim of the study is to list the "simple" mandatory provisions, i.e. the "provisions that cannot be derogated from by agreement" according to article 6 of the Rome I Regulation in the 28 Member States. In addition, the study identifies such provisions in B2B contracts.

Regarding the domestic mandatory rules regulating the sale of tangible goods on line or at a distance, the study has set forth the following trends. It reveals that numerous national provisions grant a higher level of protection to the consumer than the directive 93/13 about unfair terms, and *t*he directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees, does. Additionally, a large number of domestic provisions have a broader scope than these directives.

As for the rules outside the European Acquis, but in B2C contracts, it appears that the European Acquis covers pretty much the rules necessary for consumer protection. Only in a few areas can one find domestic rules of consumer protection that are not covered by the European Acquis: merger clauses, duty to raise awareness of non-individually negotiated terms, rules on spare parts and consumables, etc. As a result, only small improvements could still be made for sales of tangible goods sold at a distance and, in particular on line.

Finally, as far as B2B contracts are concerned, there are domestic rules that were partially inspired by consumer law, which shows that even in a liberal economy, some Member States feel the need to protect the weaker party with rules that cannot be derogated from.

1.-Executive Summary

Consumer protection[2] in Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation Rome I) is ensured especially by Article 6 of that Regulation, which stipulates that:

> *« 1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:*
> *a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or*
> *b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.*
>
> *2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by* ***provisions that cannot be derogated from by agreement*** *by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.*
> *3. If the requirements in Points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4… »*

The aim of the study is to list the "simple" mandatory provisions[3], i.e. the "**provisions that cannot be derogated from by agreement**" according to article 6 of the Rome I Regulation in the 28 Member States. In addition, in order to extend our comparison, the study will identify such provisions in B2B contracts.

In domestic law, many rules cannot be derogated from by agreement. These mandatory rules are well identified when they are part of general law. However, instead of focusing on general law, the present study scrutinizes a vast set of special rules: those that are especially intended for consumer protection on the one hand (parts I and II) and those that are aimed at professionals on the other hand (part III).

This study about the domestic mandatory rules regulating the sale of tangible goods online or at a distance has observed the following trends, in the area of the protection of consumer (1.1), and in the area of the protection of professional (1.2).

1.1. In the area of the protection of the consumer

1.1.1- Higher level of protection in domestic law than in the directives 93/13 and 1999/44 (European acquis, part. I of the study)

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[2] *O. Boskovic, La protection de la partie faible dans le règlement "Rome I": D. 2008, doctr. p. 2175; See also M. Behar-Touchais: The functioning of the CESL within the framework of the Rome I Regulation, briefing paper pe462477_en.pdf, http://www.europarl.europa.eu/webnp/webdav/users/malfons/public/JURI%202012/pe462477_en.pdf*
[3] *Cf. n° 4.1 for the distinction between simple mandatory provisions and overriding mandatory laws.*

In the first part of the study, we have looked at the rules that cannot be derogated from in the area of the European Acquis. Our aim was not to check whether the provisions of the European Acquis had been correctly implemented. **The study relies on two directives: *i)* Directive 93/13 about unfair terms, and *ii)* Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees**.
We were more specifically interested in the mandatory provisions that protect the consumer more than these two directives of the European Acquis in the area of minimal harmonization do.

Some domestic provisions provide a **higher level of protection than the directives**. This is true for the two directives 93/13 and 1999/44 examined.

- **1.1.1.1- Higher level of protection in the area of unfair terms.**

On the one hand, **the conditions for assessing that a term is unfair are more favourable in the Member States' legislations**.

- For instance, in nine Member States, good faith is not mentioned in the unfairness-test (cf Q1). Thus, the mandatory domestic laws are more protective than the directive because they do not require this condition. In two more Member States, the condition of good faith is mentioned but it does not have to be fulfilled simultaneously with the condition for significant imbalance. As a result, a contract term is deemed to be unfair if it causes a significant imbalance to the detriment of the consumer **or** if it is contrary to the principle of fairness and good faith.
- At least ten Member States (eleven if we count partial solution) consider that the protection against unfair terms is not limited to non-individually negotiated terms (cf Q1) (AT (§ 879 (3) ABGB), DK (Section 36.1 of the Danish Act on Contracts), FR (Article L. 132-1, paragraph 3 of the consumer code), LU (Article L.211-2 of the Consumer code), MT, FI (CPA (38/1978) Chapter 4 Section 1), SE (Section 36 of the Contracts Act), UK (the Consumer Rights Act 2015), CZ (Section 1813 of Civil Code), BE (no reference to the concept of negotiated term: Art. I.8, 22° Code of Economic Law (CEL)) and partially IT (Art, 36, § 2, It. Cons. Code). In fact, the consumer has no actual power to negotiate, even when he does negotiate. That is also the reason why both the duty of transparency and the interpretation more favourable to the consumer apply in some Member States (5) irrespective of whether a term has been negotiated or not.
- In addition, in eight Member States, the protection against unfair terms also applies to the main subject matter of the contract or to the price paid (cf Q2) (DK (Section 36.1 of the Danish Act on Contracts), ES, FI (CPA (38/1978) Chapter 4 Section 1), LU (article L. 211-2 of the Consumer code), MT (Article 44 of chapter 378 of the Law of Malta), PT, SE (Consumer Contracts Act (1994:1512), Section 11), SI (Article 24(2) of the ZVPot).Therefore, these Member States grant higher a consumer protection than the directive does.

On the other hand, many Member States provide for **lists of unfair terms** that are more favourable to the consumer than the indicative list in Annex of the Directive.

- Only five Member States out of twenty-eight have neither a black list nor a grey list of unfair terms (cf Q6) (CY, DK, IE, RO, SE).
- Eight Member States provide two lists of unfair terms:
  - one is black (terms that are always unfair) and the other is grey (terms that are presumed to be unfair) (cf Q.6) (FR, HU, IT, NL, SK, PT)

  - DE (a black list and the other list of clauses whose effectiveness depends on an evaluation)
    AT (a black list and another list of terms are considered unfair, unless the trader can prove they have been individually negotiated)
- Finally, thirteen Member States have added terms that are not in the indicative list of the directive, regarding sales of tangible goods, at distance, and in particular on line (cf Q6 in fine) (AT, BG, CZ, EE, EL, HU, IE, LU, NL, PL, PT, SI, UK).

As a result, the level of consumer protection against unfair terms is higher in domestic law than in the directive.

1.1.1.2.- Higher level of protection in the area of guarantees against lack of conformity.

In many Member States, the domestic rules on the proof of the existence of the lack of conformity (or the proof of the absence of lack of conformity) are more favourable to the consumer than Directive 1999/44.

- For instance, in several Member States, the presumption (or the rule) of conformity (art. 2§2 of the directive 1999/44) is stricter because it applies in fewer situations than in the directive (cf Q7) (AT, DE, EE, HR, PL, UK). Therefore, these domestic laws are more protective of the consumers than the directive. In these six Member States, the presumption applies only if the consumer was aware, or could not reasonably be unaware of, the lack of conformity, but the presumption regarding materials supplied by the consumer is not provided. In addition, in two more Member States (EL, SK), this presumption of conformity does not exist.
- In addition, some Member States prohibit contractual arrangements derogating from conformity requirements, even if these agreements are made after the consumer has knowledge of the lack of conformity (cf Q7) (CY, HR, IE, PL, SI, SK); conversely, the directive recognize such arrangements made after the consumer is aware of the said lack of conformity (Art 7). Therefore, these domestic laws are more protective of the consumer than the directive. In addition, a number of other Member States that admit contractual arrangements derogating from conformity requirements in case the consumer has knowledge of the defect, set other requirements (AT, BE, DE, ES, LU, UK). Overall, thirteen Member States out of twenty-eight are more protective of the consumer against the contractual arrangements derogating from conformity requirements.
- Many Member States provide other mandatory rules to protect consumers against the circumvention of the mandatory provisions of directive 1999/44/EC (see Q12).
  In some Member States, domestic law is more favourable to the consumer than the Directive's presumption of the existence of the lack of conformity before the delivery if it appears within six months after the delivery. In three Member States, the presumption period is longer than six months, which alleviates the consumer's burden of proof (cf Q10-2) (PL[4] (one year), PT [5] (2 years), FR[6] (2 years)).

[4] *PL: In Polish law the rule is simpler – in B2C contracts if the defect was apparent within a year of the delivery, it is presumed to have existed at the time of delivery. It must be noted that before the reform of 2014 the presumption period was 6 months, after the reform it was extended to one year.*

[5] *PT: According to Article 3, nr. 2 Sale of Consumer Goods Act, any lack of conformity which becomes apparent within two or five years of delivery of the movable or immovable goods, respectively (the Portuguese legislator extended the application of that Act to immovable - Article 3, nr. 2), are presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.*

[6] *FR: As of March 17, 2016 (cf Hamon Act of 17 march 2014; new article L211-7 of the consumer code, applicable after two years), the period of presumption of lack of conformity will be extended to twenty four months for goods and six months for second-hand goods.Such rule cannot be derogated from by agreement (Art. L. 211-17 of the Consumer code)*

Five Member States have gone beyond art.5, para. 1 of Directive 1999/44 by providing longer or undefinite legal guarantee periods or by not having such periods at all (FI, NL, SE, IE and UK).

- Six Member States have extended the group of persons for whose statements the seller is responsible in directive 1999/44/EC: to the previous seller (EE, FI), to another retailer (AT, EE), to any other professional upstream of the professional in question (LU), to the service provider (LV) and to the storer (PT).

Member States are more protective of consumers, compared to the Directives, in relation to remedies.

- On the one hand, in nine member States consumer have a free choice among several remedies (cf Q8) (CY, EL, HR, HU, IE, LI, PT, SI, UK) and four other member states have just a partial hierarchy (DK, EE, LU, PL). In most of the first nine member states cited above, the consumer has a choice, he may turn to whatever remedy he sees fit, but in IE and UK the choice of remedies exists only as long as the short term right to reject is available. Thus, the domestic laws are more protective than the directive even if the consumer's right to choose a remedy is subject to the fulfilment of the specific conditions of each right and remedy.
- On the other hand, in all the Member States, the consumer who suffers a non-performance may also obtain damages, which cannot be derogated from by agreement (cf Q8).
- In fifteen Member States, the buyer can cumulate remedies (cf Q8) (AT, BG, DK, EE, ES, FI, HU, IT, LT, LU[7], MT, NL[8], RO, SE, SK, UK).
- In two Member States, repair or replacement may be claimed by the consumer, without any restrictions (except probably where it is impossible), the seller cannot rely on the fact that the burden of expense would be disproportionate to the benefit that the consumer would obtain (cf Q8) (HR, MT).
- Some Member States grant consumers a right that is not provided by the directive: the right to withhold performance in certain cases (cf Q8) (AT**,** BE, BG, CZ, DK, EE, EL, ES, FR, HU, LT, LU, MT, NL, PL, PT, RO, SI, SK), and 14 Member States provide that this right to withhold (even where it is based on ordinary law) may be used as a preventive remedy (cf Q8) (AT, BG, CZ, DK, EE, FI, HU, LT, MT, NL[9], PL, RO, SE, SI)

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[7] LU: When there is contract between a supplier and a consumer, the consumer will have remedies provided under the legal guarantee of conformity provided for in Article L.212-1 and following of the Consumer code. The article 212-8 of the Consumer code also states that the previous provisions shall not deprive the consumer of remedies resulting from hidden defects as resulting from articles 1641 to 1649 of the Civil code, or any other contractual or non-contractual claim recognized by the law. If the contract is not subject to the specific rules of the Code of consumption (that is, the contract was not concluded between a consumer and a professional seller), the provisions of article 1184 al. 2 of the Civil code are applicable: "In this case, the contract is not terminated as of right. The party to whom the undertaking has not been performed has the option to force the other to perform the agreement when possible, or ask for termination of the contract with the payment of damages ".
Consequently, based on this article, the buyer can either ask for the enforcement of the sale contract, or for the termination of the sale contract with damages.
In that case, the contract is not terminated as of right. The party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfil the agreement when it is possible, or to request its avoidance with damages.
[8] NL: Remedies may be combined unless they exclude each other. For instance, the remedies of damages and repair/replacement, and of damages and termination may be combined, but a claim for repair/replacement excludes a claim for termination or damages replacing a claim for performance.
[9] NL: art. 6:263 BW sets out the following conditions: (1) the performance he withholds, is proportionate to the anticipated non-performance of the seller ; (2) the consumer's obligation is the direct counter-obligation of the seller's obligation ;(3) the consumer was informed of the circumstances that give rise to the fear that the seller will not perform his obligation after the contract was concluded

- In twenty-two Member States, a rule enables the buyer to terminate the contract before performance is due if the seller has declared, or if it is otherwise clear, that there will be a non-performance (cf Q8) (AT, BG, CY, CZ, DE, EE, EL, ES, FI, HR, HU, IE, IT, LT, MT, NL, PL, PT, RO, SE, SI, UK). Additionally, this rule cannot be derogated from by agreement.
- Twenty-two Member States set out a principle whereby termination of the contract is only partial if the non-performed obligations are divisible (cf Q8) (AT, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, LT,MT, PL, PT, RO, SE, SI, SK, FI[10], UK).
- In twenty-four Member States, where the consumer reduces the price, he is entitled to recover the excess already paid to the seller (cf Q8) (AT, BE, BG, CY, CZ, DE, DK, EL, ES, FI, FR, HR, IE, IT, LT, LU, MT, NL, PT, RO, SE, SI, SK, UK)
- Most of the Member States provide that where the buyer has the right to reduce the price, he is also entitled to recover damages for the loss thereby compensated (cf Q8).
- In seven Member States, the consumer is not required to give notification (cf Q10) (AT, DE, EL[11], IE, FR, PL[12], UK)

The Member States are also more protective of consumers when it comes to the written commercial guarantee .
In seven Member States, the commercial guarantee shall be drawn up in writing or it may be featured in another durable medium available and accessible to the consumer. The fulfilment of this obligation does not depend on a "*consumer's request".* Therefore, this rule increases the level of protection of the consumer.

In this respect, the level of protection in domestic law is unquestionably higher than in the directive.

But a higher level of protection is not the only way for Member States to be more favourable than the European Acquis. Indeed, it must be noted that domestic laws often have a broader scope than the European acquis, which adds to the level of consumer protection.

1.1.2. Protection of the consumer outside the area of the European Acquis (part 2 of the study)

In the second part of the study, we identified rules of domestic law that are specifically made for consumers, but that are not in the European acquis and that cannot be derogated from.
The difficulty is that most of the sales law has already been dealt with in the European Acquis, leaving very little provisions outside the area of the European Acquis.
But some provisions **are going further than the European Acquis.**

[10] *FI: the consumer has the right to terminate the contract as a whole if, by reason of the interdependence of the different parts,* ***the consumer would suffer substantial detriment if the termination were only partial.***
[11] *EL: Such provision was not adopted by the Greek law because it was considered as extremely burdensome for consumers.*
[12] *PL: after the reform of 2014 there is no such duty in B2C contracts. It existed under the Polish law before the reform (2 months period to inform).*

1.1.2.1.- Prohibition of the refusal to sell to consumers or of the discrimination between consumers (pre-contractual period).

- Some Member States have on one hand, a prohibition of the **refusal to sell to consumers (cf Q13) (**BG (only when it is a discrimination), DE, DK, PT, RO) **and, on the other hand, a prohibition of the discrimination of consumers (cf Q13) (**BG and ES)**.**
- The prohibition of the refusal to sell to a consumer, or of the discrimination between consumers, without legitimate reason, could be useful for the European single market. It could exclude that the professional refuse to sell to a consumer only because he resides in another Member State, except if the delivery costs were disproportionate to the value of the thing sold.

1.1.2.2.- ***Duty to raise awareness of non-individually negotiated contract terms (pre-contractual period)***

Seven Member States (cf Q13) impose this duty - for all terms (four Member States: BG, EL, LU, SI) or for certain terms (three Member States: HU, RO, SE).
The duty to raise awareness of non-individually negotiated terms is not provided in the European acquis. Indeed, it is more than the duty to provide clear information in an intelligible manner, since the consumer does not read all the information. Therefore, it can be more effective to raise awareness of non-individually negotiated contract terms, or only of some of them.

1.1.2.3. Prohibition of the merger clauses

Thirteen Member States are against **merger clauses** stipulated in B2C contracts (cf Q22).
However, seven of those Member States bar this clause on the basis on the prohibition of **unfair terms** (BE, CZ, ES, FI, IE, PT, UK). Other Member States consider that this type of clause does not bind the consumer, and only binds the trader. As a result, merger clauses cannot prevent the parties' prior statements from being used to interpret a B2C contract to the detriment of the consumer (AT, CZ, DK, ES, FI, PT).
Even if it can be based on the prohibition of unfair terms, it may be more effective to write it expressly in the law.

1.2.2.4.- Right to availibility of spare parts and consumables during a certain period, or right to be informed of this period

Five Member States provide specific consumer protection in this area (cf Q37). In some of them, the consumers have the **right to the availability of spare parts** for a minimum period (fixed period, or period of operation of the good) (ES[13], PT[14], RO[15], SE[16]). In one other Member

[13] *ES: According to arts. 127 RCPA and 12.3 ART, as regards long-lasting products (= only those listed in the annex II of RD 1507/2000, of 1 September), consumers shall have the* ***right to the availibility of spare parts*** *for a minimum period of* ***five years*** *following the date on which the product ceases to be manufactured. It is consumer law.*
[14] *PT: Article 9, nr. 5 Consumer Protection Act provides that the consumer has* ***the right to receive after-sales assistance related to the supply of parts and accessories for the normal average duration period*** *of the products supplied. This is limited to the "lifetime" of each existing product, and cannot be longer in any case to 10 years (Article 6 Sale of Consumer Goods Act) . It concerns also consumables (doctrinal opinion).*
[15] *RO: Art. 10, Governmental Ordinance 21/1992 on consumer protection, "The consumers concluding a contract have the following* ***rights: (e) to beneficiate of spare parts and consumables during the average period of function*** *which may vary in accordance with the manufacturer's statements, technical legal provisions or specific contractual terms."*

State, the consumer **must be informed**, at the time of the sale, of the period during which parts and consumables that are essential for use of the goods are likely to be on the market (FR[17]). Protection can also result from general texts applicable to all the parties (CY[18], DE[19], IE[20], HR[21], SI[22]).

1.2.2.5.- Liability of the seller when he entrusts performance to another person

Another example can be taken with the specific mandatory rule made for protecting the consumers which provides that when **the seller entrusts performance to another person, he remains responsible for the said performance in B2C contracts (cf Q27).** For three Member states, there is a **specific to consumers mandatory rule**, which is in the specific texts made for consumers, which provides that when **the seller entrusts performance to another person, he remains responsible for performance in B2C contracts** (ES[23], FI[24], FR[25]). For others, a term that allows the trader to transfer his obligations or the contract as a whole with debt-discharging effect to a third party that has not been mentioned by name in the contract is considered as unfair unless individually negotiated (AT, DK, IE).
There is also general rules which provide the same solution in other Member states (PT[26], RO[27], BG, CZ[28], EE, HU, NL, IT[29], LU[30], SE).

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*Any contractual terms charging the consumers for the spare parts or consumables **are void during the legal period of guarantee of two years** within which the repair of goods is free of charge for the consumers.*
*[16] SE: Should there be a lack of spare parts or consumables hampering the use of the goods and the consumer has, at the time of purchase, had good reason to believe that the product would be usable, the product will be considered **defect** under the rules on factual defects of the goods found in the Consumer Sales Act (1990:932).*
*[17] FR: As manufacturer or importer of tangible goods must inform the business seller (who inform the consumer) of the period during which parts that are essential for use of the goods are likely to be on the market, **the manufacturer or importer must provide, within two months, professional sellers or repairers, who request parts essential to the use of goods sold** (Article L111-3 of the Consumer code).*
[18] CY: In Section 16(4) of the Sale of Goods Act there is only a general provision containing that the durability of a good means the reasonable endurance in time and of the use, and includes, where necessary, for the ensurance of the durability, the availability of spare parts, and of specialist technicians.
[19] DE: a post-contractual (secondary) duty arises from the principle of good faith according to § 242 BGB and § 241 (2) BGB, which requires spare parts to be available for a certain period of time.
*[20] IE: S12 of the Sale of Goods and Supply of Services Act 1980 requires spare parts and servicing to be made available for a **reasonable period***
[21] HR: Pursuant to Article 16a of the Trade Act, a trader must store spare parts for the duration of a guarantee period.
*[22] SI: Art. 20 of the ZVPot provides that the producer of goods for which the **guarantee** is mandatory shall provide spare parts or consumables for at least **three years** upon the expiration of the time limit in the guarantee. Although contained in the ZVPot, these rules do not protect specifically consumers, as Art. 21č of the ZVPot provides that these rights are granted also to persons that are not consumers.*
[23] ES: Art. 116.2 of the RCPA.
[24] FI: CPA (38/1978) Chapter 5 Section 32.
[25] FR: Art. L. 121-19-4 of the Consumer Code.
[26] PT: Derogations of the general rule which provide the liability of the seller even he transfers the performance to a third-party are not possible for B2C contracts because they will be deems as a violation of the duties imposed by the rule of law and order: Art. 800 n°1 and 2 of the Civil Code.
[27] RO: Art. 1852 of the civil Code.
[28] CZ: Section 1935.
[29] IT: Art. 1228 of the It. Civil Code.
[30] LU: Art. 1134 of the Civil Code

1.2.2.6.- Specific limitation period to protect consumers

We can take a last example **with the specific limitation period which exists in some Member States to protect consumers. (cf Q35)**

In seven Member States, the period of prescription cannot be shortened by agreement nor can it be lengthened by agreement to the detriment of the consumer (CY[31], DK[32], EE[33], FR[34], LT[35], LU[36], RO[37]). Such a term would be an unfair term – or would be prohibited by the law without reference to unfair terms. (Then, in any case, they cannot be deviated from, neither by non-negotiated contract terms nor otherwise).

However, in order to be more effective, four Member States (two of which are already included in the previous list) **impose a special period of prescription for claims against consumers. To protect them, the period is rather short (one to three years in four Member States:** FR[38], NL[39], RO[40], SE[41]**).**

[31] **In CY**, Section 34(2) of The Consumers Rights Law No. 133(1)/2013 provides that any contractual terms which abolish or restrict, directly or indirectly the rights of the consumer are not binding on the consumer. So, **any agreement which modifies the prescription period by agreement and the shortening or lengthening in advance of prescription periods will not bind the consumer**. It is the same rule than in ordinary law, but it is provided by a special text of consumer law.

[32] **In DK**, the limitation period is three years. Section 26.2 provides "The law **may not by prior agreement be derogated from to the detriment of the creditor (consumer) when the creditor acts primarily outside his profession** and the debtor is a trader who is acting in his profession." Finally, section 26.3 provides: "The trader has the burden of proving that an agreement is not covered by paragraph 2".

[33] **In EE,** the limitation period for a claim arising from a transaction shall be three years (Art. 146 para 1 of the GPCCA). This general rule **cannot be derogated from by an agreement in the detriment to the consumer** (Art. 237 para 1 of the LOA).

[34] **In FR**, the period of prescription applicable to the obligation of the trader is 5 years. But, in a contract between a supplier and a consumer, the period of prescription **cannot be shortened by agreement nor be lengthened by agreement.** And an agreement cannot add to causes of suspension or interruption thereof (Article L. 137-1 of the Consumer code). In addition, article L 211-17 of the Consumer Code provides that any agreement between the seller and the buyer which was entered into prior to the latter making a claim and which directly or indirectly nullifies or limits the rights ensuing from the present chapter is deemed not to exist.

[35] In LT, in B2C contracts, a term which excludes or hinders the consumer's right to bring action or exercise any other remedy, would be unfair: Cf Study about CESL

[36] In LU, the limitation period is 30 years. A conventional abbreviation of limitation is in principle accepted by case law. But in B2C contracts, the provisions requiring the consumer an unusually delay short to make claims to the professional are always unfa*ir*

[37] *RO: All agreements which shorten or lengthen in advance prescription periods are void. In B2C contracts, contractual terms which modify the period of prescription or the starting point for the period of prescription are prohibited in B2C contracts.*

[38] *FR: In FR, under article L. 137-2 of the Consumer code, the claim which are initiated by business for the goods or services they provide to consumers are prescribed by two years. In addition, in a contract between a supplier and a consumer, the period of prescription cannot be shortened by agreement nor be lengthened by agreement, and an agreement cannot add to causes of suspension or interruption thereof.*

[39] *In NL, Article 7:28 BW provides that the seller's right to claim the sales price prescribes by the lapse of two years after payment of the price has become due. The parties may not derogate from these rules to the detriment of the consumer, cf. Article 7:6(1) BW. So the parties can only shorten the period of prescription of the sales price.*

[40] *RO : The period of prescription applicable to the obligation of the consumer is one year for the date on which the payment of the price was due. Art. 2520 Civil code, states that „(1) The period of prescription is one year in the case of retail sellers and suppliers, for the action requesting the payment of the price."*

[41] *In SE, the limitation period for claim against the consumer is three years. This follows from the second paragraph of Section 2 of the Act on Prescription (SFS 1981:130). In general, prescription periods may be modified by agreements. However, pursuant to Section 12 of the Act on Prescription it cannot be agreed that the prescription period shall be longer than three years where consumer obligations are concerned.*

Finally, it appears that the European Acquis covers pretty much the rules necessary for consumer protection. Only some small improvements could still be made for sales of tangible goods sold at a distance and, in particular on line.

1.2- In the area of protection of the professional

In B2B contracts, there are fewer mandatory special rules than in B2C contracts. For instance, there is **no special rule for the professional concerning the obligation of conformity and the remedies**. This is regulated by default rules, or by mandatory ordinary rules.
We must also note that indirectly, consumer's law protect the competitors because in ten Member States claims about unfair terms in B2C contracts can also be brought **by competitors**. As a result, the provisions also protect competitors (weak or not). Thus, in this respect the consumer law provisions can be considered to have a broader aim than the protection of consumers. They become part of market law. But this is not what is important here.

We will focus on some of the special rules designed for professionals, which are coming from an extension of the scope of the European acquis (1.2.1) or which are inspired from consumer law. (1.2.2)

1.2.1. Tendency to Broaden the scope of some provisions of the directives 93/13 and 1999/44 (Part. I of the study: middle column)

1.2.1.1.- The tendency to broaden the scope of rules in the area of unfair terms

Other weak parties than consumers are protected by domestic provisions.

- In seven Member States, the general mandatory provision which lays the definition of unfair terms (cf Q1) has a wider scope than the directive 93/13 because it addresses not only consumer contracts but any contracting parties (AT, DE, DK, NL, HR, HU, SE).
- In seven Member States, the mandatory provisions whereby the unfairness of a contractual term shall be assessed taking into account the same elements as those in the directive 93/13[42], apply partially or as a whole to all weak parties, and not only to consumers: (cf Q2) (AT, DE, EE, HU, NL, PT, SE).
- In at least five Member States, the duty of transparency (cf Q3) is provided for by a general mandatory contract rule which applies to all contract terms regardless of the status of the parties (AT, DE, ES, SE, SK); in eight Member States, it is the same for the rule of

[42] *Nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.*

interpretation *contra proferentem* or interpretation *in favorem*, which concerns all the weak parties (AT, DE[43], EL[44], ES[45], HR[46], IE[47] , IT[48], PL[49]).

1.2.1.2.- The tendency to broaden the scope of rules in the area of the legal guarantee against a lack of conformity

- The rules that apply to professional buyers can be drawn from directive 1999/44. For instance, the directive provides that, in B2C contracts, a guarantee shall be legally binding on the offeror under the conditions laid down in the guarantee statement and the associated advertising (see art. 6 §1 directive 1999/44/EC). In at least five Member States, a similar rule applies to any contract between a seller and a buyer (either consumer or business) (cf Q11) (CZ[50], EL[51], FI[52], HR[53], SK[54]).

[43] *DE: According to § 305c BGB (2), which applies in all standard business terms (regardless of the status of the parties), any doubts in the interpretation of standard business terms are resolved against the user. According to § 310 (3) BGB, interpretation of standard business terms resolved against the user protects specifically consumers.*

[44] *EL: According to General rule of article 200 [Interpretation of contracts] of the Greek Civil Code: Contracts shall be interpreted according to the requirements of good faith taking also into account business usages. According to Article 2 par. 4 of Law 2251/1994 for Consumer Protection: «General terms for transactions are interpreted on the basis of the need to protect consumers. When in doubt, general transactions terms set forth unilaterally by the supplier, or by any third party acting on his behalf, are interpreted in favour of the consumer».*

[45] *ES: The rules of interpretation of standard terms may be found in art. 6 GCTA, whose last paragraph provides a reference to the general rules of interpretation (arts. 1281-1289 Spanish Civil Code [SpCC]). Specifically for consumer contracts, art. 80 RCPA contains only one rule of interpretation, according to which any doubt on the meaning of a clause is always to be resolved in the manner most favourable to the consumer (this rule may also be found in art. 6 GCTA). These rules do not exempt the application of arts. 1281-1289 SpCC, but represent the realization and adaptation of their content both to standard terms and to not individually negotiated terms.*

[46] *HR: Pursuant to Article 54, paragraph 1 of the CPA, dubious and unintelligible contractual terms shall be interpreted in a way which is more favourable to consumer. On the more general level, Article 320, paragraph 1 of the COA recognises contra proferentem interpretation rule, according to which in case of pre-formulated contract, any unclear clause shall be interpreted in a way which is more favourable to the other contracting party.*

[47] *IE: The contra proferentem principle of interpretation may be applied in limited circumstances where e.g. exclusion clauses are concerned, but this principle is not limited to consumers. Regulations 5(2) and (3) of The Regulations provide: « (2) Where there is a doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail ».*

[48] *IT: Art. 1370 It. civil code affirms the special criterion of construction of the contract: interpretation contra proferentem. Art. 35, § 2, It. Cons. Code restates a civil law rule of construction of a contractual term, that is: interpretation contra proferentem in cases where the literal meaning of a term is not clear.*

[49] *PL: the courts extend the application of the "in dubio contra proferentem" formula also to the B2B contracts.*

[50] *CZ: Section 1919 (1) which applies to any kind of contract provides that: „If a transferor assumes quality guarantee, he guarantees that the subject of performance will be, for a definite period after the discharge, fit for use for the stipulated purpose and that it will retain the stipulated properties; where no properties have been stipulated, the guarantee applies to the usual purpose and properties. (2) If a guarantee is not stipulated in a contract, the transferor may assume it by a declaration in the guarantee statement or by indicating the guarantee period or its "use by" or "best before" dates on the packaging. If a contract stipulates a guarantee period different from that indicated on the packaging, the stipulated guarantee period applies. If a guarantee statement specifies a guarantee period longer than the period which is stipulated or indicated on the packaging, the Langer guarantee period applies". Section 2113 which applies to purchase contracts provides that "Quality guarantee*
By a quality guarantee, a seller undertakes that a thing will be fit for use for the usual purpose for a certain period or that it will retain the usual properties. Specification of a guarantee period or the "use by" date of a thing on the packaging or in advertising has the same effect. A guarantee may also be provided for an individual component part of a thing".

[51] *EL: Article 559 (guarantee provision) of the Greek Civil Code: « If the seller or a third party has provided guarantee for the thing sold, the buyer has, over the offeror who guaranteed, the rights arising form the guarantee statement in accordance with the terms contained therein or the associated advertising without impairing his rights which stem from the law ».*

- Here is another example: the directive states that the associated guarantee shall state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the written guarantee (art. 6 §2). Four Member States also provide that an associated guarantee shall state that the buyer (either consumer or business) has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee. It is an extension to businesses of the rule applicable to consumers (Q11) (CZ[55], FI[56], HR[57], SK[58]).

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[52] *FI: Section 15b — Warranty information (1258/2001) (1) The warranty shall clearly indicate the following information: 1. the contents of the warranty and the fact that the buyer has statutory rights and that the warranty does not restrict these rights; and 2. the party giving the warranty, its period and area of validity and the other information necessary for the filing of claims under the warranty.*
(2) On the request of the buyer, the warranty shall be given in writing or in electronic form so that the information cannot be unilaterally altered and that it remains accessible to the buyer. (3) The buyer is entitled to invoke the warranty even if it does not meet the requirements laid down in this section."

[53] *HR: 3 Guarantee for the conformity of the sold thing Liability of the Seller and Manufacturer Article 423 (3) "The guarantee binds under the conditions under which it has been issued regardless of the form in which it has been issued (guarantee letter, oral statement, advertisement, etc.) but the buyer is entitled to request a written guarantee or guarantee in some other durable medium, accessible to him, to be issued".*

[54] *SK: On the basis of a declaration stipulated in the letter of warranty given to the buyer, the seller may provide a warranty exceeding the extent of the warranty stipulated in this Act. In the letter of warranty, the seller shall specify conditions and extent of this warranty.*

[55] *CZ: Section 2166 (1) "(2) If necessary, the seller shall, in an understandable manner, explain in the confirmation the content, extent, conditions and duration of his liability as well as the manner in which the rights arising from the liability can be asserted. In the confirmation, the seller shall also state that other rights of the buyer related to the purchase of the thing <u>are not affected</u>. Failure to fulfil these duties does not prejudice the validity of the confirmation".*

[56] *FI: "Section 15b — Warranty information (1258/2001) (1) The warranty shall clearly indicate the following information:*
1. the contents of the warranty and the fact that the buyer has statutory rights and that the warranty does not restrict these rights; and
2. the party giving the warranty, its period and area of validity and the other information necessary for the filing of claims under the warranty.
(2) On the request of the buyer, the warranty shall be given in writing or in electronic form so that the information cannot be unilaterally altered and that it remains accessible to the buyer. (3) The buyer is entitled to invoke the warranty even if it does not meet the requirements laid down in this section."

[57] *HR: 3 Guarantee for the conformity of the sold thing Liability of the Seller and Manufacturer Article 423 "(5) The guarantee shall contain the buyer's rights arising from the guarantee and a clear stipulation that the guarantee does not affect other rights belonging to the buyer as per other legal grounds. (6) The guarantee shall contain details required by the buyer to be able to exercise his rights, especially guarantee period, regional scope of the guarantee and the name and address of the person who issued the guarantee".*

[58] *SK: There are no specific rules in CC. CC contains only general rules which must be used in connection with the regulation in ActPC:*
- according to Section 502 (3) CC the certificate of warranty shall contain the name and surname, business name of the seller, registered office or place of business of the seller, content, scope and conditions of warranty, warranty period, and information required to claim the warranty. If the certificate of warranty fails to contain all of the required elements, this shall not invalidate the warranty;
- according to Section 620 (4) (5) CC at the purchaser´s request, the seller is obliged to provide the warranty in writing (certificate of warranty). If the nature of the property so permits, it shall suffice to issue a proof of purchase instead of a certificate of warranty. On the basis of a declaration stipulated in the letter of warranty given to the buyer, the seller may provide a warranty exceeding the extent of the warranty stipulated in this Act. In the letter of warranty, the seller shall specify conditions and extent of this warranty.
According to Section 10a (1) (f) (g)ActPC the seller is required before the conclusion of the contract or if the contract is awarded based on the order the consumer before the consumer dispatches the order, unless such information is obvious, given the nature of the product or service to the consumer in a clear and understandable way
- guidance on the seller's liability for defects or services under the general regulation (Sections 622 a 623 CC),
-the information about the existence and details the guarantee provided by the manufacturer or seller under stringent principles as establishing a general regulation (Section 502 CC), if it is the manufacturer or seller provides, as well as information on the existence and terms of assistance and services provided to consumers after sales or services, when such assistance is provided. The consumer is entitled to claim his rights according to given warranties.

1.2.2.- Provisions which apply to B2B contracts, and which are inspired from consumer law outside the area of the European acquis (part 3 of the study)

1.2.2.1.- Some special rules in B2B contracts concern the information received by the weak party and are inspired from consumer law.

- In two Member States, in some B2B contracts where there is a weak party, there are rules demanding **formal information** to protect this party during the negotiation (cf Q38) (FI, IT). While for one MS (IT) it concerns contracts preparing sales (like franchising), they are not the sale itself.
- Three Member States consider that the trader will be **bound by his statements and by statements of a third party and by the advertising**, even in B2B contracts. (Q 38) (BG, CZ, FI).

1.2.2.2.- Other special rules are the application to the trader of the sanction of unfair exploitation.

- The traders are sometimes protected by **prohibition of unfair terms (cf Q.40)**. While many Member States have rules prohibiting unfair terms in general law, especially when they are standard terms, only one Member State (FR[59]) prohibits unfair terms in a general manner, i.e. without targeting any specific type of clause, but the scope of this general rule is limited to B2B contracts. However, three other Member States have special rules that forbid a short list of specific unfair terms, also in B2B contracts (ES, LU, UK). They deal with terms on the period of payment or the payment deadline (implementation of the Directive 2011/7 / EU of the European Parliament and of the Council of 16 February 2011 concerning the fight against late payment in commercial transactions), but also exclusion and limitation clauses, or penalty clauses.
- Finally, apart from the principle of good faith, in seven Member States **unfair trade practices are prohibited under the rules protecting against unfair competition** (cf Q40) **(**AT, BE, BG, CZ, ES, FR, SI).

They do not follow from directive 2005/29/EC, but they are especially designed for traders, because there is abuse of bargaining power, in certain areas. The sanctions of these practices are quite diverse.

Even if those rules are specific for B2B contracts, they were partially inspired by consumer law, which shows that even in a liberal economy, some Member States feel the need to protect the weaker party with rules that cannot be derogated from.

[59] *FR: Art L. 442-6-I-2° of the commercial code forbids the terms which create a significant imbalance between rights and obligations of the parties. This text applies only in B2B contracts (commercial contracts). In addition, the other paragraphs of the article L 442-6 of the civil code contain others prohibition of special unfair terms*

2.- Preliminary remarks

2.1.- Concise statement of consumer protection in the Rome I Regulation

Consumer protection[60] in Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation Rome I) is ensured by two texts.

- Firstly, with regard to the law applicable to consumer contracts, Article 6 of that Regulation stipulates that:

> *« 1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:*
> *a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or*
> *b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.*
>
> *2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.*
> *3. If the requirements in Points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4… »*

Article 6(4) lists a number of contracts to which paragraphs 1 and 2 do not apply.

Article 6 does not apply to all consumer contracts. It specifies that:

- either the professional must pursue his/her commercial or professional activities in the country where the consumer has his/her habitual residence,
- or that, « by any means, (he/she) must direct such activities to that country or to several countries including that country », this latter expression covering e-commerce and reproducing the wording of Article 15 of Regulation No 44/2001 Brussels I. The term 'passive' consumer is only used in this case, where the consumer has easily found this professional who either pursues commercial activities in the same country as him/her, or directs his/her activities to that country.

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[60] *O. Boskovic, La protection de la partie faible dans le règlement "Rome I": D. 2008, doctr. p. 2175; See also M. Behar-Touchais: The functioning of the CESL within the framework of the Rome I Regulation, briefing paper pe462477_en.pdf, http://www.europarl.europa.eu/webnp/webdav/users/malfons/public/JURI%202012/pe462477_en.pdf*

It may be that the consumer contract does not satisfy these conditions. This will be the case for example if a consumer on holiday in another country than that of his/her residence makes a purchase from a company that directs online activities to the Member State of his habitual residence. This will also be the case if an Internet consumer makes a purchase on the website of a trader who has his/her residence in another state, provided that this website has not directed its activities to the consumer's country[61].

If the consumer contract does not satisfy the above conditions of Article 6 it is subject to Articles 3 and 4 of the Regulation Rome I, which means that the parties can choose the applicable law (Article 3) and that in the absence of choice « a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence »(Article 4(1a)).

If the consumer contract satisfies the above conditions of Article 6, Article 4 of Rome I Regulation is supplanted. This means one of two things:

- Either the parties have not chosen the law applicable to their contract, in which case, the applicable law will be that of the consumer's residence, which the consumer is deemed to be more familiar with. This law will also apply to the form of contracts falling within Article 6 of the Regulation (Article 11(4) of the Regulation)
- Or the parties have chosen the law applicable, but in this case the consumer remains protected: indeed, the chosen law « *may not, however, have the result of depriving the consumer of the protection afforded to him/her by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1* ».

Note that this text applies to the simple mandatory laws of the consumer's residence and does not extend to overriding mandatory provisions[62].

This study concerns only **"simple mandatory laws that cannot be derogated from by agreement":** That concerns laws which relate simply to national public policy, but do not establish any crucial values for the organisation of the society. Their application cannot be rejected by the will of the parties, but in cross-border disputes they do not pose in principle an obstacle to applying foreign law which is normally applicable pursuant to the rules regarding conflicts of law[63]. The text does not mention « mandatory provision » but « provisions that cannot be derogated from by

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[61] In this respect, the Court of Justice has defined the latter concept of activity directed to the country of the consumer's domicile: « (…) it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them ». (OJEU 21 February 2009 Joined Cases C-585/08 and C-144/09, Pammer Reederei Karl Schluter GmbH & Co. KG (C585/08), and Hotel Alpenhof GesmbH v Oliver Heller (C144/09), Rec 2010 I-12527).

[62] Cf recital 37 of Rome I Regulation: « Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. ***The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.*** *». The o**verriding mandatory laws are different and not included in this study. They** establish values that are genuinely crucial for the organisation of society. Their imperativeness is reinforced and they are termed overriding mandatory provisions (See Article 9(1) of the Rome I Regulation). Contracting parties cannot include any clauses that would be contrary to these laws. Furthermore, any foreign law that would be normally applicable but is contrary to the overriding mandatory provisions would be supplanted by the latter.*

[63] For example, Article 132-8 of the French Commercial Code grants hauliers a guarantee of payment for their services. It is a law of domestic public policy. The parties to the haulage contract could not stipulate a clause contrary to this provision. But the French Court of Cassation considers that it is not 'a law whose observance is necessary in order to safeguard the political, social and economic organisation of the country, to the extent that it would mandatorily regulate the situation, regardless of the applicable law, and thus constitute a "loi de police"' (Cass. Com 13 July 2010, appeal No 10-12154).

agreement », because there had been problems with the term « mandatory provision » in the English translation of Rome Convention[64].

Article 6 of the Rome I Regulation, which specifies that the law chosen in a B2C contract« *may not, however, have the result of depriving the consumer of the protection afforded to him/her by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1* », **enables the consumer to invoke all the simple mandatory laws of his/her place of residence.**

But there is one more question: What means exactly « ***provisions that cannot be derogated from by agreement*** »[65] in the article 6 when it provides that « *Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1* » ?

In the context, **this study presents the mandatory rules which aim specifically at protecting a consumer** in a sales contract and which would apply in spite of a choice of law included in the contract.

2.2.- Methodology

This study is going to try to list these simple mandatory provisions, the « **provisions that cannot be derogated from by agreement** » of the article 6 of Rome I Regulation, in the 28 Member States (MS).

It will do it in three parts.

- First, it will examine the national mandatory consumer contract rules applicable to contractual obligations, which transpose the minimum

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[64] *Rome Convention in English: Article 5 Certain consumer contracts: « 2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the* ***mandatory rules of the law of the country*** *in which he has his habitual residence »: Stéphanie Francq, Le règlement « Rome I » sur la loi applicable aux obligations contractuelles . - De quelques changements..., Journal du droit international (Clunet) n° 1, Janvier 2009, 2, n°29*

[65] *We find the same wording in:*

-Rome I Regulation art. 3 (3 et 4): « 3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country ***which cannot be derogated from by agreement.****; 4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum,* ***which cannot be derogated from by agreement*** *».: Adde Recital 15, 25, 35, 37, and Art. 6, 8, 11:on this text , see L. D'Avout, Le sort des règles impératives dans le Règlement Rome I, D. 2008 p. 2165.*

-Rome II Regulation art.14 , 5 (4), 8 (3).

harmonisation European *acquis (I).*

In this part, the member states will be classified in three columns:

- One for those which have a **higher level of protection of the consumer** than the directives mentioned below (left column).
- One for those which have a **broader scope** than the directives (middle column)
- One for those which have the **same level of protection of the consumer** than the directives (right column).

Two remarks must be done:

- In principle, there should not be a Member State which has a lower level of protection of the consumer than the directives of minimal harmonization. That is the reason why there is no column for a possible lower level. But, if one Member State has exceptionally, on one point, a provision which has a lower level of protection of the consumer, it will be put in the column "same level".
- **It is possible in this part only that a Member state is in two columns**. Indeed, a Member State can have a higher level of protection of the consumer than the directives, and can have a broader scope than the directive, because the provision made for the consumer applies to a weak professional. Then, in this case, this Member state will be in two columns.

- Second, it will examine national mandatory consumer protection rules applicable to contractual obligations in B2C contracts for sales of tangible goods at a distance, in areas where there is no European *acquis* (including areas of national general contract law which do not necessarily fall within the concept of consumer law but which specifically aim at protecting consumers) (II).

  In this particular area, there is no European acquis. This part covers simple mandatory contract law rules within the meaning of Article 6(2) of the Rome I Regulation, i.e. rules of contract law which cannot be derogated from by agreement, in B2C contracts.

  In this part, the Member States will be classified in three columns:

  - One for the mandatory rules that are made especially for the consumer (left column) (it is the aim of the study to find all these mandatory provisions)
  - One for the mandatory rules that are made for all contracting parties, but that the consumer can benefit from (middle column)
  - One for the rules which are not mandatory or for the member states where there is no rule at all (right column).

  Two remarks on the methodology we followed in case there is an overlap in the protection granted to consumers by a

Member State:

- When a Member State has **both a general rule and a special rule protecting the consumer**, that Member State will appear in the first column concerning the Member States whose rules are aimed at consumers
- When a Member State has a rule derogation from which is accepted **in limited cases**, this rule will appear with the provisions which cannot be derogated from. It will be in the column 2 if the rule is specifically designed for the consumer, or in column 3 if the rule concerns all contracting parties, regardless of whether they are consumers or not.

- And finally, to be able to compare, and maybe in the future to be able to protect the weak professional party, this study will examine also national rules applicable to contractual obligations in B2B contracts for sales of tangible goods at distance which parties cannot derogate from by agreement (III).

In this part, the Member States will be classified in three columns:

- One for the mandatory rules that are made especially for the professional (left column)
- One for the mandatory rules that are made for all contracting parties, but that the professional can benefit from (middle column)
- One for the rules which are not mandatory or for the member states where there is no rule at all (right column).

It must be noted that in all the study **the rules will be taken into account even if they results from constant case law**.

The reasons are the following:

- The most important is that the parties cannot derogate from the rule by agreement.
- If that is not done, a lot of rules will not be taken into account, especially in Member States that have a legal system based on case-law (for instance English precedents). It would be discrimination between the Member States.
- Even in the Member States of continental law case law are based on a legal provision which is interpreted by the Courts, sometimes in a very creative way[66].

[66] *For instance, in France, in all the contracts, an important case law has decided that "due to the violation of this essential obligation of the contract clause limiting liability, which contradicted the scope of the commitment, should be deemed unwritten" (Cass. Com. 22 October 1996 n° 93-18632). This case law in based on article 1131 (Art. 1131 of the civil code states that « An obligation without a cause or with a false cause or with an unlawful cause cannot have any effect. ») of the French civil code which is the general provision about the « cause ». However, after this case law, the parties cannot any more stipulate a clause limiting liability which contradicts the essential obligation. The rule established by the case law cannot be derogated from.*
In 2016, this rule will become a legal provision of the new law of contract in France, but it would be exactly the same.

It must be also noted that this study is limited to sale of tangible goods at distance and especially on line, and does not concern digital content.
In addition, it does not take into account the provisions which are the result of implementation of Directive 2011/83/UE. The terms of the « invitation to tender » specify that « *the contractor does not have to deal with national rules transposing the Consumer Rights Directive* ».

Due to certain formatting issues some of the footnotes in the subsequent sections of this study, while appearing at the right page, do not follow the right sequence of numbering.

I/ National mandatory consumer contract rules applicable to contractual obligations, which transpose the minimum harmonisation European *acquis*

This section should highlight those national mandatory consumer contract provisions which go beyond the minimum standards upheld in EU legislation and which cannot be derogated from by agreement, within the meaning of Article 6(2) of the Rome I Regulation. These legislations are in the column "Higher level for the consumer in the mandatory domestic law than in the directive" in the table below.

This research will be done with to directives:

- the Directive on unfair terms (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts JO L 95 21.4.1993, p. 29.) (A)
- the Consumer Sales Directive : Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Official Journal L 171 , 07/07/1999 P. 0012 – 0016) (B)

A/ the Directive on unfair terms: Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Q 1 Art. 3 directive 93/13/EEC – Meaning of "unfair" in contract between a trader and a consumer				
Provision in the directive n° 93/13/EEC Consumer protection in	**Questions**	**Higher level for the consumer in the mandatory domestic law than in the directive**	**Broader personal scope than the directive**	**Same level of protection in the directive as in domestic law**

the directive				
Art. 3 directive 93/13/EEC 1. 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.	Are there mandatory provisions in domestic law which lay the **definition of unfair terms?** If yes, is this definition the same as the definition of article 3 §1 of the directive 93/13/EEC? Especially, **what is in national law the role of good faith in the definition of unfair terms**?	**Definition of unfair terms:** **Good Faith** -In several MS, **good faith is not mentioned in the definition of unfair terms. Therefore, the mandatory domestic laws are more protective than the directive** because they do not require this condition: BE, EE[67], HU, LU, MT, FI, FR[68], SE, SK • **SE:** Unfair terms shall be considered through the prism of the notion of « unconscionable" in which good faith does not play a role. According to Contract Act (section 36), « contract term or condition may be modified or set aside if such term or condition is unconscionable having regard to the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances, and	-In several MS, the general mandatory provision which lays **the definition of unfair terms has a wider scope than the directive because it addresses not only consumer contracts but any contracts.** Therefore those mandatory domestic laws shall be considered as more protective than the directive, but **it is not a higher protection of the consumer**. **It is a higher protection of other weak parties:** AT, DE, DK, NL, HR, HU, SE • **AT:** § 879 (3) ABGB: A clause contained in general terms and conditions or contract forms, which does not	**Good faith**: -In many MS, mandatory provisions lay a definition of unfair terms which is mostly the same as the definition of article 3 §1 of the directive 93/13/EEC. Therefore, **good faith has a role in the definition of unfair terms:** BG, IE, ES, DE, EL, HR, CY, LV, LT, NL, RO, UK, IT[69]. -In one MS, mandatory provisions provide a definition of unfair terms which does not refer to

[67] EE: Principle of good faith is not used in the regulation of unfair contract terms. In Estonian law, the principle of good faith is provided for in the Article 6 of the LOA as a general principle defining objective standard of behaviour and cannot be used as ground for the invalidity of the contract term.

[68] FR: but for some authors, bad faith is presupposed in case of a significant imbalance. In addition, in the of the French contract law, applicable from 1er October 2016, protection against unfair terms could become general.

[69] IT: Art. 33, It. Cons.Code: § 1. 'In a contract concluded between a consumer and a professional a term shall be regarded as unfair if, notwithstanding the professional good faith, it causes a significance imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'
Italian courts exclude the interpretation which provides that the ineffectiveness of a term cannot be assessed unless both good faith is violated and the imbalance is significant. Good faith is a tool that measures the significance of the imbalance.

		circumstances in general. Where a term is of such significance for the agreement that it would be unreasonable to demand the continued enforceability of the remainder of the agreement with its terms unchanged, the agreement may be modified in other respects, or may be set aside in its entirety". -In a few MS, **the condition of good faith is mentioned but it does not have to be fulfilled simultaneously with the significant imbalance:** MT, SI • **SI**: Art 24(1) provides that the contract term is deemed to be unfair if "- to the detriment of the consumer causes a significant imbalance in the rights and obligations of the parties **or** (…) [if] it is contrary to the principle of fairness and good faith" • **MT:** Article 45 of the Consumer Affairs, Chapter 378 of the Laws of Malta provides that "1) An unfair term means any term in a consumer contract, which on its own or in conjunction with one or more other terms - (*a*) creates a significant imbalance between the rights and obligations of the contracting parties to the detriment of the	address a main obligation is void if it is grossly detrimental to one party, considering all circumstances of the case. • **DE:** According to German law, the scope of the test of reasonableness is based on "**Standard business terms**" which are "all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract" (§ 305 BGB). The general provision in the first sentence of § 307 (1) BGB stipulates that standard terms are rendered ineffective "if, contrary to the requirement of good faith, they unreasonably disadvantage **the other party** to the	good faith but to **"good practice"**: PL[70] -In a few MS, mandatory provisions provide a definition of unfair terms which is the same as the definition of article 3 §1 of the directive 93/13/EEC, except for the fact that an **express reference to "good faith" is not required in this definition.** However, good faith is required as a general principle in mandatory provisions: PT, FR -In a few MS, **good faith must be indirectly taken into account:** AT, CZ • **AT**: good faith must be considered as a circumstance of

[70] *PL: Art. 385[1]. Civil Code Unlawful clauses. § 1. Provisions of a contract executed with a consumer which have not been agreed individually are not binding on the consumer if his rights and obligations are set forth in a way that is contrary to good practice, grossly violating his interests (unlawful contractual provisions).*

		consumer; **or (…)** (*d*) is incompatible with the requirements of good faith »	contract with the user." • **DK:** Section 36.1 of the Act provides "An agreement may be amended or overridden in whole or in part, if it would be unreasonable or in breach of fair trade way to render it applicable. The same applies to other legal acts." It means that the unfair terms may either be set aside entirely as inapplicable, or may be modified so as to remove the unfair aspects of the terms without entirely setting them aside. However, Danish law has also added a new Chapter IV to the Act on Contracts concerning consumer contracts, where Section 38c provides a more direct implementation of the Article 3 in the directive, but this **is explicitly made subsidiary to the wider protection in**	the case which must be taken into account[71] • **CZ**: In the context of the definition of unfair terms the accent is put on the requirement of proportionality which might be seen largo sensu as part of good faith in the objective sense

[71] *AT: § 864a ABGB: Provisions of unusual content in general terms and conditions or contract forms used by one party do not become part of the contract, if they are detrimental to the other party and if that party could not be expected to anticipate them considering the circumstances, especially the outer appearance of the document; unless they were specifically made aware of it by the one party.*

			<u>Section 36.</u> • **<u>NL:</u>** Article 6:233 BW: **A stipulation in general terms and conditions may be void:** **(a) if it is unreasonably onerous to the other party,** taking into consideration the nature and the further content of the contract, the manner in which the terms and conditions were established, the mutually apparent interests of the parties and the other circumstances of the case; or (b) if the user has not given the other party a reasonable opportunity to take note of the general terms and conditions. • **<u>HR:</u>** Unfairness of contract terms is regulated in the COA and the CPA. Whereas the COA provides for general regulation of unfairness of contract terms, applicable to every contract,	

			regardless of the status of the parties, the CPA provides for special regulation of unfairness of contract terms, applicable only to B2C contracts. • **HU:** Act V of 2013 on the Civil Code, Section 6:102 states that "(1) A standard contract term shall be considered unfair if, contrary to the requirement of good faith and fair dealing, it causes a significant and unjustified imbalance in contractual rights and obligations, to the detriment of the party entering into a contract with the person imposing such contract term". • **SE:** Unfair terms shall be considered through the prism of "unconscionability" **in the Contract Act, whose scope is general.** According to section 36, "contract term or condition may be modified or set aside if such term or	

			condition is unconscionable having regard to the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances, and circumstances in general. Where a term is of such significance for the agreement that it would be unreasonable to demand the continued enforceability of the remainder of the agreement with its terms unchanged, the agreement may be modified in other respects, or may be set aside in its entirety".	

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a	Are there domestic provisions whereby the rules on unfair terms also **apply to terms which have been negotiated**? If can these provisions be derogated from by agreement?	-Some MS consider that **the protection against unfair terms is not limited to terms which have not been individually negotiated**: AT, DK, FR, LU, MT, FI, SE, UK, CZ • **In a few MS, the protection against unfair terms is provided by a general mandatory contract rule which applies irrespective of whether a term has been negotiated:** ○ **AT:** The prevalent opinion is, that § 879 (3) ABGB[72], which applies only to general terms and contract forms, must also be applied on any contractual provision analogously. This is then mandatory. ○ **DK:** Section 36.1 of the Act which provides that "An agreement may be amended or overridden in whole or in part, if it would be unreasonable or in breach of fair trade way to render it applicable. The same applies to other legal acts" applies irrespective of whether a term has been negotiated. ○ **SE**: the general provision on unfair terms in Section 36 of the Contracts Act is applicable to contractual terms regardless of		Many MS consider that **the protection against unfair terms is limited to terms which have not been individually negotiated**[73]: BG, CY, IE, SI, SK, DE, EE, HR, HU, PL, PT, RO, ES, LT, LV, NL, RO, EL

[72] AT: § 879 (3) ABGB: A clause contained in general terms and conditions or contract forms, which does not address a main obligation is void if it is grossly detrimental to one party, considering all circumstances of the case

[73] Cf Study "Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais and Study "Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE)", by M. Behar-Touchais.

pre-formulated standard contract. Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him. 3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.		whether they have been individually negotiated or not. • **In several MS, the consumer rule which protects against unfair terms applies irrespective of whether a term has been negotiated.** ○ **FR:** Article L. 132-1, paragraph 3, provides that the rules about unfair terms apply « whatever the contract form or medium (…) in particular, for purchase orders, invoices, performance bonds, delivery notes or slips, travel vouchers or tickets, containing stipulations which may, or may not, have been freely negotiated, or references to general terms fixed in advance". ○ **CZ:** The control of the content of unfair terms is provided for by Section 1813 of Civil Code which applies to "*Stipulations which establish, contrary to the requirement of proportionality, a significant imbalance in the rights or duties of the parties to the detriment of the consumer";* ○ **LU**: The control of the content of unfair terms is provided for by Article L.211-2 of the Consumer code which applies to contracts concluded between a supplier and a consumer. ○ **FI**: The provision in CPA (38/1978) Chapter 4 Section 1,		

		according to which an unreasonable contract term can be adjusted or disregarded, applies both to individually negotiated contract terms and contract terms supplied only by the trader. ○ **UK**: the Consumer Rights Act 2015 applies to all terms in a consumer contract. • **However, in one MS no reference at all is made to the concept of negotiated term:** ○ **BE**: Art. I.8, 22° Code of Economic Law (CEL) states, "'unfair term' means any term or condition in a contract between a business and a consumer which, alone or in combination with one or more other terms or conditions, causes an obvious imbalance in the parties' rights and obligations, to the detriment of the consumer". • **In one MS, the rule applies to terms with which the consumer did not have any real possibility to become familiar. Such a rule could be broader in scope than the rule which limits the protection to terms which are not negotiated. Thus, it may be more protective than the directive: LV:** Article 6, Part 3, clause 16 of the of The Consumer Rights Protection Law sets that "Contractual		

		terms shall be deemed unfair if they make binding on a consumer such contractual term with which the consumer did not have any real possibility to become familiar with before entering into the contract". -One MS provide that **the rules about unfair terms apply also to special terms which have been negotiated:** • **IT**: Art, 36, § 2, It. Cons. Code provides a 'black list' of three terms that must be considered as unfair even though they have been individually negotiated: ○ exclusion or limitation terms having the object or the effect of limiting the liability of a professional in the event of the death or personal injury of the consumer; ○ terms having the object or the effect of excluding or limiting the action of a consumer vis-à-vis the professional in the event of a breach by the professional; ○ terms providing the extension of the acceptance of consumers to terms that he/she has never had the opportunity of becoming acquainted with before the conclusion of the contract.		

	Are there provisions in domestic law which lay a **definition of terms individually negotiated** and which cannot be derogated from by agreement?			**-In some MS, which protect against unfair terms which have not been individually negociated[74], a definition of terms which aren't individually negociated exists, as it is in the Directive .** A contract term is not individually negociated **if it has been supplied or pre-formulated by one party and the other party has not been able to influence the contract :** BG, CY, DE, EL, IE, HR, LV, LT, PL, PT, SK**:** • **BG :** Consumer Protection Act (CPA). Art. 146. (2) "The terms are not

[74] *LU: One MS which protect the consumer against unfair terms, even if the contract between the trader and the consumer has been individually negotiated (which remains quite rare), has a definition of the terms non individually negotiated, but this definition is in the general law. According to article 1135-1 of the Civil code in Luxembourg Law (Law May 15th, 1987), a term shall always be regarded as not having been individually negotiated when it has been drafted in advance by one party and that the other party has therefore, not been able to influence its content, particularly in the context of a standard contract (Law 26th March 1997).*

				individually negotiated where they have been drafted in advance and the consumer has not been able to influence their content, particularly in the context of a pre-formulated general terms". • **LV:** Article 6, Part 5 of the CRPL sets "A contractual term shall always be deemed to be not mutually discussed if the contract was drawn up in advance and the consumer wherewith did not have an opportunity to influence the content of the relevant

				contract; especially it applies to standard contracts prepared in advance” -In a few MS, **the concept of individual negociated terms exists but it isn’t specifically defined**, but it will probably be interpreted in accordance with the Directive. : DK, EE, FR, IT, FI -In one MS, **the concept of individual negociated terms doesn’t exist but it might be deduced a contrario from the definition of Contracts of adhesion** : CZ : « *The provisions on contracts of adhesion apply to any contract whose essential terms were*

				determined by one of the parties or according to the party's instructions, without the weaker party having any real opportunity to affect the contents of these essential terms » (Section 1798 of Civil Code)
	Are there in national law provisions which regulate **the burden of proof that the term has not been individually negotiated** and which cannot be derogated from by agreement?			-In most MS, which consider that the protection against unfair terms is limited to terms which have not been individually negotiated, according to a specific mandatory rule, **the trader bears the burden of proving that a contract term supplied by the trader has been individually negociated :** BG, CY, DE, DK, EE, IE, ES, FI, HR, HU, IT, LT, LU, LV, NL, PL, PT, RO, SK.

Q2 Art. 4 directive 93/13/EEC – context and exclusion				
Provision in the directive n° 93/13/EEC Consumer protection in the directive	**Questions**	**Higher level in the mandatory domestic laws than in the directive**	**Broader personal scope than the directive**	**Same level of protection in the directive as in domestic law**
Art. 4 directive 93/13/EEC 1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.	Are there in domestic law provisions which cannot be derogated from by agreement and which provide **the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances surrounding the conclusion of the contract and to all the other terms of the**	-In one MS, mandatory provisions which specifically aim at protecting consumers provide that **the unfairness of a contractual term shall be assessed, taking into account a list of elements which are more protective than those of the directive. It is a higher protection of the consumer: FI.** • **FI:** According to CPA (38/1978) Chapter 4 Section 1, *"in the assessment of unreasonableness, due note is taken of the contract as a whole, of the positions of the parties, of the*	-In several MS, mandatory provisions provide that **the unfairness of a contractual term shall be assessed, taking into account the same elements as those of the directive. But such rules are not specifically aimed at protecting consumers.** Therefore, the scope of unfairness is broader but **it is not a higher protection of the consumer**. **It is a higher protection of other weak parties** :EE, HU, NL, PT, SE • **EE [75]**: The mandatory provision	**-Concerning assessment of the unfairness, most of the MS list same elements as those of the directive:** BE, BG, CY, EL, ES, FR, HR, IE, IT, LT, LU[76], LV, MT, PL, RO, SI, SK, UK One MS (DK) provides that "*for consumer contracts section 36, paragraph 2, applies with the modification that in the assessment of the facts and circumstances, as is mentioned in section 36, paragraph 2, including the terms of other agreements, which are linked to the*

[75] *EE: Article 42 paragraph 1 of the LOA provides the grounds for the assessment of unfairness of the contractual terms which are in slightly different wording from those listed in the directive. These grounds are the nature and content of the contract, the manner of entry into the contract, the interests of the parties, other material circumstances.*

	contract or of another contract on which it is dependent?	*circumstances under which the contract was concluded and of **the changes in circumstances**, as well as of other relevant points*".	applies in « standard contracts » or in contracts which the parties have not negotiated individually. • **HU**: the elements which should be considered when analysing the unfairness are the same as in the directive. They apply both in "unfair contract terms" and "unfair contract terms in consumer contracts". • **NL:** The definition of unfair terms is provided by Art. 6:2333 Dutch Civil Code which applies to contracts in general. It indicates that « *the circumstances prevailing at the time of the conclusion of the contract are to be taken into account*	*contract in question, no account is taken of the later instances of circumstances to the detriment of the consumer, with the consequence that the agreement cannot be overridden or modified*."

[76] *LU: According to article L. 211-2 of the Consumer code, the unfairness of a term may be assessed taking into account "another contract when the conclusion or performance of these two contracts legally dependent from each other". Case law also specifies that the incriminated term should be replaced in its contractual context and assessed taking into account the other clauses within the contract.*

			when determining whether a term is unfair ». • **PT:** Those elements are commonly referred to by the courts. • **SE:** Swedish law provides that all the circumstances shall be taken into account when assessing the fairness of a contractual term. -In a few MS, mandatory provisions state that **the unfairness of a contractual term shall be assessed, taking into account "all the circumstances attending the conclusion of the contract". Such rule applies in "unfair contract terms" in B2C or in B2B contracts.** Therefore the scope of the rule is broader than in the directive, but **it is not a higher protection of the consumer. It is a higher protection of other weak parties**: AT, DE	

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.	**Can the unfairness examination include also the main purpose of the contract and the adequacy of the price**? Can the parties to the contract derogate from these rules by agreement?	For Many MS, **the protection of unfair terms also applies to the main subject matter of the contract or the price paid. Therefore, these MS are more protective than the directive. It is a higher protection of the consumer**: DK, ES, FI, LU, MT, PT, SE, SI • **DK:** Section 36.1 of the Act which provides that "*An agreement may be amended or overridden in whole or in part, if it would be unreasonable or in breach of fair trade to render it applicable. The same applies to other legal acts covering all aspects of the contract, including the main purpose of the contract and the price*." • **ES:** Spain has not expressly adopted art. 4.2 Directive 93/13/EEC. According to ECJ 3.6.2010[77] "Articles 4(2)		-For a few MS, the protection of unfair terms is **excluded for the main subject matter of the contract or the price.** Therefore, the level is almost the same as in the directive: BE, DE, EE, UK - This aspect has not been mentioned in Latvian law: LV[79]. -For many MS, the protection of unfair terms is **excluded for the main subjective matter of the contract or the price, in so far as these terms are in plain intelligible language,** as provided in the directive: AT, BG, CY[80], CZ, FR, HR**,** HU, IE, IT, LT, NL, PL, RO, SK • **In AT**, § 879 (3) ABGB:A clause contained in general

[77] *Case C-484/08, Caja de Ahorros y Monte de Piedad de Madrid contre Asociación de Usuarios de Servicios Bancarios (Ausbanc), (ECLI:EU:C:2010:309) According to the Tribunal Supremo, the rounding-up term is liable to constitute an essential element of a contract for a bank loan, such as that at issue in the main proceedings. However, given that Article 4(2) of the Directive excludes from the assessment of unfairness a term which concerns, in particular, the subject-matter of the contract, it is not possible, in principle, for a term such as that at issue in the main proceedings to be subjected to an assessment as to whether it is unfair. It was in those circumstances that the Tribunal Supremo decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:1) Must Article 8 of [the Directive] be construed as meaning that a Member State may provide in its legislation, for the benefit of consumers, that the assessment as to whether contractual terms are unfair is to be carried out also in respect of terms which, pursuant to Article 4(2) of [the Directive], fall outside the scope of such an assessment? 2)Consequently, does Article 4(2) of [the Directive], read in conjunction with Article 8 thereof, preclude a Member State from providing in its legislation, for the benefit of consumers, that the assessment as to whether contractual terms are unfair is to be carried out also in respect of*

		and 8 of Council Directive 93/13/EEC 5.4.1993 on unfair terms in con-sumer contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings [i.e. Spanish legislation], which authorises a judicial review as to the unfairness of contractual terms which relate to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other hand, even in the case where those terms are drafted in		terms and conditions or contract forms, **which does not address a main obligation** is void if it is grossly detrimental to one party, considering all circumstances of the case. But the general clause of § 879 (1) whereby terms violating moral principles are void also may be a way to tackle contract terms that are unfair in respect of main purpose (and beyond) and price.

terms which relate to "the definition of the main subject-matter of the contract" or to "the adequacy of the price and remuneration, on the one hand, as against the services or goods [to be supplied] in exchange, on the other", even where those terms are in plain, intelligible language? 3) Is an interpretation of Articles 8 and 4(2) of [the Directive] under which it is possible for a Member State to provide for assessment by the courts as to whether contractual terms are unfair, which are in plain, intelligible language and which define the main subject-matter of the contract or the adequacy of the price and remuneration, on the one hand, as against the services or goods to be supplied in exchange, on the other, compatible with Articles 2 EC, 3(1)(g) EC and 4(1) EC?'

[79] *LV: Article 6, Part 3 of The Consumer Rights Protection Law ("CRPL") sets that "A contractual term which has not been mutually discussed by the contracting parties shall be deemed to be unfair, if it creates to the disadvantage of the consumer, and contrary to the requirements of good faith, substantial non-conformity with respect to the rights and duties of the contracting parties provided for by the contract". The main purpose and the price have not been expressly mentioned on in Latvian law*

[80] *CY: article 3(2) of the Unfair Terms in Consumer Contracts Law 93(I)/1996 prescribes that when a term in a contract is drafted in a clear and understandable manner, then there is no doubt as to the fairness of the term when this term relates to the definition of the main subject matter of the contract and to the adequacy of the price or remuneration for goods or services sold or provided.*

		plain, intelligible language". As a result, and given the silence of RCPA, **Spanish courts can (but are not obliged to) extend the content control mechanism of RCPA to terms not individually negotia-ted which relate to the main subject matter of the contract or the quality/price** ratio of the goods or services supplied[78]. • **FI:** Under CPA (38/1978) Chapter 4 Section 1, any term in a contract, including price, may be adjusted or disregarded in the assessment of unfairness. • **LU:** According to article L. 211-2 of the Consumer code, in contracts between a trader and a consumer, any clause or combination of clauses causing an imbalance in the parties' rights and		

[78] *ES: After the ECJ 3.6.2010, the Spanish case law is ambiguous and contradictory. In some of its judgments, the SSC uses the ECJ judgment to clearly state that core terms can be assessed using the content control mechanism (see e. g. SSCJ 1.7.2010; in other decisions, the SSC understands that art. 4.2 of the Directive should be applied in Spain and that essential elements cannot be controlled in the way that remunerative interests of loans (which constitute their price) clearly are (SSCJs 18.6.2012, 8.5.2013, 25.3.2015).*

		obligations arising under the contract, to the detriment of the consumer is unfair. • **MT:** Article 44 of chapter 378 of the Law of Malta does not exclude the protection of unfair terms for the main subject matter of the contract or for the price paid. • **PT:** Since the General Contract Terms Act tackles every pre-established content presented to an indeterminate addressee, regardless if the contract is an individual contract or not, there is no reason to exclude the examination of the typical elements of the contract: subject matter/price is always subject to the unfairness control. • **SE:** The examination can include the main purpose of the contract and the adequacy of the price. According to Consumer Contracts Act (1994:1512), Section 11, "*If a contractual*		

		term is modified or set aside, the contract shall be upheld without further modification, provided that the term is contrary to good faith and amounts to a considerable lack of balance to the detriment of the consumer, if the consumer demands it and the contract is possible to uphold without such modification". In the typical spirit of Swedish law, in principle absolutely everything relevant can be included when making the assessment. • **SI:** Article 24(2) of the ZVPot does not exclude the protection of unfair terms for the main subject matter of the contract or for the price paid.		

Q3 Art. 5 directive 93/13/EEC – Duty of transparency in contract terms

(and Q21 – Interpretation in favour of consumers)

Provision in the directive n° 93/13/EEC Consumer protection in the directive	Questions	Higher level for the consumer in the mandatory domestic laws than in the directive	Broader personal scope than the directive	Same level of protection in the directive as in domestic law
Art. 5 directive 93/13/EEC **In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language**. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2). Even if it is not expressly mentioned in the article 5, this text applies only if the contract has **not been individually**	**Duty of transparency:** Are there in domestic law provisions which cannot be derogated from by agreement and which provide a **duty of transparency (clarity and understandability) in contract terms (not individually negotiated) between the trader and the consumer?**	-In several MS, a comparative **duty of transparency** provided by a mandatory rule aiming at protecting the consumers exists and it **applies irrespective of whether a term has been negotiated.** Therefore, it **is a higher level of protection for consumers in mandatory domestic law:** CZ, FR, IT, LV, UK	**-In several MS, the duty of transparency is provided by a general mandatory contract rule which applies in all contract terms regardless of the status of the parties:** AT, DE, ES, SE, SK • **AT:** § 6 (3) KSchG: Any contractual provision included in the General Terms and Conditions or contractual form shall be ineffective if it is unclear or unintelligible • **DE:** According to the second sentence of § 307 (1) BGB, which applies in all standard business terms (regardless of the status of the parties) "an unreasonable disadvantage may also	**-Most MS impose a similar duty of transparency (clarity and understandability) in contract terms which are not individually negotiated:** BE, BG, CY, DK, EE, EL, HR, HU, IE, LT, MT, NL, PL, PT, RO, SI **-A few MS do not have such a clear principle. They provide that the consumer needs to know the content of the terms of the contract, but not really to understand it[82]:** FI, LU,

[82] *Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*

negotiated (ECJ 15 janvier 2015 C-537/13, Birutė Šiba contre Arūnas Devėnas, EU:C:2015:14)[81]			arise from the provision not being clear and comprehensible". • **ES:** GCTA, Art. 7 - The following standard terms will not be incorporated into the contract: b) Those that are illegible, ambiguous, obscure and incomprehensible, except, as to the latter, that they had been expressly accepted in writing by the adhering party and they adjust to the specific law in the field governing the need of transparency of contract terms. • **SE**: such a duty follows from general principles • **SK:** There is no specific provision and general duty contained in the CC towards the consumer contract. This duty is obtained in the general provisions regulating legal acts in the CC. However	

[81] *Point 19 of the case: « In that connection, it must be observed that Directive 93/13 applies, as is clear from Article 1(1) and Article 3(1), to the terms of 'a contract concluded between a seller or supplier and a consumer which have not been individually negotiated' (see, to that effect, judgment in Constructora Principado, C-226/12, EU:C:2014:10, paragraph 18). »*

			Slovakian courts assess the unacceptability of the conditions also by reason of lack of clarity and understandability.	
Art. 5 directive 93/13/EEC In contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. **Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).**	**Interpretation more favourable to the consumer:** Are there provisions in domestic law which cannot be derogated from by agreement and which provide, **where there is doubt about the meaning of a term, that the interpretation most favourable to the consumer shall prevail?** If this principle exists, does it specifically aim to protect consumers or does it protect contract parties generally? If this principle exists, **is it limited to the terms offered by the seller?**	**-In several MS, a comparative rule on interpretation most favourable to the consumer exists in contract terms, whether negotiated individually or not.** Those mandatory domestic laws shall be considered as **more protective than the directive (The directive concerns terms which are not negotiated)**. It is **a higher protection of the consumer. Therefore, the principle is not limited to the terms offered by the seller:** CZ, FR, LU, LV, PT • **CZ:** Section 1812 which provides that « If the content of a contract allows different interpretations, the interpretation most	**-One MS does not have such a special rule but has a solution based on the contra proferentem principle which applies in all contract terms, regardless of the status of the parties.** Therefore, **it is not a higher protection of the consumer**: AT -**Some MS have both a rule which protect contract parties generally** (either interpretation contra proferentem or interpretation in favorem) **and a rule which is specifically designed to protect consumers** in contracts which are not negotiated. Therefore, **it is not a higher protection for the consumer. It is a protection for any**	**Many MS have such a similar rule, limited to terms which are not negotiated by the consumer, as provided by the directive. Therefore, the principle is limited to the terms offered by the business (which is not necessary a seller):** BE, BG, CY, DK, EE, FI, HU, LT, MT (the judge keeps a power of interpretation), NL, RO, SE, SI, SK.

		favourable to the consumer is used » concerns all the content of consumer contract. • **FR:** Article L. 133-2 of the Consumer Code, whereby "In the event of a doubt, they are interpreted in the sense which is most favourable to the consumer or the non-professional", protects consumer as for all contract terms, whether negotiated individually or not[83] • **LU:** Article L. 211-2 of the Consumer code provides that "In case of a doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail". This rule is not limited to the	**adhering party:** DE[86], EL[87], ES[88], HR[89], IE[90] (The judge keeps his/her power of interpretation), IT[91], PL[92].	

[83] *FR: Furthermore, French contract law (Article 1162 of the Civil code) provides a principle which protects contract parties generally. It is stated that an agreement shall be interpreted against the one who has stipulated, and in favour of the one who has contracted the obligation. This principle does not bind the judge.*

		terms which are not negotiated[84] • **LV:** Latvian law does not have general provisions that cannot be derogated from by agreement, which provide that the interpretation most favourable to the consumer shall prevail. However, more specifically Article 6, Part 21 of the CRPL provides that ambiguous and imprecise terms of a written contract		

[86] DE: According to § 305c BGB (2), which applies in all standard business terms (regardless of the status of the parties), any doubts in the interpretation of standard business terms are resolved against the user. According to § 310 (3) BGB, interpretation of standard business terms resolved against the user protects specifically consumers.
[87] EL: According to General rule of article 200 [Interpretation of contracts] of the Greek Civil Code: Contracts shall be interpreted according to the requirements of good faith taking also into account business usages. According to Article 2 par. 4 of Law 2251/1994 for Consumer Protection: «General terms for transactions are interpreted on the basis of the need to protect consumers. When in doubt, general transactions terms set forth unilaterally by the supplier, or by any third party acting on his behalf, are interpreted in favour of the consumer».
[88] ES: The rules of interpretation of standard terms may be found in art. 6 GCTA, whose last paragraph provides a reference to the general rules of interpretation (arts. 1281-1289 Spanish Civil Code [SpCC]). Specifically for consumer contracts, art. 80 RCPA contains only one rule of interpretation, according to which any doubt on the meaning of a clause is always to be resolved in the manner most favourable to the consumer (this rule may also be found in art. 6 GCTA). These rules do not exempt the application of arts. 1281-1289 SpCC, but represent the realization and adaptation of their content both to standard terms and to not individually negotiated terms.
[89] HR: Pursuant to Article 54, paragraph 1 of the CPA, dubious and unintelligible contractual terms shall be interpreted in a way which is more favourable to consumer. On the more general level, Article 320, paragraph 1 of the COA recognises contra proferentem interpretation rule, according to which in case of pre-formulated contract, any unclear clause shall be interpreted in a way which is more favourable to the other contracting party.
[90] IE: The contra proferentem principle of interpretation may be applied in limited circumstances where e.g. exclusion clauses are concerned, but this principle is not limited to consumers. Regulations 5(2) and (3) of The Regulations provide: « (2) Where there is a doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail ».
[91] IT: Art. 1370 It. civil code affirms the special criterion of construction of the contract: interpretation contra proferentem. Art. 35, § 2, It. Cons. Code restates a civil law rule of construction of a contractual term, that is: interpretation contra proferentem in cases where the literal meaning of a term is not clear.
[92] PL: the courts extend the application of the "in dubio contra proferentem" formula also to the B2B contracts.
[84] LU: Out of the European acquis, in general Civil law, Article 1162 of the Civil code provides that "In case of doubt, an agreement is interpreted against the party who has stipulated and in favour of the party who has contracted the obligation."

		shall be interpreted in favour of the consumer, and this provision cannot be derogated from by agreement. • **PT:** In individually negotiated contracts, an interpretation more favourable to the consumer may be assured in article 237 CC[85], pursuant to which, in case of a doubt in valuable transactions the declaration shall have the meaning that ensures a better balance of the considerations.		

Q4 Article 6 directive 93/13/EEC – General provisions regarding Unfair contract terms

[85] *PT: Article 237 (Cases of doubt): "In case of doubt the declaration shall have the meaning that is the less grievous for the grantor, in non-valuable transactions, or that ensures a better balance of the considerations, in valuable transactions". Then, it is an obligation for the judge.*

Provision in the directive n° 93/13/EEC **Consumer protection in the directive**	**Questions**	**Higher level for the consumer in the mandatory domestic laws than in the directive**	**Broader personal scope than in the directive**	**Same level of protection in the directive as in domestic law**
Article 6 directive 93/13/EEC **1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.** **2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of**	**What is the effect in national law of the unfairness of a term in a contract between a trader and a consumer?** **Is it void, deemed unwritten, non-binding, etc.?** Is the former provision mandatory, in the sense that it cannot be derogated from by agreement?			**-For several MS, unfair terms are not binding:** CY, IE, LV, MT, PL, RO, UK **-For most MS, the result is almost the same because the unfair terms are:** • **deemed unwritten:** CZ • **regarded as void:** AT[93], BG, DE, EE, EL • **deemed null or void:** ES, FR, HU, HU, LU, NL[94] • **affected by nullity:** IT • **set aside or disregarded:** DK, FI, SE • **null and void:** LT • **void:** PT, SI • **invalid:** SK

[93] At: Unfair terms are deemed void according to § 879 (3) ABGB and § 6 KSchG. Traditionally, this was seen as just relative voidance, meaning that the impaired party/consumer would have to assert the voidance. In Literature, this opinion is however disputed as far as consumer contracts are concerned (cf Graf in Kletečka/Schauer, ABGB-ON[1.02] § 879 mn. 297; Apathy in Schwimann/Kodek, ABGB[4] § 6 KSchG mn. 1

[94] NL: An unfair term is voidable, according to Article 6:233 BW. After avoidance, the term is deemed to have been void from the moment when the contract was concluded and therefore never to have been part of the contract (avoidance has retroactive effect).

the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.				
	Must such effects be decided by a judge or do they apply automatically?			**-For many MS, the unfair terms are considered void and do not need to be declared as such by the judge:** BG, DE, FI, HR, HU, LV, PT, SI, UK **-In several MS, this rule is regarded as theoretical because in practice it is necessary to take the matter to court, because the question of whether or not a contract term is unfair can be contested**[95]**:** CZ, ES, FR, IE, LU, MT, PL, SK **-For a few MS, the sanction "void" requires a judicial intervention:** BE, EE, EL (except for the terms which are in the list of terms, always characterized as such), IT, LT, RO, SE -or the intervention of an administrative body: CY **-For one MS, such an effect can be decided by the judge or by the parties:** DK. • **DK:** Section 36.1 grants authority to a judge to undertake the modification or to set aside of the contract performed, but the parties may also agree to modify or set

[95] *Cf Study "Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study "Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE)", by M. Behar-Touchais.*

				aside the contract based on Section 36.1. -For one MS, un unfair term can be annulled **<u>either by extra-judicial declaration or by a judicial decision</u>** : **<u>NL</u>** -For one MS, **<u>it is discussed</u>**. Traditionally, Unfair terms are deemed void. But this opinion is however disputed as far as consumer contracts are concerned. Following that opinion, such terms would in a contract between a trader and a consumer be regarded void. Under § 864a ABGB, it is also under dispute whether the voidance is just a relative (in which case such an effect can only be decided by a judge) or an absolute one (which is automatic) : **<u>AT</u>**
	In your law, may the judge examine, of his own motion, the unfairness of a term?			**-<u>For most MS, unfair terms are examined by the judge ex officio</u>**: • **For most MS, this examination by the judge or by public authorities is provided by a mandatory provision, or by a general procedural principle, or by case law:** CY[96] , CZ, DE, EE, EL, ES[97], FR, HR, HU, LT, LU, LV, RO, SI, SK, IT, UK • **For a few MS, this examination by a judge applies according to the ECJ decisions:** BG, IE, NL, PL, PT -For a few MS, unfair terms **could be** examined

[96] *CY: the Director of the Competition and Consumer Protection Service has the duty to examine upon submission of a complaint or on its own motion whether and to what extent a contractual term intended for general use, is unfair. Article 9(2) provides that when after the examination above by the Director is carried out, if the Director considers that it is indeed unfair, he/she may, if they consider it appropriate, require a request by application to the Court (meaning, President of any District Court) for the issue of a prohibitory injunction, including an interim order, against any person who, within their discretion, uses or recommends the use of such terms in contracts with consumers),*

[97] *ES: public authorities and notaries should not apply/authorize the unfair terms they detect.*

				as officio: AT, FI -For one MS, it depends of the case: DK • **DK:** Danish procedural law rests on the party principle, whereby the judge will make a ruling based on the claims brought by the parties. However, in small claims court hearings, the judge has a wide ex officio margin, and in other proceedings the judge may to a certain extent raise issues indirectly by posing questions to the parties -For two MS, unfair terms can't be examined by the judge ex officio: MT, SE
	Are there provisions in your law which cannot be derogated from by agreement and which provide that **the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms?**			**-For most MS, the rest of the contract remains valid without the unfair terms, where possible:** BE, BG, CY, CZ[98], DE, EE, ES, FI, FR, HR, HU, IE, LT, LU, LV, MT, NL, RO, SI, SK, UK **-For a few MS, the rest of the contract remains valid without the unfair terms (regardless of whether or not it is possible):** EL, IT, PL • **EL:** Article 2 par. 8 of Law 2251/1994: "The supplier cannot invoke the invalidity of the entire contract on the grounds that one or more of its general terms are void as abusive." • **IT:** Art. 36, §§ 1 and 3, It- Cons. Code state that a term considered as unfair as a result of the violation of good faith and significant imbalance is affected by nullity. Three main features of such an invalidity must be underlined:

[98] *CZ: this rule is not explicitly provided but it follows from the fact that the term is deemed unwritten*

				○ it always involves the terms considered as unfair only, without never affecting the whole contract, that remains valid; ○ the nullity can be declared by the judge only and can be denounced by the consumer who is party to the contract: it does not operate automatically nor could it be denounced by *any* person; ○ it is up to the judge to trigger the nullity of an unfair term, and only in cases where he/she deems that such a remedy operates to the consumer's benefit. • **PL:** Art. 385^1 about unlawful clauses states *"§ 2. If a contractual provision is not binding on the consumer in accordance with § 1, the parties are bound by the remaining part of the contract".* **-In one MS the effect of nullity of the unfair term is not provided**: AT -**In a few MS, a faculty and not an obligation is given to the consumer:** • **PT:** according to Article 13 General Contract Terms Act, the *adherent* who subscribes to, or accepts general contractual clauses *may* opt to continue individual contracts, of which some clauses are void. The preservation of these contracts implies the application of non-mandatory rules and, where applicable, of

				interpretation rules of legal acts. It is a matter of a faculty given to the adherent and not an obligation. • **SE:** pursuant to the third paragraph of Section 11 of the Consumer Contracts Act, where a contractual term is modified or set aside, the contract shall be upheld without further modification, provided that the term is contrary to good faith and amounts to a considerable lack of balance to the detriment of the consumer, if the consumer demands it and the contract is possible to uphold without such modification. This applies only where the contractual terms were not subject to individual negotiation.[99]

Q 5 - Art. 7 of the directive 93/13/ECC – Means of effectiveness of the protection against unfair terms				
Provision in the directive n° 93/13/ECC Consumer protection in the directive	**Questions**	**Higher level for the consumer in the mandatory domestic law as in the directive**	**Broader scope than in the directive**	**Same level of protection in the directive as in domestic law**

[99] *SE: if the contract term was individually negotiated, Section 36 of Contract Act provides that « Where a term is of such significance for the agreement that it would be unreasonable to demand the continued enforceability of the remainder of the agreement with its terms unchanged, the agreement may be modified in other respects, or may be set aside in its entirety ».*

Art. 7 of the directive 93/13/ECC **1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.** **2. The means referred to in paragraph 1 shall include provisions whereby persons or**	-In domestic law, **what are the adequate and effective means which exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers**? Are these provisions protecting only consumers, **or do they also protect competitors?**			**-In most MS, the consumer is entitled to bring individually an action aimed at obtaining the declaration of nullity or a same sanction as explained above in Q4**[104]**.** • This action is mostly an action which is brought **before a judge**: AT, BE, CY, CZ, DE, DK, EE, ES, FI, FR, HU, IE, IT, LT, LT, LU, MT, NL, PT, RO, SI, SK • In a few MS, kinds of consumers' complaints are submitted **to an authority** which is not a judge. The consumer's complaint is submitted to: ○ a Consumer Protection Commission: BG, PL[105] (in the new Polish provisions) ○ the General Secretariat of Consumer Affairs: EL[106] • In one MS, claims can be brought **before a court and before another authority:** ○ DK: Claims may be brought before the ordinary courts, as well as before the general Consumer Complaint Board and sectorial complaint boards and

[104] *Some MS did not mention the individual action. However, it does not mean that such an action does not exist. It is probably because some MS have only highlighted the collective actions.*
[105] *PL: This administrative body will be called the Office of Competition and Consumer Protection*
[106] *EL: Article 13a par. 1 of Law 2251/1994: Complaints of consumers against a supplier, in the sense of the stipulations of this law, are submitted to the General Secretariat of Consumer Affairs, which communicates them to the supplier, with an invitation to respond, in any means available, including delivery by post. The supplier must give a written response regarding complaints within a deadline set by the General Secretariat of Consumer Affairs, which starts as from communication of the relevant invitation.*

organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that	-In domestic law, is it provided that **persons or organizations, having a legitimate interest under national law in protecting consumers, may take action before the courts or before competent**		**-In some MS, in addition to individual actions, organizations or public authorities, may take action before the courts or before competent administrative bodies** so that they can apply appropriate and effective means to prevent the continued use of such unfair terms, **not only to protect consumers, but also non consumers**. Indeed, they have either a legitimate interest under national law in protecting consumers (such as qualified entities protecting consumer interests), **or a broader interest, not limited in protecting consumers**. Therefore the scope of protection is broader than in the directive because their interest in bringing proceedings is not limited to consumer protection.	also before the Consumer Ombudsman. **-In almost all MS[107], in addition to individual actions, persons or organizations, which have a legitimate interest under national law in protecting consumers, may examine unfair terms of their own motion and may file a complaint with the court when it deems a term unfair.** • In some MS, these actions are **injunctions, or collective actions or collective claims proceedings, which aimed to prevent the continued use of unfair terms in contracts**. In such actions, the judge may order the cessation of the use of the applied unfair term: AT, BE, BG, DK[108], EL[109], FR, HR[110], NL, PL, PT, RO, SK, SE, SI, UK • **In a few MS, class actions are**

[107] *It is not possible in MT*

[108] *DK: According to Section 255.1 of the Procedural Code, the right to bring cases before the courts is to be decided by "general provisions of law". In certain fields, such as public procurement, trade organisations have been granted special rights to bring cases before the Complaint Board for Public Procurement. No similar provisions have been adopted for consumer organisations, which therefore may bring cases before the courts and complaint boards only where they are individually concerned by the unfair terms or where they are acting on behalf of individual members that would be entitled to bring claims.*

[109] *EL: Article 10 par. 15 of Law 2251/1994: Every consumer union has the legal right to ask before courts and administrative authorities any kind of legal protection of the rights of its members, as consumers. Particularly, it has the legal right to bring a court action, apply for security measures, apply for annulment or recourse against administrative acts and to be the plaintiff. Every consumers union has also the right to intervene in pending trials of its members to support their rights as consumers.*
par. 16: A consumers union which has at least five hundred (500) active members and has been enrolled in the registry of consumers unions for at least one year, may bring any kind of court action for the protection of the general interests of the consuming public (collective court action). The court action of the previous subparagraph may also be brought when an illegal behaviour hurts the interests of at least thirty (30) consumers.

[110] *HR: pursuant to Articles 106 and 107 of the CPA, persons or organisations having a legitimate interest in protecting consumer can initiate court proceedings in which a contract term may be declared unfair and thus null and the trader or traders may be ordered to refrain from using the same contract term in the future.*

they can apply appropriate and effective means to prevent the continued use of such terms.	**<u>administrative bodies,</u>** so that they can apply appropriate and effective means to prevent the continued use of such unfair terms?		These actions are **<u>injunctions</u>** aimed to declare standard contract term unfair, null and void for future purposes. • **<u>AT</u>:** § 29 KSchG states that "(1) An action may be brought by the Austrian Economic Chamber, the Federal Chamber of Labour, the Council of Austrian Chambers of Agricultural Labour, the Presidential Conference of Austrian Chambers of Agriculture, the Austrian Trade Union Federation, the Verein für Konsumenteninformation (Consumer Information Association) and the Austrian Council of Senior Citizens; (2) If the infraction (§§ 28 (1) and 28a (1)) originates in Austria, an action may also be brought by anybody or organisation of another European Union Member State notified in the Official Journal of the European Communities by the Commission pursuant to Article 4 (3) of Directive 98/27/EC on injunctions for the protection of consumers' interests, Official Journal L 166 of 11 June 1998, p. 51, provided that: 1. any interests protected by such bodies are impaired in such Member State, and; 2.the purpose of such body as identified in the notification justifies bringing such action; 3.Proof of such notification shall be	**<u>accepted</u>**. The individual consumers are not parties in the judicial proceedings but are represented by a "group representative": BE[111], FR • In a few MS, **<u>a monetary sanction may be imposed on traders if they do not remove unfair terms from their general terms</u>:** BG, CZ, FR[112], FI, • In a few MS, such right has (only or also) been granted to public consumer protection authorities or public prosecutor: CY, LT, LV, PT, UK **-In many MS, <u>in addition to individual actions, administrative authorities may examine unfair terms of their own motion and may either issue an injunction or file a complaint with the court when it deems a term unfair:</u>** • **<u>BG:</u>** the Consumer Protection Commission (CPC) is granted both powers

[111] BE: This is either (i) a consumer organisation with legal personality which is also represented in the "Raad voor Verbruik"/"Conseil de la Consommation" (an advisory body within the Federal Public Service Economy) or is recognised by the Minister of Economic Affairs, or (ii) an association which has had legal personality for over three years, which has a corporate purpose directly related to collective damages, which does not pursue an economic purpose in a sustainable manner, and which is recognised by the Minister. The Minister has discretionary powers in this regard, as no criteria for recognition are specified in the draft act. In the amicable negotiations stage, the consumers can also be represented by the (future) Federal Ombudsman. If the negotiations fail and no agreement can be reached, a group representative will have to continue the legal proceedings.

[112] In case of a « black » unfair term in contracts, the business shall be amerced to an administrative fine which is imposed by the administrative authority.

			submitted upon bringing an action. • **CZ:** Any person (even the Consumer organization) is entitled to bring an objection or make a motion to competent administrative body (as The Czech Trade Inspection Authority (CTIA) or The Office for the Protection of Competition) which generally dispose of the monitoring or controlling competencies towards the sellers/suppliers/competitors. Consumer organizations are entitled to bring legal action in order to achieve abstention from further unlawful conduct towards the consumer. Within the scope of administrative proceedings, the Act no. 634/1992 Coll., on Consumer Protection admits to consumer organizations the right to make a motion in order to engage in administrative proceedings in accordance with § 42 of Act no. 500/2004 Coll., Administrative Procedure. • **DE:** §§ 1 et seq. Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (UKlaG, Act on Injunctive Relief) provides that the use of terms ineffective within the meaning of §§ 307–309 BGB can lead to **injunctive relief or, in the event the terms are recommended for use in legal relations, revocation.** In so far as the use of unfair terms also represents a breach of fair trading provisions according to the *Gesetz gegen den unlauteren Wettbewerb* (UWG; Act against Unfair Competition), **competitors are entitled to claim damages if the violating**	• **CY:** the Director of the Competition and Consumer Protection Service) is granted both powers • **FR**: the administrative authority tasked with matters relating to competition and consumption (DGCCRF) is granted both powers • **FI**: the Consumer Ombudsman is granted both powers • **HU**: the minister, autonomous administrative agencies, government agencies, the director of the head office; the heads of the Budapest and county government agencies (regardless the associations for the protection of consumers' interests as mentioned before) may bring an action before the judge. • **LT**: public consumer protection authorities are entitled to exercise control over the standard terms in consumer contracts and challenge unfair terms in consumer contracts. • **LV:** the Consumer Rights Protection Centre is entitled to propose that the manufacturer, trader or service provider makes a commitment in writing to rectify the violation within the specified time period; to take a decision, by which the manufacturer, trader or service

			party has acted at least negligently (§ 9 UWG). According to § 10 UWG it is furthermore possible to claim restitution for the profits that a violating party has wilfully achieved by injuring a multitude of consumers. According to § 3 UKlaG claims can be brought by registered qualified entities protecting consumer interests (see especially article 4 Directive 98/27/EC), organisations with legal capacity promoting interests of commercial professions or self-employment as well as the Chamber of Industry and Commerce or the Chambers of Craft. • **ES:** The **actions of cessation aimed at obtaining a decision that requires the defendant to eliminate the standard terms considered to be null and to abstain from using them in the future** (actions provided for in art. 12 GCTA)[100] **may be exercised by the following entities:** ○ **Associations or corporations of entrepreneurs, professionals and farmers that are statutorily mandated to defend the interests of their members** ○ Chambers of commerce, industry and navigation ○ Consumer associations that meet the requirements of RCPA ○ The National Consumer Institute (*Instituto Nacional de Consumo*),	provider is required to cease the violation, and to perform specific activities in order to rectify the impact thereof and which determine the time period for the implementation of such activities; and to publish the decision taken either fully or partially on the home page of the Consumer Rights Protection Centre and in the newspaper Latvijas Vēstnesis [the official Gazette of the Government of Latvia] (the costs associated with the publication shall be covered by the manufacturer, trader or service provider). • **NL**: the Netherlands Authority for Consumers and Markets (ACM) may enforce the compliance by traders of the rules on standard terms used in contracts with consumers by administrative means (regardless the associations for the protection of consumers' interests as mentioned before) • **PL**: The claim can be submitted, municipal consumer's ombudsman and the President of the Office of Competition and Consumer Protection (regardless the associations for the

[100] *ES: the "action of cessation" aims at obtaining a decision that requires the defendant to cease a conduct which is contrary to this law (in this case, the use –or recommendation of use– of unfair terms) and prohibit its future recurrence. In addition, the action shall be used to prohibit a conduct already committed if there are reasonable grounds to fear its immediate repetition.* ***The action of cessation set forth in RCPA apply to consumer contracts only****.*

			entity that promotes the rights of consumers, and the relevant bodies or entities of the Autonomous Communities (*Comunidádes Autónomas*) and local Corporations responsible for consumer protection. ○ Professional associations legally constituted ○ Public Prosecutor's Office ○ Institutions from other Member States of the EU established for the protection of collective interests and diffuse interests of consumers that are enabled by inclusion in the list published for that purpose in the Official Journal of the European Union ○ **Spanish law provides also that public authorities should keep a register of standard contract terms. This is one of the main characteristics of the national system of preventive control of unfair terms**[101]**.** • **HU:** Section 6:105 [Public-interest proceedings in connection with unfair standard contract terms] provides that **(1) As regards contracts which involve a consumer and a business party, an action may be brought for the annulment of an unfair contract**	protection of consumers' interests as mentioned before) • **RO**: a judicial action can be taken in court by the National Authority for Consumer Protection (which is an administrative body)

[101] *ES: The entries made in the register include standard contract terms and the judgments listed in art. 11 GCTA and art. 2 Royal Decree 1828/1999. In particular, can be registered: Standard terms (condiciones generales) in accordance with the provisions of GCTA ; Pre-emptive registration of individual actions of nullity or non-incorporation of standard terms, along with the text of the terms concerned; Pre-emptive registration of collective actions (actions of cessation, actions of retraction and declarative actions), along with the text of the terms concerned; The persistence in the use of standard terms that have been declared null and void by a court.*

			term that has been incorporated into a contract by: a) the public prosecutor; b) the minister, autonomous administrative agencies, government agencies, the director of the head office; c) the heads of the Budapest and county government agencies; **d) economic and trade organizations or interest-representation bodies;** and e) associations for the protection of consumers' interests within the scope of consumer interests they protect, and organizations set up for the protection of consumers' interests under the laws of any Member State of the European Economic Area. The court shall establish the annulment of an unfair contract term in favour of all of the parties with which the party imposing the condition has a contractual relationship, and shall order the party who applied the contract term in question to take measures for having a public notice on declaring the contract term unfair published at his own cost. Moreover, an action may be brought in the public interest to request to have a standard contract term or condition declared unfair, that has been defined for consumer contracts and made available to the general public, regardless of whether the term or condition in question had in fact been applied or not. If the court finds the contested standard contract term unfair, the court ruling may also contain a clause banning the party who made it available to the public from the further use of such.	

			Furthermore, a lawsuit may be brought against any party who publicly recommends the use of any unfair standard contract term or condition that has been defined for consumer contracts and made available to the general public. The court, if it finds the contested standard contract term unfair, shall declare it null and void for future purposes and shall ban any further recommendation for use. • **LU:** There are 2 types of prohibitory injunctions, one being curative and the other curative. **The first type of injunction is intended to obtain the *cancellation of unfair terms contained in the contracts already concluded by consumers*.** It is open not only to consumers themselves but also to anyone interested as well as professional groups. The Minister who holds the consumer protection in its powers, as well as the Commission de Surveillance du Secteur Financier (CSSF) and the Commissariat aux Assurances (Insurance police) are also expressly qualified as holders of this action. **The second type of prohibitory injunctions allows different actors to *act preventively against unfair terms contained in standard contracts offered by professionals to consumers*. This action can be exercised** by consumer protection associations, **by professional groups,** the minister with Consumer Protection in its attributions, the CSSF and the Insurance **policy** (Commissariat aux	

			Assurances). However, it is not opened to consumers taken individually. In practice, such action is usually brought on the initiative of the Luxembourg Consumers Union. • **PT:** An action aimed at obtaining a decision requiring abstention from the use or the recommendation of general contractual terms may be brought by ○ consumer protection associations with the capacity of representation, within the scope set out in the respective legislation (Article 13, nr. 1, lit. *b* Consumer Protection Act and Article 2, I Popular Action Act no. 83/95 of 31st August ; ○ **legally established trade union or professional associations or economic interest associations**, when acting within the scope of their powers; and ○ the Public Prosecutor, officiously, following an indication from the Ombudsman or if it deems the claim of any interested party to be justified. • **SE:** The competence of the Market Court to issue such prohibitions is awarded in Section 3 of the Consumer Contracts Act (SFS 1994:1512) which also **protects competitors**[102]. Under Section 4 of the Consumer Contracts Act a question of issuing a prohibition is addressed by the	

[102] *SE: Consumer Contracts Act (1994:1512) - Section 3: If a contractual term of the character referred to in Section 1 is unconscionable with regard to the price and other circumstances, the Market Court may prohibit the trader from any future use, in similar cases, of the same or essentially the same terms, provided that the prohibition is warranted from the public point of view or if it otherwise would further the interest of **the consumers or competitors**.*

			Market Court after application by the Consumer Ombudsman. However, if the Consumer Ombudsman in a certain case decides to not apply, an application may be made by an **association of traders, consumers or employees**. -**In some MS, claims about unfair terms in contracts can also be brought by competitors. The provisions therefore also protect competitors, so they have a broader scope than the directive:** DE, DK, EE, FR, IE, IT, LU, SI, UK • **DE:** In so far as the use of unfair terms also represents a breach of fair trading provisions according to the *Gesetz gegen den unlauteren Wettbewerb* (UWG; Act against Unfair Competition), competitors are entitled to claim damages if the violating party has acted at least negligently (§ 9 UWG). According to § 10 UWG it is furthermore possible to claim restitution for the profits that a violating party has wilfully achieved by injuring a multitude of consumers. • **DK:** Competitors may rely on the Marketing Act, which provides in Section 1.1: "Traders subject to this Act shall exercise good marketing practice with reference to consumers, other traders and public interests." More specifically, Section 1.2 provides: "Marketing in respect of consumers' economic interests may not be designed to significantly distort their economic behaviour."	

			• **EE:** The requirement that a party supplying an unfair standard term terminates application of the term and that the person recommending application of the term terminates and withdraws such recommendation may be filed, inter alia, by a non-profit association whose objectives as specified in the articles of association thereof include protection of the rights of traders or persons engaged in professional activities and who is actually able to protect these interests resulting from the organisation and financing of the activities thereof (Art. 45 para 2 of the LOA). • **ES:** According to art. 12 GCTA, the "action of cessation" (*acción de cesación*), aimed at obtaining a decision that requires the defendant to eliminate the standard terms considered to be null and to abstain from using them in the future; the "action of retraction" (*acción de retractación*) used to obtain a decision that requires the defendant to retract a recommendation of using terms considered null and to abstain from recommending their use in the future; and the "declarative action" (*acción declarativa*) aimed at obtaining a decision that declares the "standard" character of a specific term in order to make it comply with GCTA. **These actions protect any adhering party (not just consumers) against the inclusion of unfair terms in standard contracts.** • **FR:** case law • **IE:** The primary focus of the protections	

			seems to be consumers, but competitors could in principle become involved as interested parties under Regulation 8(3) of The Regulations which provides that Every person claiming to have an interest in an application under paragraph (1) of this Regulation shall be entitled to appear before and be heard by the Court on the hearing of the application[103]. • **IT:** Art. 37, §§ 1-4 It. and art. 37-*bis* It. Cons. Code provides collective redress actions and administrative remedies. The collective injunction consists in an action addressed to first instance ordinary courts (Tribunals), before the conclusion of an individual contract. The prohibitory injunction can be issued by an ordinary court: a) after a provisional order, provided that the court assesses the *emergency* of the such order according to the general rules of civil procedures (arts. 669-bis ff. Italian Code of Civil Procedure); and b) after a final ruling. In both cases a) and b) the effect of the injunction is to declare the voidness of the terms and to prevent the use of general contractual terms found as unfair after a provisional order or a final ruling. Autorità Garante della Concorrenza e del Mercato ('AGCM') which is an independent administrative authority is enable to assess the unfairness of general contractual terms listed in contract forms. The assessment	

[103] *IE: Regulation 8 (amended in 2013) provides that « 8.(1) An authorised body may apply to the Circuit Court or High Court for a declaration that any term drawn up for general use in contracts concluded by sellers or suppliers is unfair and may, at the discretion of the Court, be granted an order prohibiting the use or continued use of such a term or similar terms of like effect.*

			of unfairness shall be advertised through the AGCM website, as well as through the professional's website, and in any case through any other media considered as adequate in order to inform consumers. In case of non-compliance with AGCM order to advertise the judgement, an administrative fine can be imposed on the professional. Standing for the collective injunction under art. 37 It. Cons. Code is given not only to consumers' associations, but also to the chambers of commerce and to professionals' associations Therefore, these provisions intend to protect competitors. As regards the intervention of AGCM (art. 37-*bis*), standing is given to *any* legal or physical person or association having the interest of denouncing the unfairness of general contractual terms. The AGCM (Autorità Garante della Concorrenza e del Mercato can also investigate on the unfairness of general contractual terms listed on contract forms on its own motion. Therefore, these provisions intend to protect competitors. • **LU:** The first type of injunction allows to establish the unfairness of a clause or a combination of clauses is opened to professional organizations. The second type of prohibitory injunction allows different actors to act preventively against unfair terms contained in standard contracts offered by professionals to consumers. Protection associations and professional groups may exercise this action. **In that view, the provisions might also protect the competitors.**	

			• **SI:** the ZVPot contains special provisions governing means to prevent the continued use of unfair terms: - market inspectorate can issue a decision prohibiting sale of goods or providing services until it stops using unfair terms (Art. 72 of the ZVPot);- action seeking to stop illegal behaviour (Art. 74 of the ZVPot);- temporary injunction (Art. 74a of the ZVPot); - Action seeking to declare certain contracts or contract terms invalid (Art. 76 of the ZVPot);- penalty provisions (Art. 77(1)(7) of the ZVPot);- publication of judgment (Art. 74(2) of the ZVPot). **These provisions protect competitors as well, as also the chamber or association of which the infringing company is a member can file these actions**. • **UK:** Schedule 3 CRA 2015 gives powers to take action before the courts to "regulators", and paragraph 8 of Schedule 3 contains a list of approved regulators. This list can be amended by the Secretary of State, and for non-public bodies, para 8(3) requires that the body "represents the interests of consumers (or consumers of a particular description)". Schedule 3 para 2 only talks about the power to consider complaints about unfair terms, but there is no limitation to consumers making such a complaint, so **it is open to competitors to complain to a regulator about unfair terms.**	

Art. 7. **3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual**	**In domestic law, is it possible to direct the legal remedies referred to above, separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms?**		-Some of the MS where, as explained before, the scope of protection is broader than in the directive because their interest in bringing proceedings is not limited to consumer protection, provide that it is possible to direct the legal remedies referred to above**, separately or jointly against a number of sellers or suppliers from the same economic sector or their associations** which use or recommend the use of the same general contractual terms or similar terms: • **For some MS, regardless the scope, the rule is exactly the same as in the directive:** EE, EL[113], ES, IE, IT, LU, PT • **For a few MS, the scope and the provisions are different from the directive:** AT, CZ, SI, UK ○ **AT**: Austrian Law permits a joint lawsuit if there is, essentially, a common basis. Furthermore, essentially the same factual or	-In several MS, it is possible to direct the legal remedies referred to above, separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms. **Some of them provide the same rule as the directive:** CY, FI, FR, HR, RO, -In a few MS, it is possible to direct the legal remedies referred to above, separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms. **However, the provisions are different from the directive, but the level of protection is almost the same:** NL[115], PL[116], SK[117]

[113] *EL: Article 9i par. 1 of Law 2251/1994: Every consumer or a union of consumers, have the right, in case of violation of stipulations of articles 9c up to 9h, to ask for the judicial termination of every unfair commercial practice and its omission in the future, as well as compensation for the loss they incurred due to the practice. The judicial means of the above subparagraph may be exercised, individually or jointly, against one or more suppliers of the same financial sector or against the owner of code, if the latter promotes a code that encourages non-compliance with the stipulations of this law.*

[115] *NL: Article 6:240 BW: 3. The action may be instituted by legal persons with full legal capacity whose purpose it is to protect the interests of persons who conduct a profession or business or of end-users of goods or services not destined for a profession or business. The action can only pertain to general terms and conditions which are used or are intended to be used in contracts with persons whose interests are protected by the legal person.*

[116] *PL: It is possible according to the Class Action Bill from 2009 (USTAWA z dnia 17 grudnia 2009 r.o dochodzeniu roszczeń w postępowaniu grupowym (Dz. U. z dnia 18 stycznia 2010 r.)*

[117] *SK: Slovak legal order doesn´t contain the regulation of typical class action. It is possible to direct the legal remedies referred to above, separately against a number of sellers or suppliers from the same economic sector which use or recommend the use of the same standard contract terms or similar terms. In the theoretical way, it is possible to direct the legal remedies referred to above, also jointly against a number of sellers or suppliers from the same economic sector or which use or recommend the use of the same standard contract terms or similar terms, if their acting has the same ground, caused damage or harm to the same group of consumers or the sellers are cooperating to harm the rights of the consumers.*

terms or similar terms.			legal questions must be addressed and all claims must be ceded to the claimant (cf OGH 4 OB 116/05w) ○ **CZ**: The plaintiff must, however, always indicate all of them in the action. Effects of the judgment do not automatically apply to all sellers, if they were not parties to the proceedings. ○ **SI**: Legal remedies against a number of sellers and suppliers are possible only indirectly – through the joinder of parties (Art. 191 of the Civil Procedure Act). Another possibility is the consolidation of actions under Art. 300 of the Civil Procedure Act[114] ○ **UK**: A court issuing an injunction (or interdict) can grant this on "such conditions, and against such of the respondents, as it thinks appropriate".	- However, in some MS**, it is not possible** to direct the legal remedies referred to above, either separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms: BE, BG, DK, HU, LT, LV, MT -In one MS, domestic law generally **does not provide for joint legal actions against multiple companies or organisations:** DE • **DE: There is only the possibility of (passive) joinder of parties in order to jointly involve several persons on the defendant's side of a claim.** This requires said persons to form a legal community with regard to the matter in dispute or to be entitled or obligated according to the same actual and legal ground. The obligations have to

[114] *SI: Article 191 of the Civil Procedure Act: Several person may sue or be sued by the same action (co-litigants): 1. if in respect of the cause of action they form a legal community; or if their rights or obligations are based upon the same factual and legal ground; or if they are joint and several debtors or creditors; 2. if the disputed claims or obligations are of the same type and based upon similar factual and legal ground and if the same court has the subject-matter and territorial jurisdiction over each of the claims and each of the defendants; 3. if so is stipulated by another Act. Until the completion of the main hearing and subject to conditions provided in the first paragraph of the present Article, the plaintiff may be joined by another plaintiff, or the action may be extended to comprise another defendant, subject to consent of the latter. The person joining the action and the person on whom the action is extended shall take over the litigation in the state as existing upon their joinder. Article 300 of the Civil Procedure Act: In the event that several cases are litigated between the same persons in the same court, or if several cases in which the same person is the opponent of several plaintiffs or several defendants are heard by the same court, the panel may decree that such cases be jointly heard if this is convenient to speed up the proceedings or to reduce the costs. A joint judgment shall be passed on several disputes which are being jointly heard. The panel may issue a decree on joint hearing of several cases also when some of the cases should have been heard by a single judge of the same court. The panel may also decree for the severance of the action consisting of several claims and may render separate decisions on particular claims after hearing them separately from each other.*

				be congenial and based on a fundamentally similar actual and legal ground. Lastly, the trial court has to have jurisdiction in regard to all claims (see §§ 59, 60, 260 *Zivilprozessordnung* with analogous application [ZPO, Code of Civil Procedure]). These requirements are regularly not met.

Q 6 - Annex- terms referred to in article 3 §3 1 - Indicative list of unfair terms				
Provision in the directive n° 93/13 Consumer protection in the directive	**Questions**	**Higher level for the consumer in the mandatory domestic laws than in the directive**	**Broader scope than in the directive**	**Same level of protection in the directive as in domestic law**
Art. 3. 3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair	Does domestic law contain a **black list of unfair terms**, that is to say a list of terms that are always unfair? Does domestic law contain a **grey list of unfair terms**, that is to say a list of terms that are presumed to be unfair? Does domestic law contain an	-Some MS provide **two lists of unfair terms: one being black** (terms that are always unfair) **and the other grey** (of terms that are presumed to be unfair): FR, HU, IT, NL, SK, PT, MT[118]: • These lists apply in		**-A few MS provide an indicative list of unfair terms which is non exhaustive:** CY, IE, RO **-In one MS, there is no list.** However, similar effect of an indicative list is achieved by mandatory

[118] *MT: There is a list of unfair terms provisions. One can describe the list as a grey list though the law never uses such a term.*

	indicative list of unfair terms?	B2C contracts: ES, FR, HU, IT, NL, SK • In one MS, these lists apply in B2C contracts and in B2B contracts: PT[119] **-One MS provides two lists of unfair terms: one being black** (terms that are always unfair) **and the other grey of clauses whose effectiveness depends on an evaluation** (therefore it is slightly different from a presumption): DE -One MS provides **an indicative list** of terms and, in addition, some terms which are singled out as always being unfair: UK **-**In one MS, **a black list** can be found **and, in addition, a list of terms are considered unfair, unless the trader can prove they have been**		provisions in domestic laws: DK[123] **-In a few MS there is no list but the Annex is referred to in case law:** SE[124]

[119] *PT: The General Contract Terms Act specifies a certain number of the prohibited clauses concerning B2B (or similar entities) contracts (articles 17 to 19) as well as B2C contracts (articles 17 to 22). In both cases, there are two kind of prohibited clauses: "clauses that are strictly prohibited" and "clauses which are prohibited in certain circumstances". The former can be assimilated or considered as to a "black list", while the second to a "grey list".*

		<u>individually negotiated</u>: AT[120] -Several MS provide **<u>only a black list of terms that are always unfair</u>** (In these MS an indicative list does not exist, neither a grey list): BE, BG[121], CZ, EE, EL, ES, LU, LV • In one MS, B2C contracts are related to the black list whereas B2B contracts are related to the grey list: EE -A few MS provide **<u>only a grey list of terms that are presumed to be unfair</u>** (In these MS an indicative list does not exist neither a black list): HR, LT, PL, SI -In one MS, there is **<u>no list. However, similar</u>**		

[123] DK: Section 36.1 of the Act provides "An agreement may be amended or overridden in whole or in part, if it would be unreasonable or in breach of fair trade way to render it applicable. The same applies to other legal acts." Section 38c.1 provides "Section 36.1 applies to consumer contracts. If it would be contrary to honest business practices and lead to a significant imbalance in the parties ' rights and obligations, to the detriment of the consumer to make a contract terms apply, they apply in section 36, paragraph 1, referred to also as the effects of the consumer in this case, however, may require that the remainder of the agreement is to apply without changes, if this is possible."

[124] SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].

[120] AT: § 6 (2) KSchG contains a list of terms that are considered unfair, unless the trader can prove they have been individually negotiated. It is not considered as a grey list.

[121] BG: some lawyers interpret Art. 143 in a different manner, as an indicative list because the list in Art. 143 of the Consumer Protection Act is not explicitly defined by the law as a black list, neither a grey list. The terms contained therein will normally be considered as unfair, but the law does not define them as "always" or as "presumed to be" unfair.

		effect of a black list is achieved by mandatory provisions: FI[122]		
Unfair terms of the Annex above mentioned				
(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;	Does domestic law consider as unfair a term that has the object or the effect to ***"exclude or limit the legal liability of a seller or supplier in the event of the death of a consumer or personal injury*** *to the latter resulting from an act or omission of that seller or supplier"* "(see Annex a)? Does this term fall under a black list, a grey list, an indicative or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, BE, BG, CZ, DE, EE[125], EL, ES, FR[126], IT, LU, LV, NL, PT, SK, UK **-Similar clause is included in the domestic grey list**: HR, LT, SI -**Similar clause would be considered as ineffective under a mandatory provision:** FI[127], HU[128], PL[129]		-**Similar clause is included in the indicative list:** CY, IE, RO -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[130]

[122] FI: parliamentary acts do not contain a black list, grey list or an indicative list of unfair terms. The Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts was implemented into Finnish law in a manner of including the contract terms in the Annex of the directive in the text of government (bill 218/1994) p. 10-14. The contract terms of the Annex were in 1994 presumed, under Finnish case law or mandatory legislation, to be unfair also according to Finnish law. See the government bill 218/1994, p. 9

[125] EE: It is black in consumer contracts and grey in business contracts.

[126] FR: There is no similar clause in the French list. But the case-law could considerer it as unfair according to article R. 132-1, 6° whereby are prohibited "the clauses with the aim, or effect to: Inappropriately excluding or limiting the legal rights of the non-business or the consumer in the event of non-performance of any of the contractual obligations". This French black term is broader as it extends to damages caused by a third person acting on behalf of the trader.

[127]FI: Courts are highly likely to consider such terms unfair. In addition, in general, the mandatory provisions of CPA (Chapters 5, 8 and 9) affect the assessment of the binding nature of disclaimers and terms that limit the liability of a seller. The government bill on the adjustment of unreasonable contract terms (247/1981) states that disclaimers and terms limiting the liability of a seller are seen as typical examples of unfair terms.

[128] HU: It is neither on the black, nor on the grey list. However the law provides that any contract term limiting or excluding liability for premeditated non-performance of an obligation resulting in loss of life, or harm to physical integrity or health shall be void.
See: Civil Code art 6:152

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;	Does domestic law consider as unfair a term that has the object or the effect to "***inappropriately exclude or limit the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance*** *by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against*	**-Similar clause is included in the domestic black list**: AT, BE, BG, DE[131], EE[132], EL, ES, FR, LU, LV, NL[133], PT, SK **-Similar clause is included in the domestic grey list**: HR, HU[134], IT, LT, PL, SI -**Similar clause would be considered as ineffective under a mandatory provision:** FI[135]		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: **SE**[136] **Similar clause would fall under the general**

[129] *PL: According to art.385[3] 1) CC in case of doubt, unlawful contractual provisions are those which especially: 1) exclude or limit liability towards the consumer for personal injury. Formally this provision fall under a grey list, but - although Polish law does not contain express provision – it is commonly adopted in judiciary and doctrine that liability for death or personal injury can never be excluded. So practically this provision is a black one and is invalid because it is at least contrary to the principles of community life.*

[130] *SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].*

[131] *DE: Concerning this term, German law applies only to claims that are uncontested or are final.*

[132] *EE: It is black in consumer contracts and grey in business contracts.*

[133] *NL: These may be qualified as terms which fall under the blacklist of Article 6:236 under a-c BW (a) totally and unconditionally excludes that other party's right to claim the performance by the user of the promised performance ; (c) limits or excludes the right which, pursuant to the law, the other party has to suspend performance or which gives the user a more extensive power of suspension than that to which he is entitled to pursuant to the law;) or under the grey list of Article 6:237 under g and h BW (g) excludes or limits a right of set-off of the other party under the law, or confers on the user a more extensive right to set-off than he has under the law;*
(h) provides for the forfeiture of rights of the other party or of his entitlement to raise certain defences as a sanction for certain conduct of the other party, including omissions, save to the extent that this conduct justifies the forfeiture of those rights or defences).

[134] *HU: the Hungarian law provides that in contracts which involve a consumer and a business party a contract term shall, in particular, be considered unfair if its object or effect is to exclude or limit the right to offset claims that the consumer may have against the business party against what the consumer may owe to the business party;*

[135] *FI: Courts are highly likely to consider such terms unfair. In addition, in general, the mandatory provisions of CPA (Chapters 5, 8 and 9) which apply to the consequences of the breach of contract.*

[136] *SE: In the preparatory works the legislator makes note of the fact that such terms often will conflict with the mandatory provisions of consumer legislation and that, even if they do not, they will in principle be considered unfair if they indeed amount to an "inappropriate" delimitation of rights. See prop. 1994/95:17 p. 95.*

	him » (Annex b)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?			**prohibition of unfair term if the judge will consider it: CZ**
c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;	Does domestic law consider as unfair a term that has the object or the effect to make ***« an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone »*** (Annex c)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: BE, BG, CZ, EE[137], EL, ES, HU[138], IT[139], LV, NL, SK **-Similar clause is included in the domestic grey list**: DE[140], HR, LT, PL **-Similar clause would be considered as ineffective under a mandatory provision:** FI[141]	**-Similar clause is prohibited by a mandatory provision, applicable to contract in general:** AT, FI[142], FR[143], LU[144], RO[145]	-**Similar clause is included in the indicative list:** CY, IE, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[146] **Similar clause would fall under the general**

[137] *EE: It is black in consumer contracts and grey in business contracts.*
[138] *HU: Black list provides that the consumer is bound by the contract when the business party is not whereas the grey list provides the clause that allows a business party to be bound by commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the business party, except if the consumer is free to withdraw from or to terminate the contract*
[139] *IT: Art. 33, § 2, let. d) It. Cons. Code includes this term under the grey list. This provision is completed by Art. 33, § 2, let. which considers as unfair a term that submits the assignment of a right or the assumption of an obligation to a condition precedent dependent on the mere will of the professional, as against an immediately effective obligation binding the consumer. Such a condition precedent may be referred to the contract as a whole. In such a case, under general contract law (art. 1355 of the Italian civil code) the entire contract shall be void.*
[140] *DE: § 308 No. 3 BGB considers "the agreement of a right of the user to free himself from his obligation to perform without any objectively justified reason indicated in the contract" as ineffective term. However, "this does not apply to continuing obligations."*
[141] *FI: See text of government (bill 218/1994) p. 10-14. Furthermore courts are likely to consider and have considered such terms unfair.*
[142] *FI: See text of government (bill 218/1994) p. 10-14. Furthermore courts are likely to consider and have considered such terms unfair.*
[143] *FR: Similar clause is included in the French grey list. It is also regarded as a purely discretionary condition which is invalid under article 1174 of the Civil code (general contract law) so it could be considered as a clause included in a black list (See also LU and RO)*
[144] *LU: Similar clause is, as in France, regarded as a purely discretionary condition which is invalid under article 1174 of the Civil code (general contract law) so it could be considered as a clause included in a black list (See also FR and RO).*

				prohibition of unfair term if the judge will consider it: SI **No comparable clause in the domestic list:** PT
(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;	Does domestic law consider as unfair a term that has the object or the effect to permit "***the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount*** *from the seller or supplier where the latter is the party cancelling the contract*" (Annex d)? Does this term fall under a black list, a grey list, an indicative list, or is	**-Similar clause is included in the domestic black list**: AT[147], BE, BG, CZ, DE[148], EL, ES, LV, SK **-Similar clause is included in the domestic grey list**: FR, HR, HU[149], IT[150], LT, NL, PL -**Similar clause would be considered as ineffective under a mandatory provision:** FI[151]		-**Similar clause is included in the indicative list:** CY, IE, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[152] **-Similar clause would fall under the general prohibition of unfair**

[145] *RO: In accordance with Art. 1403 of the Romanian Civil Code, "the contractual duty subject to a condition whose realization depends on the debtor's own will alone has no binding effect." This is not a provision applying to B2C contracts only, but a general provision applicable to contracts in general. See also FR and LU.*
[146] *SE: In the preparatory works the legislator notes that such terms often will be unfair. See prop. 1994/95:17 p. 95 cf. prop. 1975/76:81 p. 118. For an example see Market Court decision MD 1978:1.*
[147] *AT: This term is presumed to be unfair unless the trader can prove that it has been individually negotiated. The aim is to establish equal treatment between the parties. Even when individually negotiated, the sum paid by the consumer that can be retained may still be moderated;*
[148] *DE: under German law, such term may be considered unfair whereas the scope of the corresponding provision is slightly different. According to § 308 No. 7 BGB "a provision by which the user, to provide for the event that a party to the contract revokes the contract or gives notice of termination of the contract, may demand a) unreasonably high remuneration for enjoyment or use of a thing or a right or for performance rendered, or b) unreasonably high reimbursement of expenses" is ineffective.*
[149] *HU: the Hungarian law does not include the conclusion of the contract.*
[150] *IT: the consumer's right consists in demanding from the professional twice the amount of the sum paid where the professional is in breach of his/her obligations.*
[151] *FI: See text of government (bill 218/1994) p. 10-14. Furthermore courts are likely to consider and have considered such terms unfair.*
[152] *SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].*

	it the case-law that has considered it as unfair?			**<u>term if the judge will consider it:</u>** EE, SI **<u>-No comparable clause in the domestic law</u>:** PT
(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;	Does domestic law consider as unfair a term that has the object or the effect to require « ***<u>any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation</u>***;» (Annex e)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**<u>-Similar clause is included in the domestic black list</u>**: BE, BG, DE[153], EE[154], EL, ES, LV, SK **<u>-Similar clause is included in the domestic grey list</u>**: FR[155], HR, HU, IT, LT, PL, PT, SI -**<u>Similar clause would be considered as ineffective under a mandatory provision</u>:** FI[156]		-**<u>Similar clause is included in the indicative list</u>:** CY, IE, RO, UK[157] -**<u>Similar effect as such of the indicative clause is achieved by a mandatory provision</u>**: AT[158], DK, MT, LU[159] **<u>-Similar effect as such of the indicative clause is achieved by case law</u>**: SE[160]

[153] *DE: Similar cause exists. However German law lists certain breaches of the contract which are interdicted irrespective of the extent of the contractual penalty. These conditions are not mentioned in the annex of the directive.*
[154] *EE: It is black in consumer contracts and grey in business contracts.*
[155] *FR: Similar clause is included in the grey list. Therefore, penalty clauses remain governed by the general rules applicable to such terms, namely the Article 1152 of the Civil code, which provides: «Where an agreement provides that he who fails to perform it will pay a certain sum as damages, the other party may not be awarded a greater or lesser sum. Nevertheless, the judge may moderate or increase the agreed penalty, where it is obviously excessive or ridiculously low. Any stipulation to the contrary shall be deemed unwritten".*
[156] *FI: Such terms would be considered void according to the mandatory provisions of CPA (Chapters 5, 8 and 9) which apply to the consequences of the breach of contract.*
[157] *UK: There are also common law controls over penalty clauses which render these void, but the UK Supreme Court has a case before it which will reconsider this aspect of the law. Its ruling is not expected until later in 2015.*
[158] *AT: Such a penalty for non-performance (liquidated damages) would not always be considered as unfair. Unfairness) would however assumed, when the term would pose an excessive burden on the consumer causing an obviously unjustified property gain for the trader (cf Größ in Kletečka/Schauer, ABGB-ON[1.02] § 1336 mn. 15; OGH 4 Ob 229/13z). Furthermore, the law itself provides that the sum that is due because of such and comparable terms may be moderated by a judge (§ 1336 (2) ABGB). An additional restriction is found in § 1336 (3) ABGB: If the trader suffered damage because of the consumer's actions exceeding that penalty, he may only claim those exceeding damages if this has been individually negotiated. Since unfairness is just an implied danger but not automatically presumed, I would evaluate this category as treated similar to one being on an indicative list.*
[159] *LU: As in France, penalty clauses remain governed by the general rules applicable to such terms, namely the Article 1152 of the Civil code, which provides: «Where an agreement provides that he who fails to perform it will pay a certain sum as damages, the other party may not be awarded a greater or lesser sum. Nevertheless, the judge may moderate or increase the agreed penalty, where it is obviously excessive or ridiculously low. Any stipulation to the contrary shall be deemed unwritten". Hence, such a clause is applicable even in*

				Similar clause would fall under the general prohibition of unfair term if the judge will consider it: CZ, NL
(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;	Does domestic law consider as unfair a term that has the object or the effect to authorize « ***the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer****, or permit the seller or supplier to* ***retain the sums paid*** *for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract*;» (Annex f)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, BE, BG, EE[161], EL, ES, FR, HU, LV, SK **-The first part of the annex f) is included in the domestic black list:** CZ **-Similar clause is included in the domestic grey list**: DE, HR, IT, LT, NL[162], PL, PT[163], SI -**Similar clause would be considered as ineffective under a**		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[165] **The second part of the clause would fall under the general prohibition of unfair term if the judge will consider it:**

a contract concluded with a consumer, but the judge may change the amount of the penalty, if it is grossly excessive or derisory. Case law, however, applies sanctions on unfair terms in a specific case.

[160] SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].

[161] EE: It is black in consumer contracts and grey in business contracts.

[162] NL: Some of these terms will qualify as terms referred to in Article 6:237 under d and iBW and are thus grey-listed: (d) releases the user from his obligation under the contract, or gives him the right to release himself on grounds other than those mentioned in the contract, of such a nature that he cannot be required to remain bound; (i) obliges the other party to pay a sum of money in the event that the contract is terminated for a reason other than the fact that he has failed in the performance of his obligation, save to the extent that it concerns reasonable compensation for loss incurred by the user or for profit of which he has been deprived. Other terms only fall under the general clause of Article 6:233 under a BW.

[163] PT: The first term may be considered included in the national grey list. Pursuant to Article 22, nr. 1, lit. b, general contractual terms that authorise the party proposing the contract to freely cancel the contract, without adequate notice, or to terminate it without any legal or agreed basis is prohibited in certain circumstances.

		mandatory provision: FI[164]		CZ, LU
(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;	Does domestic law consider as unfair a term that has the object or the effect to enable « ***the seller or supplier to terminate a contract of indeterminate duration without reasonable notice*** *except where there are serious grounds for doing so*» (Annex g)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT[166], BE, BG, CZ, EL, ES, FR, LV, SK **-Similar clause is included in the domestic grey list**: DE[167], FR[168], HR, IT[169], LT, NL, PL, PT, SI -**Similar clause would be considered as ineffective under a mandatory provision:** FI[170]		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT, EE[171], SE[172] **-Similar clause would fall under the general prohibition of unfair term if the judge will consider it:** HU, LU

[165] SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].

[164] FI: As a general rule of Finnish contract law, after the unwinding of contract each party is entitled to claim restitution from the other party of whatever the latter party has received insofar as contract has been performed. However, there are some exceptions of the rule under special legislation.

[166] AT: This term is presumed to be unfair unless the trader can prove that it has been individually negotiated.

[167] DE: According to Therefore § 308 No. 6 BGB "a provision providing that a declaration by the user that is of special importance is deemed to have been received by the other party to the contract" is ineffective. § 308 No. 6 BGB differs from annex g insofar as it refers to a fictitious receipt whereas the Directive 93/13/EEC relates to the period of notice. Therefore § 308 No. 6 BGB provides a specification of unfair terms in the meaning of article 3 Directive 93/13/EEC.

[168] FR: The corresponding clause does not mention the exception of the serious grounds.

[169] IT: Nevertheless, in financial contracts of indeterminate duration this provision is without hindrance to terms under which the professional reserves: a) the right to withdraw without notice and for cause from the contract; and b) the right to alter unilaterally the conditions of the contract, provided that the professional is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract:

[170] FI: See text of government (bill 218/1994) p. 10-14. Furthermore courts are likely to consider such terms unfair depending on details.

[171] EE: Tenants are protected against the termination of the lease contract without serious ground under the regulation of the contractual use of dwellings (Art. 275 of the LOA).

[172] SE: In the preparatory works the legislator notes that such terms "as a rule" will be unfair under Swedish law.

(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;	Does domestic law consider as unfair a term that has the object or the effect to automatically extend « *a contract of fixed duration where the consumer does not indicate otherwise,* ***when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early***;» (Annex h)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, BE, BG, DE, EE[173], ES, LV, NL, SK **-Similar clause is included in the domestic grey list**: HR, HU, IT, LT, NL, PL, PT, SI -**Similar clause would be considered as ineffective under a mandatory provision:** FI[174]		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[175] **Similar clause would fall under the general prohibition of unfair term if the judge will consider it:** CZ, LU **No comparable clause in the domestic law:** EL, FR

[173] *EE: It is black in consumer contracts and grey in business contracts.*
[174] *FI: See text of government (bill 218/1994) p. 10-14. Furthermore courts are likely to consider such terms unfair.*
[175] *SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].*

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;	Does domestic law consider as unfair a term that has the object or the effect to irrevocably **bind « *the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract*;»** (Annex i)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: BE, BG, CZ, EL[176], ES, FR, IT, LU, LV, PT[177], SK **-Similar clause is included in the domestic grey list**: HR, LT, PL -**Similar clause would be considered as ineffective under a mandatory provision:** FI[178] **-Similar clause is not as such prohibited. Mandatory provision considers that the term will not become part of the contract:** AT, DE, EE **-Similar clause is both an unfair clause and prohibited by a mandatory provision**		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[180] **-Similar clause would fall under the general prohibition of unfair term if the judge will consider it:** HU, NL, SI

[176] EL: Similar is case "x" of article 2 par.7 of Law 2251/1994: "x. attest that the consumer is aware of certain terms in the contract or of the condition of the items supplied or of the quality of services, when actually he is not."(black list). By analogy, applicable could be article 2 par.1 of Law 2251/1994,which provides that: "Terms that have been set forth in advance for future contracts (general terms for transactions) are not binding to the consumer if, upon compilation of the contract, the consumer was innocently unaware of them as, and most particularly, in cases when the supplier does not indicate the existence of these terms or deprives the consumer of the possibility to acquire knowledge of their content."

[177] PT: According to the black list, shall be considered to be excluded from individual contracts: (a) terms which have not been subject of communication under the terms of Article 5 (:according to which, adhering parties who merely subscribe to or accept general contractual terms must have these communicated to them in their entirety; communication must be in an adequate manner and at such an early stage that, taking into consideration the importance of the contract and the length and complexity of the terms, it is possible for a person with ordinary knowledge of them); (b) terms which have been communicated although its duty to inform has been violated, so that its effective knowledge cannot be expected. According to the grey list a general contractual term that establishes a presumption of receipt, of acceptance or other expressions of willingness on the basis of insufficient facts, is prohibited in certain circumstances.

[178] FI: The Supreme Court has considered such a term unfair: KKO 1993:45.

		which considers that the term will not become part of the contract: EL[179]		
(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;	Does domestic law consider as unfair a term that has the object or the effect to **enable *« the seller or supplier to alter the terms of the contract unilaterally without a valid reason*** *which is specified in the contract;»* (Annex j)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair? Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the	**-Similar clause is included in the domestic black list**: AT, BE, BG, CZ, EE[181], EL, ES, FR[182], LU, LV, SK **-Similar clause is included in the domestic grey list**: HR, HU[183], IT[184], LT, PL, PT, SI -**Similar clause would be considered as ineffective under a mandatory provision:** DE, FI[185]		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT, SE[186] **Similar clause would fall under the general prohibition of unfair term if the judge will consider it:** NL

[180] SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].

[179] EL: Similar is case "x" of article 2 par.7 of Law 2251/1994: "x. attest that the consumer is aware of certain terms in the contract or of the condition of the items supplied or of the quality of services, when actually he is not."(black list). By analogy, applicable could be article 2 par.1 of Law 2251/1994, which provides that: "Terms that have been set forth in advance for future contracts (general terms for transactions) are not binding to the consumer if, upon compilation of the contract, the consumer was innocently unaware of them as, and most particularly, in cases when the supplier does not indicate the existence of these terms or deprives the consumer of the possibility to acquire knowledge of their content."

[181] EE: It is black in consumer contracts and grey in business contracts.

[182] FR: This term falls under a black list if the terms are related to the "duration, the characteristics of the product or service to be provided and the price agreed" and under a grey list if the terms are related to other facts

[183] HU: the grey list considers as unfair the term which entitle the business party to withdraw from or terminate the contract on a discretionary basis without giving the same right to the consumer.

[184] IT: Nevertheless, in financial contracts of indeterminate duration this provision is without hindrance to terms under which the professional reserves: a) the right to withdraw without notice and for cause from the contract; and b) the right to alter unilaterally the conditions of the contract, provided that the professional is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

[185] FI: Finnish law considers such a term unfair and contrary to the general principles of Finnish contract law. Such terms would often be considered void.

[186] SE: In the preparatory works the legislator notes that such terms often will be unfair and that this corresponds to a general principle of Swedish contract law. See prop. 1994/95:17 p. 96 f. cf. prop. 1975/76:81 p. 139; SOU 1974:83 p. 149 f.

	right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.)			
(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;	Does domestic law consider as unfair a term that has the object or the effect to **enable « *the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided*;»** (Annex k)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT[187], BE, BG, DE, EE[188], EL, ES[189], FR[190], LU[191], LV, SK **-Similar clause is included in the domestic grey list**: DE[192], HR, HU, IT[193], LT, NL, PL, PT, SI -**Similar clause would be considered as ineffective under a mandatory provision:** FI[194]		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[195] **Similar clause would fall under the general**

[187] *AT: This term is presumed to be unfair unless the trader can prove that it has been individually negotiated.*
[188] *EE: It is black in consumer contracts and grey in business contracts.*
[189] *ES: Spanish law has a broader scope since according to art. 85.3 RPCA, "terms that provide the entrepreneur with the power to unilaterally amend the contract" are unfair.*
[190] *FR: It may, however, be stipulated that the business may make modifications relating to technical changes, provided that there is no resultant price increase nor alteration in quality and that the clause reserves the right of the non-business or consumer to mention the characteristics to which his undertaking is subject.*
[191] *LU: it seems very close to the unfair term set by Article L. 211-3 of the Consumer code:"7.The clauses providing that goods must not match their descriptive elements essential for consumer or to the sample or to the purpose specified by the customer and accepted by the trader or, failing this specification, to normal use."*
[192] *DE: German law extends beyond the provision of annex k as it also includes secondary obligations.*
[193] *IT: It. Cons. Code includes this term under the grey list. In derogation of this provision, if the object of the contract is the supply of financial services, and provided that there is a valid reason, the professional may, without notice, alter the rate of interest or the amount of any other charge relating to the financial service originally agreed. The professional is required to inform the consumer immediately, and the consumer is entitled to withdraw from the contract.*
[194] *FI: See text of government (bill 218/1994) p. 10-14. Furthermore courts will highly consider the term unfair.*
[195] *SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].*

				prohibition of unfair term if the judge will consider it: CZ
(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;	Does domestic law consider as unfair a term that has the object or the effect to provide « *for* ***the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract*** *if the final price is too high in relation to the price agreed when the contract was concluded;»* (Annex l)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, BE, BG, CZ, DE[196], EE[197], EL, ES, FR, LV, NL, SK **-Similar clause is included in the domestic grey list**: HR, HU, IT, LT, PL, PT, SI -**Similar clause would be considered as ineffective under a mandatory provision:** FI[198]		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[199] **Similar clause would fall under the general prohibition of unfair term if the judge will consider it:** LU

[196] *DE: § 309 No. 1 BGB extends beyond the provision of annex l as it interdicts a price increase within four months of the entering into the contract. However, § 309 No. 1 BGB does not include continuing obligations. If the parties agree on delivery after four months or on continuing obligations (§ 309 No. 1 BGB is not applicable) the term can still be ineffective according to the general clause in § 307 (1) BGB.*

[197] *EE: It is black in consumer contracts and grey in business contracts.*

[198] *FI: See text of government (bill 218/1994) p. 10-14. Furthermore courts will highly consider the term unfair.*

[199] *SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].*

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;	Does domestic law consider as unfair a term that has the object or the effect to **give** ***« the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract,*** *or giving him the* ***exclusive right to interpret any term of the contract****;»* (Annex m)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, BE, BG, EE[200], EL, ES, FR, HU, LU, LV, NL, PT, SK **-Similar clause is included in the domestic grey list**: HR, IT, LT, PL, SI -**Similar clause would be considered as ineffective under a mandatory provision:** FI[201]		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[202] **Similar clause would fall under the general prohibition of unfair term if the judge will consider it:** CZ, DE

[200] *EE: It is black in consumer contracts and grey in business contracts.*
[201] *FI: See text of government (bill 218/1994) p. 10-14. Furthermore courts will have and have considered such terms unfair.*
[202] *SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].*

(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;	Does domestic law consider as unfair a term that has the object or the effect to **limit *« the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;»*** (Annex n)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, BE, BG, EE[203], EL, ES, FR[204], HU, LU, LV, PT[205], SK **-Similar clause is included in the domestic grey list: HR, IT, LT, PL, SI** -**Similar clause would be considered as ineffective under a mandatory provision:** FI[206], NL[207]		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT, SE[208] **Similar clause would fall under the general prohibition of unfair term if the judge will consider it:** CZ, DE

[203] *EE: It is black in consumer contracts and grey in business contracts.*
[204] *FR: The corresponding clause does not mention the term that has the object or the effect « making his commitments subject to compliance with a particular formality;».*
[205] *PT: A term that has the object or the effect to limit « the seller's or supplier's obligation to respect commitments undertaken by his agents may be considered as covered by Article 21, lit. a General Contract Terms Act, according to which clauses that limit or in any way alter the obligations assumed under the contract so as directly to benefit the party proposing the contract or their representative are strictly prohibited (black list). A term that has the object or the effect to make seller's or supplier's commitments subject to compliance with a particular formality" may be considered as covered by Article 22, nr. 1, lit. o General Contract Terms Act, according to which clauses that impose formalities for acts not required by law during the duration of the contract or require the parties to carry out superfluous acts in order to exercise their contractual rights are prohibited in certain circumstances (grey list).*
[206] *FI: See text of government (bill 218/1994) p. 10-14.*
[207] *NL: Dutch law does not explicitly forbid such terms, but provides that the trader cannot invoke the term against a consumer, Article 6:238(1) BW.*
[208] *SE: In the preparatory works the legislator notes that such terms often will conflict with the duty of the trader to respect the commitments of his agents vis-à-vis the consumer, a duty which, it is said, to some extent exists outside of the area of application of the statutory provisions providing it.*

(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;	Does domestic law consider as unfair a term that has the object or the effect to **oblige** ***« the consumer to fulfil all his obligations where the seller or supplier does not perform his;»*** (Annex o)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: BE, BG, CZ[209], DE, EE[210], EL, ES, FR[211], HU, LU[212], LV, NL, PT, SK **-Similar clause is included in the domestic grey list**: **HR,** IT, LT, PL, SI -**Similar clause would be considered as ineffective under a mandatory provision:** AT, FI[213]		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[214]
(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the	Does domestic law consider as unfair a term that has the object or the effect to **give** ***« the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may***	**-Similar clause is included in the domestic black list**: AT[215], BE, BG, DE, EE[216], EL, ES, HU, LU, LV, NL, SK **-Similar clause is**		-**Similar clause is included in the indicative list:** CY, IE, RO, UK -**Similar effect as such of the indicative clause is achieved by a mandatory**

[209] CZ: Such term is not regulated explicitly but is covered by the Section 1814 which lays the black list.
[210] EE: It is black in consumer contracts and grey in business contracts.
[211] FR: The corresponding clause considers as unfair a term that has the object or the effect to oblige « the consumer to fulfil all his obligations where the business does not perform his obligations related to the deliver or the guarantees of the goods or to the supply of the service".
[212] LU: Such a clause is not included on the black list of unfair terms of Article L. 211-3 of the Consumer code. It could be regarded as unfair under the article L 211-3 of the Consumer code which considers unfair: "3. The clauses prohibiting the consumer from suspending whole or part of the payment of amounts due if the professional is not fulfilling its obligations".
[213] FI: Such terms would under most circumstances run counter to the mandatory provisions of CPA Chapters 5, 8 and 9, which apply to the consequences of the breach of contract. Consequently, they would be ineffective.
[214] SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].

[215] AT: This term is presumed to be unfair unless the trader can prove that it has been individually negotiated.
[216] EE: The Estonian law is more general, providing that the term is unfair if the transfer of rights may serve to reduce the likelihood of the contract being performed. It is black in consumer contracts and grey in business contracts.

consumer, without the latter's agreement;	***serve to reduce the guarantees for the consumer**, without the latter's agreement;»* (Annex p)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**included in the domestic grey list**: FR, HR, IT, LT, PL, SI[217] -**Similar clause would be considered as ineffective under a mandatory provision:** FI[218], PT[219]		**provision**: DK, MT **-Similar effect as such of the indicative clause is achieved by case law**: SE[220] **Similar clause would fall under the general prohibition of unfair term if the judge will consider it:** CZ
(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,	Does domestic law consider as unfair a term that has the object or the effect to **exclude or hinder « *the consumer's right to take legal action* *or exercise any other legal remedy,*** *particularly by requiring the consumer to take*	**-Similar clause is included in the domestic black list**: AT[221], BE, BG, CZ, DE, EE[222], EL, ES, HU, LU, LV, NL, PT, SK **-Similar clause is included in the domestic**		-**Similar clause is included in the indicative list:** CY, IE, RO, UK[226] -**Similar effect as such of the indicative clause is achieved by a mandatory provision**: DK, MT

[217] *SI: There is a provision that a contract term is unfair if it allows a trader to transfer its rights and obligations to the third party that has not been identified in the contract. Such unfair term is included in the grey list.*
[218] *FI: Such terms would under most circumstances run counter to the mandatory provisions of CPA Chapters 5, 8 and 9, which apply to the consequences of the breach of contract. Consequently, they would be ineffective.*
[219] *PT: According to Article 18, lit. l of that Decree, terms that enable the party proposing the contract to assign the contract, transfer debts or subcontract without the agreement of the other party to the contract, unless the identity of the third party is specified in the initial contract, are strictly prohibited.*
[220] *SE: the Swedish legislator concluded that there was no need to replicate the list of the directive annex in statutory text. The legislator considered it sufficient to state, in the preparatory works, that the list should be taken into account by the courts (see prop. 1994/95:17 p. 47 ff.). This technique was later accepted by the ECJ in case Commission v Sweden (C-478/99) [2002].*

[221] *AT: § 6 (2) no. 7 KSchG considers as unfair a term that requires disputes between the trader and the consumer to be decided by arbitrators. This term is presumed to be unfair unless the trader can prove that it has been individually negotiated. § 6 (1) no. 11 KSchG considers as unfair a term that imposes on the consumer a burden of proof which should legally lie with the trader. This term falls under a black list.*
[222] *EE: In addition, Estonian law provides as unfair contract term the term which provides that in the event of a breach of the contract by the party supplying the term, the other party may exercise the party's legal remedies against the party supplying the term only if the other party has previously filed a claim against a third party with a court. It is black in consumer contracts and grey in business contracts.*

unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.	*disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.»* (Annex q)? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**grey list: HR, IT, LT, PL[223], SI** **-A part of the annex q is included in the domestic black list whereas another part is included in the domestic grey list:** FR[224] -**Similar clause would be considered as ineffective under a mandatory provision:** FI[225]		**-Similar effect as such of the indicative clause is achieved by case law**: SE[227]
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)				

[226] UK: Also, s.91 of the Arbitration Act 1996 blacklists a term requiring a consumer to take a dispute to arbitration where the value of the dispute is less than £5000 (see Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999/2167).

[223] PL: according to art.385[3] 23) CC in case of doubt, unlawful contractual provisions are those exclude the jurisdiction of Polish courts or which refer the case to a Polish or foreign arbitration tribunal or another authority, or which require that the case be heard by a court which, according to the law, has no local jurisdiction.

[224] FR: The black list considers as unfair a term that has the object or the effect to "imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract". The grey list considers as unfair both a term that has the object or the effect to exclude or hinder "the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions" and a term that has the object or the effect to "restricting the evidence available to him".

[225] FI: Contract terms that require the consumer to submit disputes exclusively to arbitration are ineffective according to CPA Chapter 12 Section 1 d. Consumers may, however, submit disputes to arbitration after they have arisen (CPA 12:1.2). CPA includes several mandatory provisions on the burden of proof that aim to protect consumers. Terms that restrict the evidence available to consumer or impose him a burden of proof, which should lie with the seller, are considered ineffective under Finnish law.

[227] SE: In the preparatory works the legislator notes that arbitration clauses is often considered unfair under Swedish even when the arbitration process is covered by law. There are several examples of this in the case law of the Swedish Supreme court. See e.g. NJA 1981 p. 711, NJA 1982 p. 800 och NJA 1983 p. 510. This attitude is confirmed in NJA 1992 p. 290. See prop. 1994/95:17 p. 98 and also prop. 1975/76:81 p. 147.

Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL) **Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)**	Does domestic law consider as unfair a term that has the object or the effect to ***exclude or limit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence*****?** Does this term fall under a black list, a grey list, an indicative list or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, BE, DE, EE[228], EL, ES, FR, IT, PT, SK **-Similar clause is included in the domestic grey list: LT, SI** -**Similar clause would be considered as ineffective under by a mandatory provision:** FI[229], HR[230]	**-Similar clause is prohibited by a mandatory provision, applicable to contract in general:** BG, CZ, LU, LV[231], NL[232], PL[233] **-Similar clause is prohibited by case law, whose solution is applicable to contract in general:** LU[234]	**-Similar clause is included in the indicative list:** CY, IE -**Similar effect is achieved by a mandatory provision**: DK **-No similar clause exists in the domestic law:** HU, IE, MT, RO, SE, UK

[228] *EE: It is black in consumer contracts and grey in business contracts.*
[229] *FI: Under a general contract law rule such terms are considered ineffective. In addition, the mandatory provisions of CPA (Chapters 5, 8 and 9) affect the assessment of the binding nature of disclaimers and terms that limit the liability of a seller. The government bill on the adjustment of unreasonable contract terms (247/1981) states that disclaimers and terms limiting the liability of a seller are seen as typical examples of unfair terms. See the government bill 247/1981, p. 15.*
However, there are no explicit provisions governing such terms.
[230] *HR: Pursuant to Article 345, paragraph 1 of the CPA (which is a mandatory provision), in any contract liability of a debtor cannot be excluded or limited for damage caused by intentional or grossly negligent non-performance.*
[231] *LV: Article 2022 of the Civil Law sets: "Both parties must strictly observe their mutual duties; the seller must, in particular, keep the sold property with greatest care until the delivery of the property and be liable for the consequences of any negligence in this respect However, if the purchaser delays in accepting the purchased property, then the seller shall be liable only for acts in bad faith and gross negligence".*
[232] *NL: A term limiting liability in case of damage inflicted upon the consumer intentionally or due to gross negligence by the trader himself or his managing staff is considered to be contrary to good morals, which results in the term being null and void. Cf. HR 14 April 1950, NJ 1951, 17 (Röntgenoloog); HR 20 February 1976, NJ 1976, 486 (Pseudovogelpest) ; HR 31 December 1993, NJ 1995, 389 (Matatag/De Schelde) ; HR 18 June 2004, ECLI:NL:HR:2004:AO6913, NJ 2004, 585 (Kuunders/Swinkels). This applies both in B2B and B2C-contracts.*
[233] *PL: according to art.473§2 CC a stipulation that a debtor will not be liable for damage which he may intentionally cause to a creditor is invalid. This provision is applicable both in B2B and B2C agreements.*
[234] *LU: "(...) The application of those clauses is limited by the case law that consistently decided that they cannot cover fraudulent or gross negligence" (G. Ravarani, The liability of public and private persons, No. 2006, No. 635).*

Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to ***confer exclusive jurisdiction for all disputes*** *arising under the contract to a court for the place where the trader is domiciled unless the chosen court is also the court for the place where the consumer is domiciled*? Does this term fall under a black list, a grey list, an indicative list or is it the case-law that has considered it as	**-Similar clause is included in the domestic black list**: BE, EL, ES, NL[235] **-Similar clause is included in the domestic grey list**: IT[236], LT, PT -**Similar clause is prohibited by a mandatory provision:** AT, CZ[237], DE, DK[238], EE[239], FI[240], FR[241]		**-No similar clause exists in the domestic law:** BG[242], HR, HU, IE, LU, LV, MT, PL[243], RO, SE, SI, SK, UK

[235] *NL: Such a jurisdiction clause is blacklisted unless the consumer has the possibility to turn to the otherwise competent court within 30 days after the trader has invoked the ADR clause (Article 6:236 under n BW).*

[236] *IT: Art. 33, § 2, let. u) It. Cons. Code includes this term under the grey list. Italian Supreme Court at United Chambers has interpreted such a rule in a strict sense, that is: it confers exclusive jurisdiction in favour of the consumer's domicile for all disputes arising under the contract (Corte di Cassazione, 1 October 2003, n. 14669). Such exclusive jurisdiction prevails on any other criterion established in the code of civil procedure and/or in any other special statute*

[237] *CZ: § 86 of Act n. 91/2012 of 25 January 2012 on Private International :Law: Determining Jurisdiction of Foreign Court*
(1) Jurisdiction of a foreign court in matters of the law of obligations and of other property rights may be determined by means of a written agreement of the parties. In matters of insurance and consumer contracts such an agreement shall be admissible only after a dispute arises or provided it enables only the policyholder, the insured, another beneficiary, the injured or the consumer to initiate proceedings in the courts of another state. (2) If jurisdiction of a foreign court is determined pursuant to the paragraph 1, jurisdiction of the Czech courts shall thereby be excluded; a Czech court shall nevertheless hear the case provided a) the parties unanimously declare their intent not to insist on the agreement, b) a judgment given abroad would not be recognized in the Czech Republic, c) a foreign court declined to hear the case, or d) a jurisdiction agreement is contrary to the public policy.

[238] *DK: This issue is regulated by Section 245.2 of the Procedural Code, which provides: "In legal proceedings concerning consumer agreements, a prior jurisdiction agreement is not binding on the consumer."*

[239] *EE: Art. 36 para 2 of the LOA provides that there is exclusive jurisdiction if the consumer's residence is in Estonia or in a Member State of the European Union and the contract was entered into as a result of a public offer, advertisement or other such activity in Estonia or the contract is essentially related to the territory of Estonia for any other reason. Estonian law will be applied even if the place of business of the party supplying the terms or, if no place of business exists, the residence or seat of such party is not in Estonia, regardless of which state's law is applicable to the contract. This rule is mandatory and cannot be agreed otherwise; agreement derogating the rule is void (Art. 35 para 5 of the LOA).*

[240] *FI: According to the Code of Judicial Procedure (4/1734) Chapter 10 Section 5, the consumer is always entitled to initiate court proceedings in the general court of first instance in whose jurisdiction the consumer resides. This provision is mandatory.*

[241] *FR: Similar clause is unlawful regarded to the article L. 141-5 of the consumer Code which provides that "Consumers can enter at its option, in addition to courts which have territorial jurisdiction under the Code of Civil Procedure, the court of the place where he lived at the time of conclusion of the contract or at the time of harmful event occurred".*

[242] *BG: such term may not have effect, if it contradicts to an imperative rule regarding the jurisdiction of the court.*

[243] *PL: Polish law does not exactly the same provision but in the grey catalogue of art.385[3] CC 23) one may find the provision according to which in case of doubt, unlawful contractual provisions are those which exclude the jurisdiction of Polish courts or which refer the case to a Polish or foreign arbitration tribunal or another authority, or which require that the case be heard by a court which, according to the law, has no local jurisdiction. It is a provision from grey list. There is also a huge number of judgments issued by the Court of Competition and Consumer Protection that find unfair the clauses that confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the trader is domiciled.*

	unfair?			
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to ***require the consumer to use a more formal method for terminating the contract than was used for conclusion of the contract?*** Does this term fall under a black list, a grey list, indicative list or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, DE, ES - **Almost similar clause is included in the domestic black list**: EE[244], NL[245] **-Similar clause is included in the domestic grey list**: HU, PT		-**Similar effect is achieved by a mandatory provision**: DK -**No similar clause exists in domestic law**: BE, BG, CZ, EL, FI, FR, HR, IE, IT[246], LT, LU, LV, MT, PL, RO, SE, SI, SK, UK
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to "***oblige the consumer to pay for goods not actually delivered, supplied or rendered***"? Does this term fall under a black list,	**-Similar clause is included in the domestic black list**: AT, BE[247], BG[248], DE, ES, HU, PT[249] - **Almost similar clause is included in the**		**Similar clause is included in the indicative list:** CY -**Similar effect is achieved by a mandatory provision**: DK, MT

When the provision is introduced into the Register (on the basis on Court's judgment) then in fact it becomes a black list provision as it cannot be used by the trader in further contracts concluded with consumers.

[244] EE: Art. 42 para 3 subparagraph 35 of the LOA provides as unfair the term that prescribes that declarations of intent are to be made in a manner other than that provided by law and this causes harm to the other party, except where such specification applies to the format of the declaration of intent of the other party. Standard term requiring more formal and harmful methods for termination from the consumer may fall under this provision. It is black in consumer contracts and grey in business contracts.

[245] NL: Such a term restricts the consumer's right to terminate the contract for non-performance and is therefore blacklisted under Article 6:236 under b BW.

[246] IT: There is no specific provision. However, according to Italian scholarly opinion,, a contractual term imposing to consumer a formal notification of his/her desire not to extend a contract of fixed duration would be considered as unfair under art. 33, § 2, let. i) which considers as unfair a term establishing a period of notice to terminate which is too far in advance of the contract's expiry date in order to avoid tacit extension or renewal;

[247] BE: article VI.83 9° (black list) precludes the addition of terms which "oblige the consumer to perform his obligations when the company fails to fulfil its obligations."

[248] BG: this list (which is not exhaustive) in its last point refers to "other similar conditions" so that such term may fall within its scope.

[249] PT: There is no comparable clause on the national list. Nevertheless, similar effect is achieved by other legal prohibition. Indeed, Article 18, lit. f General Contract Terms Act (black list) considers as stately prohibited general contractual terms that exclude exception for non-performance or termination for non-fulfilment of the contract.

	a grey list, an indicative list or is it the case-law that has considered it as unfair**?**	**<u>domestic black list</u>**: EE[250], FR[251], LT[252], LV[253] **<u>-Similar clause is included in the domestic grey list</u>**: PL[254] -**<u>Similar clause is prohibited by a mandatory provision</u>:** EL[255]		**<u>-Similar effect is achieved by case law</u>**: IT[256] -**<u>No similar clause exists in domestic law</u>**: CZ, FI[257], HR, IE, LU, MT, NL, RO, SE, SI, SK, UK
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to ***<u>determine that non-individually negotiated contract terms prevail or have preference over</u>***	-**<u>Similar clause is prohibited by a mandatory provision</u>:** AT[258]	**<u>-Similar clause is contrary to a mandatory provision, applicable to contract in general:</u>** BG[259],	-**<u>Similar effect is achieved by a mandatory provision</u>**: DK -**<u>No similar clause exists in domestic law</u>**: BE, CZ, FR, HR, HU, IE, IT, LT, LU,

[250] EE: Art. 42 para 3 subparagraph 21 of the LOA defines as unfair the term that prescribes the obligation of the other party to make an unreasonably large advance payment before the party supplying the term performs the obligations thereof.
[251] FR: French black lists considers as unfair terms: « Obliging the non-business or the consumer to fulfil all his obligations where the business does not perform his obligations related to the deliver or the guarantees of the goods or to the supply of the service".
[252] LT: Only in case, this is considered as failure by entrepreneur to execute its own obligations.
[253] LV: This term is indirectly encompassed in Article 4, Part 1 of the CRPL, which states that: "When entering into contractual obligations with the trader or the service provider, the consumer shall be provided an opportunity to fully exercise his choice and will, purchasing exactly the type of goods or receiving exactly the service the consumer wishes, except for restrictions prescribed by law. It is the duty of the trader or the service provider to respect such will. Choice and will shall be expressed in the terms of contract, or it shall be apparent from the circumstances".
[254] PL: According to art.385[3] CC 22)) in case of doubt, unlawful contractual provisions are those which contain the obligation of the consumer to perform an obligation despite non-performance or improper performance of an obligation by his contracting party.
[255] EL: there are relevant specific provisions in articles 4 and 3 of Law 2251/1994 which expressly prohibit such term: According to article 4 (distance selling contracts) par. 7: "It is forbidden to collect all or part of the price even in the form of wedding engagement, guarantee, issuance or acceptance of marketable securities or in any other form, before the delivery of the product or the rendering of the service.". According to article 3 (off-premises contracts) par. 5: "It is forbidden to collect all or part of the fees even in the form of a wedding, engagement, guarantee, issuance or acceptance of marketable securities or in any other form, during the period stipulated in the above paragraph [withdrawal period].".
[256] IT: according to a first instance court (Tribunale Firenze, 30 May 2007) terms that have the object or effect of limiting or excluding the consumers' right to trigger the walkaway clause would fall under letters r or b, art. 33, § 2 (grey list).
[257] FI: courts are highly likely to consider such terms unfair.
[258] AT: such a term would most likely be considered invalid pursuant to § 879 (1) and (3) ABGB or § 6 (3) KSchG.
[259] BG: such term contradicts to the general contractual rules under Bulgarian law (Art. 16 OCA).

	contract terms which have been individually negotiated ? Does this term fall under a black list, a grey list, indicative list, or is it the case-law that has considered it as unfair?		DE[260], EE[261], EL[262], ES[263], FI[264], PL[265], PT[266]	LV, MT, NL, RO, SE, SK, UK
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to *enable a trader to* ***alter unilaterally without a valid reason any characteristics of the goods****, to be provided or any other features of performance*? Does this term fall under a black list, a grey list, an indicative list, or is it the case-law that has considered it as unfair?	**-A clause with a reduced scope is included in the lists which lay on the term** that has the object or the effect to enable a trader to alter unilaterally without a valid reason **any characteristics** of the goods, to be provided, without aiming "any other features of performances": • **Black list:** BE, BG, EE[267], EL, FR, LU, LV • **Grey list**: HR, HU, IT, LT, PL, SI	-**Similar clause is contrary to a mandatory provision, applicable to contract in general:** PT[268]	**A clause with a reduced scope is included in the indicative list which lays on the term** that has the object or the effect to enable a trader to alter unilaterally without a valid reason **any characteristics** of the goods, to be provided, without aiming "any other features of performances": CY, UK -**Similar effect is achieved by a mandatory**

[260] *DE: According to § 305b BGB, "individually agreed terms take priority over standard business terms". Conflicts between standard business terms and individually agreed terms must be decided in favour of the individually agreed terms.*
[261] *EE: Art. 38 of the LOA provides that if the content of a standard term contradicts a term individually agreed upon by the parties, the term individually agreed upon applies. This is a mandatory rule and term against the rule is considered as void.*
[262] *EL: article 2 par. 3 of Law 2251/1994 expressly prohibits such term: "Terms that have been agreed further to individual negotiations between the contracting parties (special terms) prevail over the respective general terms."*
[263] *ES: Spanish law grants the same effect through the GCTA mandatory rules on interpretation of standard contract terms. Thus, according to art. 6.1 GCTA, in case of contradiction between an individually negotiated term and a non-individually negotiated term the former prevails.*
[264] *FI: Contract interpretation rules will likely render such terms ineffective as individually negotiated terms indicate that parties had intended not to apply the term.*
[265] *PL: art.385 CC: "in the event of a discrepancy between a contract and the standard contract, the parties are bound by the contract". This provision is mandatory.*
[266] *PT: Article 7 General Contract Terms Act states that terms which are specifically agreed prevail over any general contractual term, even when set out in forms signed by the parties.*
[267] *EE: It is black in consumer contracts and grey in business contracts.*
[268] *PT: Pursuant to Article 22, nr.1, lit. c, a general contractual term that authorise the party proposing the contract to alter its terms unilaterally, other than for a special reason agreed on by the parties is prohibited in certain circumstances.*

				<u>provision</u>: DK -**<u>No similar clause exists in domestic law</u>**: CZ, FI[269], IE, MT, RO, SK
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to *allow a trader, where what has been ordered is unavailable, to* ***<u>supply an equivalent without having expressly informed the consumer</u>*** *of this possibility and of the fact that the trader must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to reject performance?* Does this term fall under a black list, a grey list, an indicative list or is it the case-law that has considered it as unfair?	**<u>-Similar clause is included in the domestic black list</u>**: AT[270], BG[271], ES[272] **<u>-Similar clause is included in the domestic grey list</u>**: **DE,** NL[273] -**<u>Similar clause is prohibited by a mandatory provision, so that the effect is the same as if the clause would be mentioned in a black list</u>:** IT[274]		-**<u>Similar effect is achieved by a mandatory provision</u>**: DK -**<u>No similar clause exists in domestic law</u>**: BE, CZ, ES, FI, FR, HU, IE, LT, LV, MT, PL, PT, RO, SE, SI, SK, UK

[269] *FI: Courts are highly likely to consider such terms unfair.*
[270] *AT: This term is presumed to be unfair, unless the trader can prove they have been individually negotiated.*
[271] *BG: this list (which is not exhaustive) in its last point refers to "other similar conditions" so that such term may fall within its scope.*
[272] *ES: the provision is not exactly the same: 3. Terms that provide the entrepreneur with the power to unilaterally interpret or amend the contract, except, in the latter case, where there are valid grounds specified in the contract.*
[273] *NL: Article 6:237 under c BW considers as unfair the term which gives the user the right to performance materially different from that performance unless, in such case, the other party has the power to terminate the contract*
[274] *IT: art. 134 It. Cons. Code shall apply, that considers as not binding upon the consumer any contractual term or agreement concluded with the seller (before the lack of conformity is brought to the seller's attention), which directly or indirectly waives or restricts the consumers' right to reject.*

Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does your law consider as unfair a term that has the object or the effect to ***allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer****?* Does this term fall under a black list, a grey list, an indicative list or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, EE[275], EL, ES **-Similar clause is included in the domestic grey list**: DE, NL, PT[276] **-Similar clause would be considered as ineffective under a mandatory provision:** FI[277]		-**Similar effect is achieved by a mandatory provision**: DK -**No similar clause exists in domestic law**: BE, BG[278], CZ, FR, HR, HU, IE, IT[279], LT, LU, LV, MT, PL, RO, SE, SI, SK, UK
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to ***allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract?*** Does this term fall under a black list, a grey list, an indicative list or is it the case-	**-Similar clause is included in the domestic black list**: AT, BE[280], EE[281], ES, LU **-Almost similar clause is included in the domestic black list**: EL[282] **-Similar clause is**		-**Similar effect is achieved by a mandatory provision**: DK -**No similar clause exists in domestic law**: BG[284], CZ, FI[285], FR, HR, IE, IT[286], LT, LV, MT, PL, RO, SE, SK, UK

[275] EE: It is black in consumer contracts and grey in business contracts.
[276] PT: Such term is prohibited in certain circumstances.
[277] FI: Such a term has been singled out as a typical unfair contract term in the government bill of CPA (8/1977) as well as in the government bills of Contracts Act (247/1981). However, there are no explicit provisions governing such terms.
[278] BG: Such term generally would not be considered unfair under Bulgarian law.
[279] IT: A court of first instance (Tribunale Treviso, 14 January 2002) has judged as unfair under art. 33, § 2, let. d) It. Cons. Code (grey list) a contractual term referring to a firm offer ('proposta irrevocabile') proposed by the consumer with no expiring date.
[280] BE: it is forbidden for the trader to fix or unilaterally change the delivery of a product. (article VI.83, 5° - black list).
[281] EE: It is black in consumer contracts and grey in business contracts.
[282] EL: Relevant would be cases "b" and "o" of article 2 par.7 of Law 2251/1994: "b. restrict the undertaken contractual duties and responsibilities of suppliers." "o. restrict the obligation of the supplier to fulfil the obligation undertaken by his authorized representatives or make the fulfilment of his obligations dependent on the application of a special typical procedure."

	law that has considered it as unfair?	**included in the domestic grey list**: DE, HU, NL, PT[283], SI		
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to *subject performance of obligations under the contract by the trader, or subject other beneficial effects of the contract for the consumer, to* ***particular formalities that are not legally required and are unreasonable?*** Does this term fall under a black list, a grey list, an indicative list or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, BG[287], DE, EE[288], EL, ES -**The first part of the clause is included in the domestic grey list:** NL, PT[289]		-**Similar effect is achieved by a mandatory provision**: DK **-No similar clause exists in domestic law**: BE, CZ, FI[290], FR, HR, HU, IE, IT[291], LT, LU, LV, MT, RO, SE, SI, SK, UK -**No similar clause concerning the formalities:** NL, PL

[284] *BG: Such term generally would not be considered unfair under Bulgarian law.*
[285] *FI: Courts may consider such terms unfair depending on the circumstances and specific details of the term.*
[286] *IT: A court of first instance (Giudice di Pace Pordenone, 6 May 1999) has judged as unfair under art. 33, § 2, let. v) It. Cons. Code (grey list: see above at Q6- 4) a contractual term according to which the consumer's offer for the purchase of a car did not impose on the seller any specified period to perform the obligation to deliver the car.*

[283] *PT: Such term is prohibited in certain circumstances.*
[287] *BG: this list (which is not exhaustive) in its last point refers to "other similar conditions" so that such term may fall within its scope.*
[288] *EE: It is black in consumer contracts and grey in business contracts.*
[289] *PT: Such term is prohibited in certain circumstances.*
[290] *FI: Courts may consider such terms unfair depending on the circumstances and specific details of the term.*
[291] *IT: a court of first instance (Giudice di Pace Pordenone, 6 May 1999) has judged as unfair under art. 33, § 2, let. v) It. Cons. Code (grey list) a contractual term according to which the consumer's offer for the purchase of a car did not impose on the seller any specified period to perform the obligation to deliver the car.*

Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to ***require from the consumer excessive advance payments or excessive guarantees*** *of performance of obligations?* Does this term fall under a black list, a grey list, an indicative list or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: BG[292], DE, EE[293], EL, ES, SK **-Similar clause is included in the domestic grey list**: PT[294] -**Similar clause is prohibited by a mandatory provision:** NL[295]		-**Similar effect is achieved by a mandatory provision**: DK **-No similar clause exists in domestic law:** AT, BE, CZ, FI[296], FR, HR, HU, IE, IT, LT, LU, LV, MT, PL, RO, SE, SI, UK
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to ***unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources****?* Does this term fall under a black list, a grey list, an indicative list or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: BG[297] **-Similar clause is included in the domestic grey list**: PT[298] -**Similar clause is prohibited by a mandatory provision:** EE[299]	**-Similar clause is prohibited by a mandatory provision, applicable to contract in general:** AT	-**Similar effect is achieved by a mandatory provision**: DK **-Similar effect is achieved by case law**: DE[300] **-No similar clause exists in domestic law**: BE, CZ, EL, ES, FI[301], FR, HR, HU, IE, IT, LT, LU, LV, MT, NL,

[292] *BG: this list (which is not exhaustive) in its last point refers to "other similar conditions" so that such term may fall within its scope.*
[293] *EE: It is black in consumer contracts and grey in business contracts.*
[294] *PT: Such term is prohibited in certain circumstances.*
[295] *NL: Article 7:26 BW: 1. The buyer is obliged to pay the price. 2. Payment must be made at the time and place of delivery. In a consumer sale the buyer cannot be obliged to prepay more than half the purchase price.*
[296] *FI: Courts may consider such terms unfair depending on the circumstances and specific details of the term.*
[297] *BG: this list (which is not exhaustive) in its last point refers to "other similar conditions" so that such term may fall within its scope.*
[298] *PT: Such term is prohibited in certain circumstances.*
[299] *EE: Art. 222 para 5 of the LOA provides that if the purchaser legitimately requires the repair of a thing and the seller fails to repair the thing within a reasonable period of time, the purchaser may repair the thing or have the thing repaired, and claim compensation for any reasonable costs incurred thereupon from the seller. Art. 237 para 1 of the LOA provides that in the event of consumer sale, agreements which are related to the legal remedies to be used in the case of a breach of contract and which derogate from the provisions of the LOA to the prejudice of the purchaser are void. Finally this term will be considered as void.*

				PL, RO, SE, SI, SK, UK
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to ***unjustifiably bundle the contract with another one*** *with the trader, a subsidiary of the trader, or a third party, in a way that cannot be expected by the consumer?* Does this term fall under a black list, a grey list, an indicative list or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: BG[302], EE[303], EL **-Similar clause is included in the domestic grey list**: NL	**Similar clause is prohibited by a mandatory provision, applicable to contract in general:** AT, DE[304]	-**Similar effect is achieved by a mandatory provision**: DK **No similar clause exists in domestic law**: BE, CZ, ES, FI[305], FR, HR, HU, IE, IT, LT, LU, LV, MT, NL[306], PT[307], RO, SE, SI, SK, UK

[300] *DE: There is no express clause in legislation. The unfairness of such terms is to be decided on the basis of the first sentence of § 307 (1) BGB. Case law has, however, provided that clauses in relation to guarantee claims are ineffective if they provide that the consumer can only obtain repairs from parties named in the contract (e.g. BGH VIII ZR 206/12).*

[301] *FI: Courts may consider such terms unfair depending on the circumstances and specific details of the term.*

[302] *BG: this list (which is not exhaustive) in its last point refers to "other similar conditions" so that such term may fall within its scope.*

[303] *EE: It is black in consumer contracts and grey in business contracts.*

[304] *Such a term, bundling the contract with another, would constitute a surprising term and would therefore be invalid according to § 305c BGB: § 305c BGB – Surprising and ambiguous clause:*
(1) Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract.
(2) Any doubts in the interpretation of standard business terms are resolved against the user.

[305] *FI: Courts may consider such terms unfair depending on the circumstances and specific details of the term.*

[306] *NL: There are two provisions mentioned in the domestic law but they seem to have a different scope than the term mentioned in the question. According to art.385[3] CC 6) and 7) in case of doubt, unlawful contractual provisions are those which make the execution of a contract conditional on the consumer promising to execute further contracts of a similar type in the future (6) or make the execution, content or performance of a contract conditional on execution of another contract that has no direct link to the contract containing the assessed provision (7). These are grey list provisions.*

[307] *PT: There is no corresponding provision. Therefore, some similar effects can be achieved by a mandatory provision of the General Contract Terms Act. According to Article 18, lit. l of that Decree, terms that enable the party proposing the contract to assign the contract, transfer debts or subcontract without the agreement of the other party to the contract, unless the identity of the third party is specified in the initial contract, are strictly prohibited (black list).*

Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect to ***impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration"***? Does this term fall under a black list, a grey list, an indicative list or is it the case-law that has considered it as unfair?	**-Similar clause is included in the domestic black list**: AT, BE[308], BG[309], EE[310], EL **-Similar clause is included in the domestic grey list**: FR, IT, NL		-**Similar effect is achieved by a mandatory provision**: DK -**No similar clause exists in domestic law**: CZ, DE, ES, FI[311], HU, IE, LT, LU, LV, MT, NL, PT, RO, SE, SI, SK, UK
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	Does domestic law consider as unfair a term that has the object or the effect **to *make the initial contract period, or any renewal period, of a contract for the protracted provision of goods, longer than one year***, *unless the consumer may terminate the contract at any time with a*	**-Similar clause is included in the domestic black list:** BE, BG[312], DE[313], EE[314], EL, NL[315] -**Similar clause is prohibited by a mandatory provision:** AT[316]		**Similar clause is included in the indicative list:** HR, LU, UK -**Similar effect is achieved by a mandatory provision**: DK -**No similar clause exists in domestic law**: CZ, ES,

[308] *BE: it is forbidden to prohibit the consumer to dissolve the contract when the trader does not fulfil its commitments (article VI.83 7°).*
[309] *BG: this list (which is not exhaustive) in its last point refers to "other similar conditions" so that such term may fall within its scope.*
[310] *EE: It is black in consumer contracts and grey in business contracts.*
[311] *FI: Courts may consider such terms unfair depending on the circumstances and specific details of the term.*
[312] *BG: this list (which is not exhaustive) in its last point refers to "other similar conditions" so that such term may fall within its scope.*
[313] *DE: Such a term is only provided for in a mitigated form. According to § 309 No. 9 BGB terms are ineffective if they bind the other party to the contract for a duration of more than two years, contain a tacit extension of the contractual relationship by more than one year in each case that is binding on the other party to the contract or contain a notice period longer than three months prior to the expiry of the duration of the contract as originally agreed or tacitly extended at the expense of the other party to the contract. This term falls under black list.*
[314] *EE: Art. 42 para 3 subparagraph 27 of the LOA considers unfair the term prescribing that, at the end of the term of a contract for a specified term, the contract is automatically extended for a period exceeding one year without the other party making a corresponding request.*
[315] *NL: Where the contract pertains to the regular delivery of goods (electricity included) or the regular supply of services, and the standard terms contain notice requirements or a minimum contract period, a term leading to the tacit prolongation of the contract is deemed to be unfair unless the consumer has the possibility to terminate the contract at will while respecting a notice period of three months (in the case of a subscription to a newspaper, magazine or periodical which is published with a frequency of less than once per month) or of one month (for all other contracts), cf. Articles 6:236 under j, p and q BW. The term is therefore blacklisted if these qualifications have not been met.*
[316] *AT: for certain continuous obligations § 15 (1) KSchG sets maximum limits for the period of notice imposed on the consumer.*

	termination period of no more than 30 days? Does this term fall under a black, a grey, an indicative list or is considered as unfair by the case-law?			FI[317], FR, HR, HU, IE, IT, LT, LV, MT, NL, PT, RO, SI, SK

Following Q6 Recall Provision in the directive 93/13	**questions**	**Higher level for the consumer in the mandatory domestic laws than in the directive**	**Broader scope than in the directive**	**Same level of protection in the directive as in the domestic laws**
Unfair terms which are not in the Annex of the directive 93/13 (taking inspiration from the list of CESL)	In your law, are there **others unfair terms, concerning sale of tangible goods, at distance, and in particular online**?	**In many MS, there are other unfair terms, concerning sale of tangible goods, at distance, and in particular online:** AT, BG, CZ, EE, EL, HU, IE, LU, NL, PL, PT, SI, UK • **AT:** There are other unfair terms: ○ § 6 (1) no. 3 KSchG considers as unfair a term, whereby a declaration of the trader is deemed to have been received by the consumer even though it hasn't been (except for a change of address unknown to the trader) (term on a black list). ○ § 6 (1) no. 12 KSchG considers as unfair a term, whereby the consumer's title to an article which has been given to the entrepreneur for processing lapses in an unreasonably short time (e.g. sending in shoes for repair which the trader then keeps for resale due to a corresponding term) (term on a black list). ○ § 6 (1) no. 13 KSchG considers as unfair a term, whereby the interest payable in the		**In many MS, there are no other unfair terms concerning sale of tangible goods at distance, and in particular on line:** BE, CY, DE, DK, ES, FI, FR, HR, IT, LT, LV, MT, RO, SE, SK

The maximum limit is two months before the end of the first year of the continuous obligation, then two months before the end of each half year. § 15 (1) KSchG allows the consumer to terminate even if the contract does not provide for termination or if it is excluded (black list effect). In case of an impartible performance, the maximum limit is the end of the second year of the continuous obligation (§ 15 (2) KSchG).

[317] FI: Courts may consider such terms unfair depending on the circumstances and specific details of the term.

		event of the consumer's default exceeds by more than five percentage points p.a. the interest rate agreed for contractual payment (term on a black list). ○ § 6 (1) no. 14 KSchG considers as unfair a term, whereby the right of the consumer to assert a mistake (§ 871 (1) ABGB) or the lack or frustration of contract is excluded or limited in advance (term on a black list). ○ § 6 (1) no. 15 KSchG considers as unfair a term, whereby the consumer is obliged to pay collection costs upon occurrence of a default, provided that such costs are not separately listed and broken down in the agreement, or provided that such costs were not necessary to reasonably collect the debt (term on a black list). ○ § 6 (2) no. 4 KSchG considers as unfair a term, that has not been individually negotiated and whereby the trader is entitled, on demand, to payment of a consideration higher than that originally specified for a performance which has to be rendered by him within two months of entering into the contract. ○ § 6 (2) no. 5 KSchG considers as unfair a term, that has not been individually negotiated and whereby the obligation of the trader to make good any damage to an article which he has accepted for processing is excluded or restricted. ○ There are specific rules on guarantees in §§ 8 ff. KSchG, which will however be addressed in the questions below. ○ § 12 (1) KSchG considers as unfair a term, whereby the consumer assigns any claim in respect of wages or salary to the trader in order to secure or satisfy any claims by the		

		trader which are not yet due for payment (black list effect). ○ § 13a (1) KSchG considers a term whereby the law of a state which is not party to the EEC Treaty is opted, insofar as unfair as the chosen law is more disadvantageous to the consumer than the law which would be applicable without such choice of law (black list effect). ○ § 13 (2) KSchG considers as unfair a term, where by choice of law, § 6 KSchG, §§ 864a and 879 (3) KSchG cannot be applied, even though there is a connection with a trader's or his agent's activity pursued in Austria and directed towards entering into such contracts. In such a case, these provisions are applicable regardless. The prevailing opinion is, however, that this only applies, where the law of a non-member state has been chosen (cf *Andréewitch*/*Arbesser-Rastburg*, Internationale Zuständigkeit und anwendbares Recht bei Cloud-Computing-Verträgen mit Verbrauchern, MR 2014, 268 (273). ○ Of major importance in Austrian law, when evaluating the (unfairness of a term, are § 6 (3) KSchG and § 879 (3) ABGB, which is the reason for the following overview. In order to comply with § 6 (3) KSchG, which is based on Art 5 of directive 93713/EEC, a term must be formulated so that the consumer receives clear and reliable information about his legal status. The information must be perceptible, comprehensible, complete and true. The consumer must be able to understand the essential consequences of the term. ○ § 879 (3) ABGB considers as unfair and void a term which is grossly detrimental to one party, considering all circumstances of the case. It		

		concretises the general clause of § 879 (1) ABGB (violation of moral principles). When determining whether a term is grossly detrimental, it must be taken into account, what dispositive law would provide and if there is disproportionality between the legal positions. § 879 (3) ABGB only addresses ancillary obligations, however, terms which impair main obligations may also be considered as unfair (cf. *Graf* in Kletečka/Schauer, ABGB-ON[1.02] § 879 mn. 283, OGH 6 Ob 507/95 on a term passing the risk of delivery of the leasing property to lessee). • **BG:** There are two rules: Art. 143, i. 8a and i. 18 CPA. o Art. 143, i. 8a considers as an unfair term in a contract concluded with a consumer any clause which provides for automatic renewal of a fix-term contract, if the user does not request its termination and the term in which the user should request it is too remote from the date of expiry of the fix-term contract; o Art. 143, i. 18 CPA considers as an unfair term in a contract concluded with a consumer any clause which does not provide the possibility for the user to estimate the economic consequences from entering into of the contract; • **CZ:** There are some other unfair terms regulated by law. All of them fall under the black list stipulated in section 1814 of Civil Code: "The prohibition in particular applies to stipulations which:… c) allow the entrepreneur not to surrender to the consumer what the consumer surrendered to the entrepreneur, even where the consumer fails to conclude or withdraws from the contract"		

		• **EE:** There are following unfair terms listed in the law and applicable to all contracts: LOA § 42 (3): ○ 8) precludes or restricts rights which the other party could exercise pursuant to law with regard to a third party if the rights arising from the contract to the party supplying the term transfer to such third party; ○ 9) prescribes an unreasonably short term for the other party to submit claims, including an unreasonably short limitation period for claims arising from the contract or law; ○ 26) precludes or unreasonably restricts the right of the other party to assign claims; ○ 33) provides the party supplying the term with the right to terminate a contract entered into for an unspecified term without good reason and without a reasonable period of advance notice; ○ 36) enables the party supplying the term to make use of an unreasonably long or insufficiently determined term for acceptance or refusal of an offer; ○ 37) prescribes that, upon performance or non-performance of a particular act, a declaration of intent of a party is deemed to have been made or not to have been made, unless the party supplying the term undertakes to specifically notify the other party of the consequences of the other party's conduct and gives the other party a reasonable term for confirming the declaration of intent. ○ In addition to the list of unfair terms which are void in consumer contracts, all provisions concerning consumer sale of tangible goods, at distance, and in particular online are mandatory and derogating agreements or contract terms are void.		

		• **EL:** Cases "c", "l", "q", "u", "v" of article 2 par. 7 of Law 2251/1994 which are included in a black list: ○ "c. provide for a contract termination notice period which is too short for the consumer or too long for the supplier." ○ "l. restrict the supplier's responsibility for hidden flaws of the item." ○ "q. entail the consumer's resigning from his rights when the service is not rendered at all or when it is not properly rendered by the supplier, even if the supplier is charged with an offence." ○ "u. force the consumer who has been credited with the value of commodities or services to issue a post-dated check." ○ "v. entail the consumer's resigning from raising any objection against a third party who has replaced the supplier in the relation to the consumer.". • **HU:**In contracts which involve a consumer and a business party a contract term shall, in particular, be considered unfair if its object or effect is to: ○ entitle the business party to withdraw from or terminate the contract on a discretionary basis without giving the same right to the consumer; ○ exclude the consumers right to recover at the time the contract is terminated the services already performed without compensation, except where the contract is terminated on the grounds of non-performance; ○ exclude or limit the right to offset claims that the consumer may have against the business party against what the consumer may owe to the business party; ○ allow the business party to transfer its debts to a third party without the consumers		

		consent; ○ limit the business party's obligation to be bound by commitments undertaken by its authorized agents; ○ exclude or hinder the consumers right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions, restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the other party; In contracts which involve a consumer and a business party the contract term shall, in particular, be considered unfair, until proven otherwise, if its object or effect is to: ○ declare a specific conduct of the consumer as making a contract statement, or the failure to make one, if the time limit available for performing that conduct is unreasonably short; ○ extend a contract of fixed duration unless the consumer indicates otherwise, in cases where contract terms provide for an unreasonably early deadline for making such statement; ○ enable a business party to alter contract terms unilaterally without a valid reason which is specified in the contract, in particular to increase the monetary consideration fixed in the contract, or to allow the business party to alter unilaterally the terms of a contract where there are serious grounds laid down in the contract for doing so, provided that in such cases the consumer is not free to withdraw from or to terminate the contract; ○ allow a business party to be bound by		

		commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the business party, except if the consumer is free to withdraw from or to terminate the contract; ○ exclude or limit the remedies available to the consumer against the business party in the case of non-performance; ○ exclude the consumers right to recover any payment made under contract in case of the consumers non-performance or if his performance is not in conformity with the contract, if the business party is not bound by similar obligations; ○ order the consumer to pay a disproportionately high amount if he fails to perform obligations or fails to perform as stipulated by the contract. • **IE:** Section 21 (6) of the Arbitration Act 2010 includes a provision stating that a term in an arbitration agreement to which one of the parties was a consumer which provided that each party would bear his or her own costs is deemed to be an unfair term for the purposes of the European Communities (Unfair Terms in Consumer Contracts) Regulations. It provides that without prejudice to the generality of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000, an arbitration agreement to which one of the parties to the agreement is a consumer, and a term of which provides that each party shall bear his or her own costs, shall be deemed to be an unfair term for the purposes of those Regulations. The proposed Consumer Rights Bill will include this in the Black list. • **LU:** according to the black list set by article L. 211-3 of the consumer code, shall also be considered as unfair:		

		○ clauses excluding or limiting the legal guarantee in case of defect or lack of conformity. ○ Any clause increasing the amount of the obligation contracted in case where there is an action taken before a court of justice. ○ The clauses, under which the contract is extended for a period longer than one year if the consumer does not give a notice to terminate on a specified date. ○ The clauses determining the price at time of delivery or supply or allowing the trader to successive to increase it, even in consideration of objective criteria, if the consumer does not have the corresponding right to cancel the contract when the final price for consumers becomes excessive relatively to the price which could be expected at the conclusion of the contract. ○ The clauses contained in contracts for the supply of gas, electricity or fuel and causing a minimum of consumption. ○ The terms by which one who undertakes to perform a specified work on something that is given to him to this end, excludes or limits its obligation to ensure the conservation of this thing and to return it after performance. The terms by which the consumer waives towards the repairer of a thing or in respect of the person who performs work on it, to invoke the guarantee required from a professional seller due to the new works and parts supplied by him. • **NL:** Are also unfair: ○ A term that provides that the consumer in advance grants consent to the trader's transfer of his obligations under the contract		

		transferred to a third person is deemed to be unfair unless the consumer may terminate the contract at any time or the trader remains liable for non-performance of the third party towards the consumer (blacklist, Article 6:236 under e BW). ○ A term that in case of a transfer of the trader's obligations under the contract to a third person limits or excludes the rights or defences of the consumer against the third person is deemed to be unfair (blacklist, Article 6:236 under f BW). ○ A term that shortens a legal prescription period or absolute time limit within which the other party must exercise any right, to a period of less than one year is deemed to be unfair (blacklist, Article 6:236 under g BW). ○ A term that limits or excludes the other party's right to terminate a contract that was concluded orally, in writing or electronically in a corresponding manner is deemed to be unfair (blacklist, Article 6:236 under o BW). ○ A term that requires the notice of termination of a contract for the regular supply of goods or services to be received at a specific moment is deemed to be unfair (blacklist, Article 6:236 under r BW). ○ A term leading to the prolongation of an introduction subscription for a limited period for the regular delivery of newspapers, magazines and reviews is deemed to be unfair (blacklist, Article 6:236 under s BW). ○ A term that provides for the forfeiture of rights of the consumer or of his entitlement to raise certain defences as a sanction for certain conduct of the consumer, including omissions, save to the extent that this conduct justifies		

		the forfeiture of those rights or defences, is presumed to be unfair (grey list, Article 6:237 under h BW). ○ A term that fixes an original contract period of more than one year for a contract for the regular supply of goods or services is presumed to be unfair unless the consumer has the right to give notice of termination of the contract after one year (grey list, Article 6:237 under k BW). ○ A term that provides for a longer notice period for the consumer than the notice period for the trader is presumed to be unfair (grey list, Article 6:237 under l BW). ○ A term that provides for a more stringent form for the validity of a declaration than that of a private instrument is presumed to be unfair (grey list, Article 6:237 under m BW). ○ A term that provides that a power of attorney given by the consumer shall be irrevocable or shall not end on his death or his placement under guardianship, unless the procuration serves to transfer registered property, is presumed to be unfair (grey list, Article 6:237 under n BW). ○ A term that binds the consumer to a notice period of more than one month in so far as the contract is not a prolonged, renewed or continued contract for the regular delivery goods or services is presumed to be unfair (grey list, Article 6:237 under o BW). • **PL:** Polish law contains two clauses which are based on internal Polish experience in the field of consumer protection: ○ make the execution of a contract conditional on the consumer promising to execute further contracts of a similar type in the future;		

		○ make the execution, content or performance of a contract conditional on execution of another contract that has no direct link to the contract containing the assessed provision; There are other which in fact fall under the directive's catalogue, but are formulated slightly different: ○ exclude or significantly limit a consumer's claim being set off against the other party's claim; ○ exclude the obligation to reimburse to the consumer payment made for a performance which has not been fully or partly made if the consumer decides not to execute or perform the contract; ○ specify the loss of the right to demand the return of a performance made by a consumer earlier than the contracting party's performance if the parties terminate, dissolve or rescind the contract. • **PT**: General contractual clauses that **impose to consumer the conclusion on line of a contract are prohibited** (Article 25, nr. 4). In addition, the General Contract Terms Act indicates other unfair terms which are not in the Annex of the Directive 93/13 and concerns the sales of tangible goods, regardless if the contract is concluded at distance or not. There is other unfair terms than those mentioned in the Directive: **In the black list**, those that: ○ exclude or limit the right of lien (Article 18, lit. *g*); ○ restrict, for any reason, the option of making a deposit, in the cases and under the conditions provided for in law (Article 18, lit. *i*); ○ establish obligations of unlimited duration or of a duration solely dependent on the will of the party proposing the contract (Article 18, lit. *j*);		

		○ affirm the parties' knowledge in relation to the contract, either of legal aspects or substantive issues (Article 21, lit. *e*); ○ alter the rules governing the allocation of risk (Article 21, lit. *f*) **In the grey list**, those that: ○ establish a presumption of receipt, acceptance or other expressions of willingness on the basis of insufficient facts (Article 19, lit. *d*); ○ enable one of the parties to terminate the contract immediately or with insufficient notice, and without suitable compensation, when the other party to the contract has made considerable investments or had other expenses (Article 19, lit. *f*); ○ restrict, without justification, the right to interpretation of the contract (Article 19, lit. *i*); ○ remove without justification the rules on inadequate performance or time limits for the exercise of rights arising from defects in the goods or service (Article 22, nr. 1, lit. *g*); ○ specify premises, timetables or manner of performance that are unreasonable or inconvenient (Article 22, nr. 1, lit. *n*). The Consumer Protection Act n° 24/96 also contains provisions of which contents lead to consider other general contractual terms as unfair. **Among these provisions, only two concern exclusively the sale of tangible goods at distance.** ○ The first rule concerns the freedom to terminate a sale of goods contract concluded at distance. According to Article 9, nr. 7 Consumer Protection Act, notwithstanding more favourable regimes, those contracts that result from the initiative of the supplier of the goods or services outside of the commercial establishment via correspondence or similar		

		means are subject to the right of retraction by the consumer within a period of seven business days from the date of reception of the good or conclusion of the contract for the supply of services. ○ The second rule concerns the allocation of risk. According to Article 9-C Consumer Protection Act, in contracts where the supplier sends the goods to the consumer, the risk of loss or damage to the goods passes to the consumer when he or a third party indicated by him other than the carrier acquires physical possession of the goods. If the consumer trusts a carrier different from the one proposed by the supplier to carry the goods, the risk passes to the consumer as soon as the goods are in possession of the carrier. Any modification of these rules are considered as strictly prohibited since Article 16 of the Consumer Protection Act sanctions with the nullity any agreement or contractual provision that excludes or restricts the rights attributed by that Act, and since Article 21, lit. *f* General Contract Terms Act determines that general contractual clauses which « *alter the rules governing the allocation of risk* » are strictly prohibited. **Other Provisions may concern sale of tangible goods, regardless if at distance or not**. ○ Thus, according to Article 7, nr. 5 Consumer Protection Act, concrete and objective information contained in the advertising messages for a particular good, service or right shall be considered part of the content of the contracts to be signed after its disclosure. Any contractual clauses that run contrary to this information shall be considered unwritten		

		(Article 16, nr. 1 states, on the other hand, that any agreement or contractual provision that excludes or restricts the rights attributed by the Consumer Protection Act shall be considered void). ○ According to Article 9, nr. 4 Consumer Protection Act, the consumer shall not be obliged to pay for goods or services that he has not previously and expressly ordered or requested or which do not conform with a valid contract. Moreover, he is not responsible for returning the goods or services or making compensation for them, nor is he responsible for the risk of the object perishing or deteriorating. ○ According to Article 9, nr. 6 Consumer Protection Act, the supplier of goods or services is prevented from making the supply of a good or service while dependant on the acquisition or supply of another good or service from other supplier(s). ○ Any contractual provision contrary to the consumer's rights laid down by these law provisions is strictly prohibited. The Sale of Consumer Goods Act contains a prohibition affecting the sale of tangible goods, regardless if the contract was concluded at distance or not. Pursuant to Article 10, nr. 1, without prejudice to the system of general contractual clauses, any contractual term or agreement concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from that Decree is void. • **SI:** The grey list in the third paragraph of the Article 24 of the ZVPot also includes unfair terms that: ○ do not determine the price or is the determination not adequate;		

		○ sets contractual penalty to the benefit of the seller. • **UK**: there are also other unfair terms: ○ A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied (Schedule 2(1)(5)) ○ A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it (Schedule 2(1)(12)) ○ A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded. (Schedule 2(1)(15)).		

B/ the Consumer Sales Directive : Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

Q 7 - Art. 2 directive 1999/44/EC – Conformity with the contract				
Provision in the directive 1999/44/EC Consumer protection in the directive	**Questions**	**Higher level for the consumer in the mandatory domestic laws than in the directive**	**Broader scope than in the directive**	**Same level of protection in the directive as in domestic law**
Conformity or lack of conformity				
Art. 2 directive 1999/44/EC **1. The seller must deliver goods to the consumers that are in conformity with the contract of sale.** **2. Consumer goods are presumed to be in conformity with the contract if they:** **(a) comply with**	In domestic law, is there a **presumption of conformity** that cannot be derogated from by agreement as presumption of article 2 §2 of the directive above mentioned?		In a few MS, the provision **applies to contracts in general**. Then it has a broader scope than the directive. In addition, it is not formulated as such a presumption, but **as either mandatory requirements which cannot be derogated from by agreement, or conditions for conformity, or negative conditions**: HU, FI	**-Most MS have transposed a presumption of conformity which cannot be derogated from by agreement:** BE, CY, EE, ES, FR, HR, IE, IT, LT, LU, LV, PL, PT, RO, SE **-In many MS, the provision is not formulated as such a presumption**: AT, BG, CZ, DE, EL, NL, SI, SK **The provision, which is mandatory, is formulated as such:** ○ **either mandatory**

the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model; (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted; (c) are fit for the purposes for which goods of the same type are normally used; (d) show the quality and performance which are normal in goods of the same type and which the				**requirements which cannot be derogated from by agreement, or conditions for conformity, or negative conditions:** BG, DE, MT, NL, SI, SK ○ **legal duties for the seller:** CZ, EL -**In one MS,** the provision is not a presumption. Furthermore, **the requirements are not mandatory**: Such requirements are provided: "except where the parties have agreed otherwise (…)": DK

consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.				
3. There shall be no lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the	In domestic law, is there a **presumption,** which cannot be derogated from by agreement, **that there is no lack of conformity as in article 2 §3 of the directive** above mentioned?	**-In several MS, the presumption or the rule that there is no lack of conformity is stricter in so far it applies in fewer situations than provided by the directive.** Therefore, domestic laws are more protective than the directive: • The presumption applies if the consumer was aware, or could not reasonably be unaware of, the lack of conformity (**the presumption regarding materials supplied by the consumer is not provided**): AT, DE, EE,	**In a few MS, the same provision has been introduced as a ground for exemption of liability, in favour of the seller** It applies to contracts in general: FI**,** HU,	**-In many MS, there is a presumption which cannot be derogated from by agreement that there is no lack of conformity, as in article 2 §3 of the directive:** BE, BG, CY, ES, FR, IE, IT, LT, LU, LV, PT, RO, SI **-In several MS, the same provision has been introduced as a ground for exemption of liability in favour of the seller**: CZ, DK, MT, NL **-Under SE law, there are no such rules, expressly codified. However the result of the application of domestic law would be the same as if there**

consumer.		HR, PL, UK ○ **EE, HR, PL**: The consumer was aware, or could not reasonably be unaware of, the lack of conformity ○ **AT**[318]**:** In case of apparent defects ○ **DE**[319]**:** If the buyer has knowledge of the defect at the time of the conclusion of the contract ○ **UK:** Under United Kingdom law, there is no lack of conformity when (a) the defect are specifically drawn to the consumer's attention before the contract is made; (b) the consumer examined the goods before the conclusion of the contract and that examination ought to have revealed		**were:** • Section 16 paragraph 2 of the Consumer Sales Act contains a reference to the contents of the contract, making it possible to derogate from the presumptions therein by contract. In cases where the consumer was aware, or could not reasonably be unaware of the "lack of conformity", a correct interpretation of the contract would most likely be that there is no lack of conformity, since the quality etc., is in conformity with the contract. • There is a general principle of the law of obligations (Sweden: "*allmän obligationsrättslig princip*") whereby contractual remedies may not be invoked, if that which would have been assessed as a defect is caused by the buyer (see paragraphs 12-13 of the reasons in the Swedish Supreme Court case NJA 2013 p 1174).

[318] *AT: Apparent defects are those that can be perceived when applying common diligence or that are known to the buyer.*
[319] *DE: If the buyer has no knowledge of a defect due to gross negligence, the buyer may assert rights in relation to this defect only if the seller fraudulently concealed the defect or gave a guarantee of the quality of the good.*

		the defect; (c) the consumer examined the sample of the goods and that examination ought to have revealed the defect. **-In a few MS, the presumption or the rule that there is no lack of conformity does not exist:** EL, SK • **EL:** The seller is liable if the subject-matter at the time the risk passes to the buyer, has real defects or lacks of the agreed qualities • **SK:** According to Section 500 (1) CC As for obvious defects or for defects that may be found out from the relevant real estate registration, the claim from the liability for defects cannot be vindicated unless the transferring person made the other party sure that the thing is free of any defects.		This principle is applicable to cases where the buyer has contributed materials, necessary for the fulfilment of the Sellers obligations, of such a nature that the delivered goods should be considered defective. In such cases as, a general rule, the Buyer is seen as having caused the lack of conformity, and is prevented from invoking contractual remedies.

	In domestic law, **is an agreement derogating from conformity requirements possible in a B2C contract**? If this is the case, **what knowledge of the defect, the consumer should have** (proved or presumed? with acceptance?) to exclude the obligation of compliance?	**Some MS do not recognise contractual arrangements** derogating from conformity requirements imposed on the trader, **even if these agreements are made after the consumer will have a knowledge of the lack of conformity.** Therefore, these domestic laws are more protective than the directive: CY, HR, IE, PL[320], SI, SK **-For several MS, contractual arrangements derogating from conformity requirements imposed on the trader are valid not only in case of knowledge but if more others requirements are met.** Therefore, domestic law is more protective than the directive: AT, BE, DE, ES, LU, UK • **AT:** The consumer's actions must clearly and unambiguously suggest that he seriously intended to waive his rights. It is not sufficient that the defect is merely perceptible. And a seller	**In some MS, contractual arrangements derogating from conformity requirements imposed on the trader are valid if the buyer (consumer or business) knows about the defect:** EL In any case the responsibility of the vendor for real defects or absence of the agreed qualities is subject to the application of the stipulations of the Civil Code. Any waiver of consumer protections as per those stipulations, before the disclosure of the defect or absence of the agreed quality, is not valid. the Greek law in article 537 of the Civil Code refers to knowledge in general, according to the interpretation of Directive 1999/44 of the Council, and does not demand culpable ignorance	**In many MS, contractual arrangements derogating from conformity requirements imposed on the trader are valid if the consumer has a knowledge of the lack of conformity:** BG, CZ, DK, EE, FI, FR, HU, IT, LT, MT, NL, SE • **BG, FI, FR, HU, IT:** The consumer was aware or could not reasonably be unaware of the lack of conformity. Such knowledge can be either proved or presumed. • **CZ:** the consumer must have known about the defect before the contract was concluded or the good was taken over. The knowledge here means being aware (subjectively) of the defect itself or about the way the defect is becoming evident (is manifesting itself). The burden of proof about that fact lies upon the seller. • **DK:** the consumer must prove that the lack of conformity was not one that "he knew or could not

[320] *PL: Such an agreement is not possible in a B2C contract in Polish law. Generally the parties may broaden, limit or exclude liability under implied warranty for defects. However, in consumer contracts, limitation or exclusion of liability under implied warranty for defects is admissible only in the instances set forth in specific regulations (art.558 CC). The only exception in B2C contracts at the moment being is the possibility to limit the liability for the used goods to one year.*

		may give specifications of the object that clarify which properties that commonly would be expected are missing in the particular case[321]. • **BE:** The knowledge of the defect is the moment of closing the contract (and not the moment of the delivery) and the seller must notify the consumer at the moment of the contract closing that the product has a defect and the consumer must accept the good with it is defect as the subject of the agreement. • **DE:** Due to § 475 (1) BGB it is not possible to deviate — before a defect is notified to the business — by agreement from the *conformity requirements*, as provided in § 434 BGB, to the detriment of the consumer (i.e. the good has to be in conformity with the quality agreed on, be suitable for the use intended under the contract, etc.), nor can § 434 be circumvented by		have been unaware of at the time of the conclusion of the contract unless supported by evidence in the contract", or alternatively that "the seller acted contrary to the requirement of good faith". • **EE:** The purchaser was or ought to have been aware of the lack of conformity of the thing upon entry into the contract. This rule covers gross negligence of the consumer in not having knowledge about the defect, also agreement between the seller and the buyer that goods are with the defects, and approval of the defects in the goods. Consumer has no obligation to inspect the goods after delivery (Art. 119 para 1 of the LOA) and the possibility to be in gross negligence is rare. Finally the only possible situation where consumer ought to be known about the defect is where the consumer has inspected the goods and defects were visible. Estonian

[321] *AT: However, this option may not be used to circumvent § 9 KSchG which is why global indications (e.g. 'defects of any kind must be expected') are not valid (for more details cf. Apathy in Schwimann/Kodek, ABGB Praxiskommentar4 § 9 KSchG mn. 2).*

		other constructions. **However, this has to be differentiated from an *agreement on the quality of the good itself*** which is named in the first sentence of § 434 (1) BGB as one criterion to determine whether the good delivered is in conformity with what the consumer can demand according to the contract. Not only can the parties agree on the qualities which a good is to possess, but also on qualities which it does not possess ("**negative agreement of quality**") – potentially in contrast to what can normally expected – and thus determine that a lack of these qualities will not lead to an inconformity of the good. Such an agreement can be admissible as long as it does not impose the risk of the existence of an unknown defect on the consumer. **If the seller *actually* informs the consumer of a specific defect before the conclusion of the**		court practice has been always very strong concerning the possibility to prove that consumer ought to know about the defect. • **LT:** The consumer was aware or could not reasonably be unaware of the lack of conformity. Such knowledge must be proved. • **MT:** The consumer was aware or could not reasonably be unaware of the lack of conformity. • **NL:** The consumer may not rely on defects that he had noticed before the contract was concluded or that he could not have missed. From this, a very restricted duty for the consumer is derived, basically restricted to visible defects and to the question whether or not the intended use of the goods qualify as 'ordinary use' of the goods. • **SE:** According to the possibility of application of Section 20 of the Sales of Goods Act (1990:931) *ex analogia* requires that the buyer must be presumed to have known about the

		contract, an additional individual agreement derogating from conformity requirements is not necessary, but claims for defect are already excluded by § 442 (1) BGB in such cases when the consumer has knowledge of the defect at the time when the contract is entered into. • **ES:** Defects are specifically drawn to consumer's attention before the conclusion of the contract (art. 116.3 RCPA), provided that it is not a fictitious declaration (art. 89.1 RCPA) and other requirements for non-negotiated terms to be valid are met (art. 80 RCPA). In fact, if defects are brought to consumer's attention and he/she agrees, there is no lack of conformity. Knowledge can be presumed when the consumer has examined the goods and when the trader draws the defect to the consumer's attention, but it is possible to prove the contrary. • **LU:** The consumer must declare to have learned of		alleged defect at the time of the purchase (i.e. the formation of the contract), this corresponds to the must have known-species of knowledge. In most practical cases, the Seller will have burden of proof. **-In some MS, contractual arrangements concluded before the lack of conformity was brought to the seller's attention are void. Such arrangements are valid after the lack of conformity was brought to the seller's attention** : PT, RO **-In one MS, contractual arrangements are not mentioned:** LV. The place of this MS in the table is justified by the principle of freedom of contract whereby what is not forbidden is allowed

		the lack of conformity at the time of conclusion of the contract, stating precisely the nature of the defaults, is valid. • **UK:** Domestic law only excludes matters from the requirement of satisfactory quality which are (a) specifically drawn to the consumer's attention before the contract is made; (b) matters which an examination carried out by a consumer ought to reveal; and (c) matters which would have been apparent on a reasonable examination of the sample where goods are supplied by sample.		
Public statements[322]				
Article 2 (d) show the quality and performance which are normal in goods of the same type	Is there a mandatory rule which provides that **statements made by persons other**	-**Some MS have extended the group of persons for whose statements the seller is responsible in directive 1999/44/EC, to the assistant of the producer (DE), to the**	For some MS, the rule has a broader scope, because it is a general rule, which apply even if the buyer is not a consumer. **-In IT**[327], as a general rule of	-**Some MS have such mandatory rules which benefit the consumer.** These rules are the consequence of the implementation of Directive 1999/44/EC.

[322] *Q7 and the beginning of Q13 (Q 13-3 to 13-6).*

and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods **made about them by the seller, the producer or his representative, particularly in advertising or on labelling.**	**than the trader,** such as the person responsible for advertising, or the producer of products sold by the trader, bind the trader?	**previous seller (EE, FI), to another retailer (AT, EE), to** any other professional upstream of the professional in question (LU), to the service provider (LV) and **to the storer (PT).** • **DE:** Referring to § 4 (1), (2) Product Liability Act, § 434 (1) BGB extends the group of persons for whose statements the seller is responsible. There is also a difference between the wording of the Directive 1999/44/EC ("representative" or "*Vertreter*" in the German translation) and the German provision ("*Gehilfe*" or "assistant" in the English translation) for the second group of persons, which gives room for interpretation. Its meaning has not yet been conclusively clarified by case law.	contract law (**art. 1228 It civil code**), the person responsible for advertising commits the trader for any liability deriving from the employment relationship. (But as regards the producer of products sold by the trader, there is no special statutory provision) -**In NL,** Article 7:17 BW states that « : 2. A thing is not in conformity with the contract if it does not have the characteristics which the buyer was entitled to expect under the contract, taking into account the nature of the thing **and the statements made by the seller about it… ». Art. 7 :18 BW adds that « 1. In determining whether a thing delivered pursuant to a consumer sale conforms to the contract, public statements regarding the thing made public by or on behalf of a previous seller of**	According to this text, **special rules made for the consumer** provide that the seller can be responsible for the **statements made by the producer** (BE[328], BG, CY[329], CZ, DK , EL[330] , ES, FR, HR, HU, IE, LT, MT[331], PL, PT, SI[332], SK, UK), or by a **representative** (BE, BG, CY, EL, ES, FR, FI, HR, HU, IE, LT, MT, PL, SE, SI, SK, UK), or especially **advertising agency** (BE, BG, CY, EL, ES, FR, HR, HU, IE, LT, MT, PL, SI, SK, UK). It is only the implementation of the directive. • **In SK,** Section 496 CC states that "(1) As regards consumer contracts, an agreement on properties, purpose and quality shall also be a performance that the consumer showed interest in and that corresponds **to a description provided by the supplier, manufacturer, or their**

[327] *In IT, the directive has also been implemented : the article 129 §2 of the consumer code states that « c) existence the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling;"*

[328] *BE: article 1649 ter 4° of the civil code*

[329] *CY: article 4 1° d of the Sale of Consumer Goods and Associated Guarantees Law 7(I)/2000*

[330] *EL: Article 535 of the Greek Civil Code*

[331] *MT: Article 73 1°d of the Consumers Act*

[332] *SI: Art. 37 of the ZVPot:(3) states that "The suitability of goods for normal use shall be assessed by their conformity to other prevailing goods of the same type and in consideration of any declarations of the seller regarding the product properties, conferred by the seller or manufacturer, particularly in relation to advertising, product presentation or marking on the product itself*

		• **AT:** The seller can be bound by the statement made by another person if this third person can be linked to the seller because the seller is relying on this third person to deal with his affairs. This can include both the seller's employees and other traders like e.g. an advertising agency (cf. ABGB §922[323]). • **EE:** under Art. 217 para 2 subparagraph 6 of the LOA[324], statements made by the producer or the previous seller of the thing or by another retailer in advertisements or labels are binding to the seller (Art. 217 para 2 subparagraph 6 of the LOA). • **FI:** CPA (38/1978) Chapter 5 Section 13[325]	**such thing acting in the conduct of a profession or business shall be deemed statements of the seller … ». But for the statements made by other persons like producers or advertising agency, the same result is obtained on the basis of respect of the buyer's reasonable expectations.** The reasonable expectations that the buyer may have of the goods can also be influenced by third parties. This will apply in particular with regard to statements by a franchisor, but may also apply with regard to statement by non-professional suppliers of the seller, where the seller was aware of these statements and did not contradict them. Even statements of other sellers or producers for similar products in the same price range may have a – limited – influence on	**representative in any generally accessible form, especially by advertising, promoting and labelling the product."** -In one MS, **this rule is not mandatory**: EL - In DK, the Sale of Goods Act does not have explicit provisions on public statements, such as provided in Article 2.4 of the Directive, but it is a well-established norm in judicial practice that the trader is **not liable in general for public statements** praising the goods. However, this general exemption is limited by the specific provision in Section 76.1.2, of the Sale of Goods Act, which establishes conformity liability for information given in "advertising or other communications intended to be

[323] *AT: § 922 (2) ABGB: "Whether the object is in conformity with the contract must also be assessed on the basis of what the recipient can expect from the public statements of the supplier or the manufacturer, particularly those made in advertisements and specifications attached to the object; this also applies for public statements of a person that imported the object into the European Economic Area or who calls itself the manufacturer by mounting its name, its trademark or another mark. Such public statements are however not binding for the supplier, if he did not know them or could not know them, if they were corrected at the time the contract was concluded or if they could not have an effect on the conclusion of the contract."*

[324] *EE: § 217. Conformity of thing: "…(2) A thing does not conform to a contract if:… 6) in the event of consumer sale, the thing does not possess the quality usual for that type of thing which the purchaser may have reasonably expected based on the nature of the thing and considering the statements made publicly with respect to particular characteristics of the thing by the seller, producer or previous seller of the thing or by another retailer, in particular in the advertising of the thing or on labels".*

[325] *FI: CPA (38/1978) Chapter 5 "Section 13 — Information on the goods (1258/2001) "(1) The goods are defective also if they do not conform to the information given by the seller or by a person other than the seller either at a previous level of the supply chain or on behalf of the seller on the characteristics or the use of the goods when marketing the goods or otherwise before the conclusion of the sale. (2) However, the seller shall not be liable for a defect referred to in paragraph (1), if the seller proves that:*

		applies also to the information given by a person other than the trader either at a previous level of the supply chain or on behalf of the trader. • **LU:** According to Article L.111-1 (2) of the Consumer code[326], the professional will also be bound by the statements made by the manufacturer, the owner or operator of the mark or of any other professional upstream of the professional in question • **PT:** Article 8, nr. 1 Consumer Protection Act. This duty to inform extends to the producer, manufacturer, importer, distributor, packager, and keeper. To that extent, statements made by other persons than the trader, as the person responsible for	the consumers' justified expectations. This is a general rule. **-In RO,** According to Art. 5(2) of Law 449/2003 on the sale of consumer goods and associated guarantees, the lack of conformity is appreciate **"taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling", as in the directive. But there is also a general mandatory rule which provides** that, in advertising, there is a solidarity in terms of liability, between the multiple debtors, such as:(a) the beneficiary of the advertising (the manufacturer, distributor, seller or supplier or one of their agents or representatives), (b) the author of the advertisement (c) the producer of the	communicated to the general public or the buyer".

(1) the seller was not aware and should not have been aware of the information given;
(2) the information cannot have had an effect on the sale; or
(3) the information has been clearly corrected in time."

[326] *LU: L.111-1 (2) - Consumer code: "Any description of the characteristics and qualities of a good or service made in documents and advertisements, and any commercial warranty statement relating thereto made at the time of advertising or communicated to the consumer, are considered an integral part of the contract on that good or service, even if advertising was made by the manufacturer, owner or operator of the mark or any other professional located upstream of the professional in question…."*

		advertising, or the producer of products sold by the trader, are binding on the latter.	advertisement and (d) the legal representative of the media channel. (text on commercial advertising)	
4. The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he: **- shows that he was not, and could not reasonably have been, aware of**	In domestic law, are there cases **where the seller is not bound by public statements**, as in article 2 §4 above mentioned?	-**A few MS do not have provisions on public statements, which allow the seller not to be bound by these public statement, if he could not reasonably have been aware of these statements,** such as provided in article 2.4 of the Directive: CZ[333], EL, PT, SI, SK. • **PT:** The Portuguese Legislator has not	**In one MS, the seller is not bound by public statements, as provided in article 2 §4 of the directive. Such provision applies to contracts in general:** HU **In one MS, general contract law provides almost the same rule:** FI**:** According to CPA Chapter 5 Section 13, the	-**In most MS, the seller is not bound by public statements, in the same conditions as those as provided in article 2 §4 of the directive:** AT, BE, BG, CY, DE, EE, ES, FR[334], HR, IE, IT, LT, LV, MT, NL[335], PL, RO[336], SE, UK **-LU**[337] **provides almost the same rule.** However, Luxembourg law does not forbid the parties from modifying the

*[333] CZ: Section 1822 of th civil code: "Contents of a contract (1) A contract must also contain information communicated to the consumer before it was concluded. This information may be changed if expressly stipulated by the parties. **A concluded contract must be consistent with the information communicated to the consumer before its conclusion**. This information may be changed if expressly stipulated by the parties; otherwise, the content of the contract which is more favourable to the consumer applies"; Section 2161 of Civil Code « **(1) A seller is liable t**o a buyer for a defect-free condition of a thing upon takeover. A seller is in particular liable to ensure that at the time the buyer takes over the thing: a) the thing has the properties stipulated by the parties, and in the absence of such a stipulation such properties which the seller or producer described, or which the buyer expected given the nature of the goods concerned and the advertising presented by the seller or producer »*

[334] FR: Art. L. 211-6 of the consumer code.

[335] NL: Article 7:18 BW:1. In determining whether a thing delivered pursuant to a consumer sale conforms to the contract, public statements regarding the thing made public by or on behalf of a previous seller of such thing acting in the conduct of a profession or business shall be deemed statements of the seller, save to the extent that the latter neither was nor ought to have been aware of them or that they were revoked, no later than at the time the contract was concluded, in a manner that was clear for the buyer, or if the purchase cannot have been influenced by such statements

*[336] RO: In addition, according to art. 20 of Law 148/2000 on commercial advertising and art. 73 of the Consumer Code, the beneficiary of the advertisement **should be able to prove the veracity of the statements, indications and presentations** which have been included in the advertisement.*

[337] LU: Article L.111-1 (2) of the Consumer code provides that: "Any description of the characteristics and qualities of a good or service made in documents and advertisements, and any commercial warranty statement relating thereto made at the time of advertising or communicated to the consumer, are considered an integral part of the contract on that good or service, even if advertising was made by the manufacturer, owner or operator of the mark or any other professional located upstream of the professional in question. When the good or service does not conform to this description or that statement, the consumer may request cancellation of the contract". Under that provision the professional will be bound by any statements he may have made to the consumer and the statements are considered part of the contract with the consumer. And, according to Article L.212-3 of the Consumer Code the professional will also be bound by the statements made by the manufacturer, the owner or operator of the mark or of any other professional upstream of the professional.

the statement in question, **- shows that by the time of conclusion of the contract the statement had been corrected, or** **- shows that the decision to buy the consumer goods could not have been influenced by the statement.**		transposed the limits provided by Article 2, nr. 4 Consumer Sales Directive (1999/44/EC). • **In SI,** there is no case where the seller is not bound by the public statement, as in the directive. • **In SK**, according to CC section 496, an agreement on properties, purpose and quality shall be a performance that the consumer showed interest in and that corresponds to a description provided by the supplier, manufacturer, or their representative in any generally accessible form, especially by advertising, promoting and labelling the product. But there is a discussion about the advertising statement regarding the price. It is unclear whether information referring to the price of the product on the webpage is binding or not (whether it is an offer, in which case it is binding; or whether it is a mere invitation ad offerendum, thus not binding). There are more court	seller is not liable for a defect if the seller proves that: (1) the seller was not aware and should not have been aware of the information given; (2) the information cannot have had an effect on the sale; or (3) the information has been clearly corrected in time.	binding effect of the statements made by the trader or certain other persons. **-DK does not have explicit provisions on public statements, but almost the same rule exists in domestic law**: The Sale of Goods Act does not have explicit provisions on public statements, but it is a well-established norm in judicial practice that the trader is **not liable in general for public statements praising the goods.**

		proceedings dealing with this question under way, but to this day, none of them have been adjudicated upon. **Anyway, there is no exception as those provided for by the directive**.		
Lack of conformity resulting from incorrect installation				
5. Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms	In domestic law, is there a provision that cannot be derogated from by agreement that provides that the **incorrect installation of the goods by the seller is a**		**In one MS, general contract law provides almost the same rule:** CZ[338]	-Most MS have transposed such provision by a mandatory rule that cannot be derogated from by agreement. **Therefore, incorrect installation of the goods is a lack of conformity either if it is caused by the defective installation of the seller or if it is caused by defective installation instructions used by the consumer[339]**: AT, BE, BG, CY, DE, EE, EL, ES, FI, FR,

[338] CZ: In actual Czech law there is no such mandatory provision. But in case, the same result would be achieved by court ruling in application of general obligation provisions.
[339] Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.

part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. This shall apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.	**lack of conformity**? In domestic law, is there a provision which cannot be derogated from by agreement and which provides that the incorrect installation of the goods by the consumer when the installation instructions are defective, incomplete or non-existent is a lack of conformity?			HR, IE, IT, LT, LV, MT, NL, PL, PT, RO **Some MS do not provide the case where there is a defective installation caused by defective instructions used by the consumer:** LU, SE, UK • **SE**: However, section 16 § paragraph 1 of the Consumer Sales Act contains a rule that the goods shall be accompanied by the instructions necessary for their installation, assembly, use, storage, and care. The instructions must meet the buyer's reasonable expectations. If such instructions do not accompany the goods, they are defective according to Section 16 paragraph 3 1 of the same Act. The incorrect installation of the product by the Consumer has no bearing on whether there is a lack in conformity, other than possibly as proof that the instructions are unsatisfactory. That the instructions comply with the requisite

				"necessary" entail among other things that they can be understood, and are given in a language that the normal consumer can understand. • **UK**: There is no explicit provision in the CRA 2015 on installation instructions. When the Directive was first implemented through the Sale of Goods Act 1979, it was assumed that the "satisfactory quality" test would cover this requirement implicitly (there is some non-consumer case-law suggesting that this would be so). **Presumably, this position was thought to apply also to the new provisions in the CRA** **-DK does not have explicit provisions on public statements, but almost the same rule exists in domestic law**. **However, it is not a mandatory provision.** • Section 2 of the Sale of Goods Act provides: "A contract for the supply of goods to be manufactured or produced is to be considered a sale for the purposes of this Act. In a

				non-consumer sale, this shall only apply if the party who undertakes the manufacture or production supplies the substantial part of materials necessary." This provision does not explicitly address the issue of installation, but in judicial practice the provision has been interpreted to this effect, as long as the installation does not constitute the dominant element of the contract. In this manner, the mandatory conformity requirements will also apply to the **installation** of contract goods. • Section 75a.1 of the Sale of Goods Act provides: "The nature, quantity, quality and other properties of the goods must conform with the contract and, in relation to the contract, **the buyer must be given the information required for installing**, using, keeping and maintaining the goods."

				-**In a few MS, there is no specific provision:** HU[340], SI. • **SI:** Pursuant to the case law, **incorrect installation by the seller is not considered as a lack of conformity** if the goods have all the attributes needed for proper use and the problem is only in the lack of professional knowledge to install it correctly (see judgement I Cp 285/2003, 14 April 2004). For **incorrect installation by the consumer,** there are no specific provisions dealing with this matter. Article 33 of the ZVPot provides that the seller must provide the consumer with the instructions for use if specific procedure is required for the proper use of the goods. Content of the instructions must be easily comprehensible for consumers and it must enable proper use of the product

[340] *HU: the general rules apply, and the parties cannot derogate from these rules to the detriment of the consumer.*

Guarantee of capacity (guarantee of volume)				
The Directive does not seem to have expressly provided for the case of failure to capacity. **But, it can be included in the guarantee of conformity: <u>A lack of capacity would be treated as a lack of conformity</u>**	In domestic law, are there provisions which cannot be derogated from by agreement and about a **<u>special guaranty of capacity (=volume)</u>**, in B2C contracts? Can it be applicable in sales of tangible goods? Is it different than conformity?	**<u>-In a few MS, there are specific provisions, about a special guaranty of capacity (=volume)</u>:** BG, CZ, IT • **<u>BG</u>**: The goods shall be deemed defective when they do not meet the common expectations of customary use, taking all circumstances into account, related "to the presentation of the product with regard to the following characteristics: quality, **quantity**, name, type, composition, origin, durability, distinctive features, customary and possible use of the goods, advertisement of the goods and the information provided about them (…)" • **<u>CZ:</u>** Civil code provides for B2C contracts **special requirements called « quality upon takeover ».** Breaching of these duties is a breach of contract with relevant consequences. Section	**<u>In a few MS, there are specific provisions, in general contract law about a special guaranty of capacity (=volume)</u>:** BE, FR, LT, SK • **<u>BE:</u>** The guarantee of capacity is protected by the general rules concerning the common sales law. Article 1616 CC states that: *"The seller is obligated to deliver the good in the volume as agreed by in the contract."* Those provisions are not mandatory. • **<u>FR</u>** :It is the same rule than in Belgium (article 1616 of the civil code) • **<u>LT:</u>** Article 6.363 (3) of the Civil Code states that the characteristics of the item are in conformity with the contract provided that: (1) the item complies with the descrip-tion given by the seller and possess the qualities of	-**<u>In most MS, there are no provisions about a special guaranty of capacity (=volume)</u>:** AT, DE, FR, EE, ES, FI, HR[341], HU, IE, LU, LV, NL, PL, PT, RO, UK • **A lack of capacity would constitute a defect treated under the rules of warranty:** AT, DE, DK, FR, SE ○ **<u>DK:</u>** provides that **the** "nature, **quantity**, quality and other properties of the goods **must conform with the contract**". T**his provision is not mandatory.** ○ **<u>SE</u>**: According to Swedish Law, a delivery of goods lacking in capacity (i.e. volume/number of delivered goods)

[341] *HR: Croatian law is not familiar with a notion of « special guaranty of capacity ».*

		2161 about the quality upon takeover states that *« a seller is liable to a buyer for a defect-free condition of a thing upon takeover. A seller is in particular liable to ensure that at the time the buyer takes over the thing: (…) d)* ***the thing has the quantity, measurement or weight (…)*** **»**. • **IT:** A **conventional guarantee** is provided for at art. 133 It. Cons. Code. (see also art. 128, § 2, let. c) It. cons.code). **It is applicable to the sale of tangible goods, and it is refers to guarantees different from conformity.** The provision states that once inserted in the contract the conventional guarantee binds the seller (§ 1); a detailed discipline of the conventional guarantee is provided at §§ 2-4.: should it be ignored by the seller, the consumer can in any case consider it as valid. **These provisions cannot be derogated from by agreement**, in compliance with art. 134. § 1, It. Cons. Code.	the goods which the seller has held out as a sample or model;(2) the item is fit to be used for the purpose for which the items of the type are normally used; (3) the item is fit for any particular purpose the buyer made known to the seller at the time of conclusion of the contract and which the seller has accepted;(4) the item complies with the quality indicators which are normal in goods of the same type and which the customer can reasonably expect given the nature of the item and taking into account any public statements on the specific characteristics of the item made by the producer, his representative or the seller, particularly in advertising or on labelling. • **SK:Every special guarantee of capacity declared by the seller is covered by the warranty in the CC**. According to Section	are handled according to the normal rules of defects, that is, in B2C Sale of goods contracts, Section 16 of the Consumer Sales Act, which explicitly refers to quantity. It reads: "**The goods shall conform to the provisions of the contract with respect to** type, **quantity**, quality, other characteristics, and packaging." There is no difference from other types of non-conformity, as regards the definition of non-conformity. According to Section 1 of the Consumer Sales Act **it is applicable to sales of personal property, which entails tangible goods.** • **However, a lack of capacity would not**

			499 CC. If a person who leaves a thing to someone else for payment shall be liable for that at the moment of the performance, the thing has explicitly stipulated or usual qualities, that it can be used according to the nature and purpose of the agreement or according to what was agreed by the parties and that the thing has no legal defects. In this connection, according to Section 597 (2) CC the purchaser shall also have the right of withdrawal from the contract if the seller assured him that the property had certain qualities, in particular, those stipulated by the purchaser or that it had no defects and such assurances proved to be false.	**constitute a defect treated under the rules of warranty:** PL • **In RO,** legal literature, suggests that **a special guaranty of capacity (volume), in B2C contracts, as an hypostasis of conformity, should be admitted in the future legislation**[342].

[342] *RO : I.F. Popa, Conformitatea lucrului vândut, Ed. Universul juridic, Bucharest, 2010*

Q 8 - Art. 3 directive 1999/44/EC- Rights of the consumer				
Provision in the directive 1999/44/EC Consumer protection in the directive	**Questions**	**Higher level for the consumer in the mandatory domestic laws than in the directive**	**Broader scope than in the directive**	**Same level of protection in the directive as in domestic law**
Relevant time for establishing conformity[343]				
Art. 3 directive 1999/44/EC **1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.**	In domestic law, **when must the lack of conformity exist to the make the seller liable**? Is it a mandatory rule, in the sense that it cannot be derogated from by agreement?			**-Most MS** expressly provide that the seller is liable if the lack of conformity exists **at the time of delivery**: AT[344], BE, BG, CY, CZ, ES, FI, FR, HU, IE, IT, LU, LT, MT, PT, RO, SE, SK[345]. -**Many MS** provide that the seller is liable if the lack of conformity exists **at the time of transfer of risk**. • DE, EE • DK, EL, FI, HR, NL, PL, SI, UK. For these MS, **the risks**

[343] *Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*

[344] *AT: §924 ABGB: "at the time of the handover".*

[345] *SK: Section 619 (1) CC: " at the moment when it was taken over by the buyer".*

				<u>are transferred at the time of delivery:</u> -In one MS, the seller is liable if the lack of conformity exists **<u>at the time of the purchase of the goods or of provision of the service:</u> LV**
<u>Art. 3 directive 1999/44/EC</u> **1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.** **How this text will apply when the lack of conformity will result from an incorrect installation?** **When the seller makes installation, we can consider that the good is delivered at the moment of the concomitant complete installation.** **But when it is the consumer who installs the good**	In domestic law, **if the incorrect installation by the seller is a lack of conformity,** is there a rule which cannot be derogated from by agreement determining **<u>when must this lack must exist?</u>**			-For **<u>many MS</u>**, **<u>in</u>** **<u>the rule relative to the incorrect installation, there is no provision as to relevant time for establishing conformity</u>** **(such as the time when the installation is complete or such as the time when the consumer had reasonable instructions for installation):** AT, BE, BG, CY, ES, FR, IE, IT, LT, LU, LV, NL, PT, SE. Then, there is the same difficulty of interpretation than in the directive. The texts provide that the lack of conformity must exist before delivery, but in fact, **<u>incorrect installation which is assimilated with lack of conformity, could be made after the delivery.</u>** In some of these MS, academic opinions consider that the risk passes when the installation is complete. That means that delivery is made only **<u>when the installation is complete in the</u>**

with the instructions of the seller, when the delivery of the good happens? Is it when the good is delivered to the consumer with reasonable instructions for installation, or, when installation is complete?				**<u>case where the seller is in charge of the installation, or where he has given instructions to the consumer, to install the good</u>**: AT[346], LT, NL, SE • **<u>LT:</u>** It should be presumed that this lack of conformity should exist **after installation of device made by the seller**. • **<u>NL:</u>** Whether or not there is a lack of conformity is to be determined at the time when risk passes to the consumer. This is normally the moment of delivery, Article 7:10 BW provides, cf. Loos 2014, p. 74. As Article 7:18(3) BW explicitly provides that incorrect installation by the seller is to be equalled to non-conformity, one may assume that delivery is not complete and therefore risk does not pass **<u>until the installation is completed.</u>** • **<u>SE:</u>** The Section 20, the defect must have existed when the goods were *delivered*. Domestic law considers that the finishing

[346] *AT: Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*

				of the installation would be deemed equivalent to delivery. This would also conform to the rules of services (in the Consumer Services Act, Section 12), where the relevant time for assessing defectiveness, is **"when the service is completed".** As the text of the Directive and the texts of these MS are not accurate, we consider that the level of the protection of the consumer is the same: **it will depend on the interpretation of the ECJ.** **-In many MS, the rule relative to the incorrect installation by the seller has not been transposed** so there is no provision as to relevant time for establishing conformity: CZ, DK[347], FI, HU, LT, MT, PL, RO, SI, SK, UK
Art. 3 directive 1999/44/EC **1. The seller shall be liable to the consumer for any lack of conformity which exists at the**	In domestic law, is there a rule whereby the consumer has **special duties to examine the goods at the time of delivery** and that			**-In most MS**, the **consumer do not have special duties to examine the goods at the time of delivery:** AT, BE, BG, DE, DK, EE, ES, FI, FR, HR, HU, IE, IT, LU, LV, MT, PL, RO, SE, SI, SK, UK

[347] *DK: As set out in question 7-6, the Sale of Goods Act does not explicitly address the issue of installation by the seller, but in judicial practice the Act has been interpreted to cover also installation, as long as the installation does not constitute the dominant element of the contract. In this manner, the mandatory conformity requirements will also apply to the installation of contract goods.*

time the goods were delivered.	would condition his right to complain of lack of conformity? If so, can such rule be derogated from by agreement?			**-Under <u>CZ</u> law,** the **<u>consumer has special duties to examine the goods at the time of delivery and that would condition his right to complain of lack of conformity</u>***: as soon as possible after the passage of the risk of damage to the thing and verify its properties and quantity*. **-<u>In a few MS</u>**, the **<u>examination of the goods is not formulated as a duty but as a right:</u>** CY, LT
<u>Art. 3 directive 1999/44/EC</u> 2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.	In domestic law, **<u>is there a hierarchy of remedies</u>** available to the consumer or does the consumer have the choice? If there is a hierarchy, give the order of the consumer's remedies (without developing them, as they will be later) If there is a hierarchy in domestic law, can such hierarchy be derogated from by agreement?	**-In <u>many MS there is no hierarchy between the remedies. The consumer has the choice.</u> Thus, domestic law is more protective than the directive even if the consumer's right to choose a remedy is limited to the specific conditions for each right and remedy:**, CY[348], EL, HR, LI, HU,PT, SI, • **<u>EL:</u>** The purchaser shall have the right according to his option: 1. to demand the goods brought into conformity free of charge by repair or replacement, unless such action is impossible or demands disproportionate expenses. 2. to reduce the price. 3. to rescind from the		**-In <u>many MS</u> <u>there is a hierarchy of remedies</u>, which is the same as provided as the directive,** such as right to repair or replace the goods (primary) or to have an appropriate reduction made in the price or the contract rescinded (secondary): • **<u>AT, BE, BG, ES, FR, MT, NL RO, SE</u>**: They cannot be derogated from to the detriment of the consumer unless it is more favourable to the consumer • **SK**: 1. If the defects can be rectified the consumer may ask for performance (i.e. repair or replacement of the goods); 2. If the defect cannot be rectified

[348] *In CY, the wording of the text is almost the same of the wording of the directive, but in Lawsuit no. 399/2008 (reasoned decision dated 27/09/2013), the judge stated that the consumer has a choice between the remedies mentioned in section 5(2) without making any reference to any hierarchy.*

		contract, unless the real defect is insignificant. • **HR:** The consumer has a choice of the remedies, and there is in principle no hierarchy between the remedies, but the consumer's choice is limited in one way: according to Article 412, § 1 of the COA, a buyer can terminate a contract only after having given to the seller a subsequent adequate time to perform the contract. • **HU:** to choose either repair or replacement, or to ask for a commensurate reduction in the consideration, repair the defect himself or have it repaired at the obligors expense, or to withdraw from the contract if the obligor refuses to provide repair or replacement or is unable to fulfil that obligation), or if repair or replacement no longer serves the creditors' interest. • **LT:** the choice is the following one: to replace the goods; to reduce the purchase price accordingly; that the seller eliminates the defects ; to refund the payment of the price and cancel the contract • • **PT:** Repair, replacement, reduction of the price, terminate the contract		and this prevents the proper use of the goods, the consumer may terminate the contract and claim the return of any price already paid or require replacement of the goods; 3. If the goods have other defects that cannot be rectified the consumer may ask for a price reduction. In all cases the consumer may claim damages (Section 622,623 CC), and may withhold performance (Section 560). • **IT:** they can be derogated from by agreement **-In a few MS there is a hierarchy of remedies, which is slightly different from the directive.** They cannot be derogated from to the detriment of the consumer**. The hierarchy is as follows:** • **CZ**: 1) supply of a new thing without defects, unless it is disproportionate to the nature of the defect, but where the defect only concerns a component part of the thing, the buyer may only request a replacement of that component part; 2)if it is impossible, he may

		• **SI:** Art. 37c of the ZVPot. **In two MS there is a hierarchy of remedies, however initially the consumer can also revert to the short term right to reject:** IE, UK • **IE:** The consumers may in appropriate circumstances reject the goods under the Sale of Goods Act (provided that they have not accepted them in the defective condition) or they may elect to pursue their remedies under the Directive. If they choose their remedies under the directive then in the first place they must seek repair or replacement free of charge within a reasonable time, after that they may seek a reduction in price or rescission of the contract. • **UK:** There is both an element of choice and a hierarchy: UK law maintains the short-term right to reject the goods within 30 days, so the consumer has an initial choice between immediate rejection, or repair and replacement. The right to price reduction or the "long-term" right of rejection are only engaged at a second stage. **-In some MS, there are rules which can be interpretated as a partial hierarchy, because the**		withdraw from the contract. 3) If, however, it is disproportionate to the nature of the defect, in particular where the defect can be removed without undue delay, the buyer has the right to have the defect removed gratuitously • **DE:** 1) demand to cure; 2) stage remedies are revocation (termination) of the agreement or price reduction; damages or reimbursement of expenditures. • **FI:** Regarding the **remedies for delay** the hierarchy is as follows:1) Right to demand fulfilment of the contract (CPA (38/1978) Chapter 5 Section 8); 2) Cancellation of the contract (CPA (38/1978) Chapter 5 Section 9), the buyer has set the seller a reasonable additional time period for the delivery of the goods and the seller has not delivered or has declined to deliver within that time period or if the seller has declined to deliver the goods or delivery at a certain time must be deemed or was known by

		choice of the consumer is limited only if the seller offers to repair the goods or to replace it : DK, EE, LU, PL • **DK:** In principle, the consumer has the choice between repair, replacement, reduction and termination. But Section 78.3 provides: "*If the seller offers to remedy the lack of conformity or to deliver substitute goods, the buyer may not require an appropriate reduction of the price or declare the contract avoided*." • **EE:** In general the main remedy for consumer is the right to claim performance (Art. 222 para 1 of the LOA) and all other remedies are in that case secondary: Termination, right for a price reduction. But the free choice of remedies is limited by the seller's right to cure, even if only in some cases. the seller may impose repairmen (cure) only if cure is reasonable in the circumstances, and cure does not cause unreasonable inconvenience or expenses to the injured party, and the injured party has no legitimate interest in refusing cure (Art. 107 para 1 of the LOA). • **LU:** Article L. 212-5 of the		the seller to be essential to the buyer. Remedies which can be cumulated with both 1) and 2) or used separately without a hierarchy are: a) Right to withhold payment (CPA (38/1978) Chapter 5 Section 7); b) Compensation (CPA (38/1978) Chapter 5 Section 10). **Regarding the remedies for non-conformity** the hierarchy is following:1) Rectification (CPA (38/1978) Chapter 5 Section 18); 2) Reduction of price or cancellation of contract if the defect is not slight (CPA (38/1978) Chapter 5 Section 19). Remedies which can be cumulated with both 1) and 2) or used separately without a hierarchy are: a) Right to withhold payment (CPA (38/1978) Chapter 5 Section 17). Compensation (CPA (38/1978) Chapter 5 Section 20) • **LV:** Article 28, Part 1 of the CRPL states that: "A consumer to whom goods not in conformity with the provisions of a contract are sold or given for use is entitled to require the performance of one of the

		Consumer Code provides that: "*In case of lack of conformity, the consumer has the choice to return the goods and obtain the refund of the price or keep the goods and return a part of the price.* ***There is no reason to terminate the sale or to reduce the price if the trader replaces the goods or repair them***" • PL: Repair, replacement, termination of the contract; but the free choice of remedies is limited by the seller's right to cure, even if only in some cases.		following actions by the trader or the service provider:1) rectification of the non-conformity of the goods with the provisions of the contract; 2) exchange of the goods for such goods with which conformity with the provisions of the contract is ensured; 3) appropriate reduction of the price of the goods; 4) revocation of the contract and repayment to the consumer of the amount paid for the goods".
There is no specific provision in the directive.	In domestic law, is there a rule whereby the seller may reply to the consumer's demand by **imposing him to repair the goods?** If so, can such rule be derogated from by agreement?			**-In some MS the seller has such a right:** • **a right to replace** LU, EL • **to repair:** DK, EE, LU, FI, PL -In many MS there is no specific provision. The law provides **the right for the seller to refuse the kind of cure chosen by the buyer if this cure is possible only at disproportionate expense. Therefore, with exception of this case, the**

				seller cannot impose the consumer to repair the goods (mandatory rule): AT, BE, BG, CZ, DE, EL, ES, FR, HR, HU, IE, IT, LV, LT, MT, NL, RO, SE, SI, SK, UK **-In one MS, there is no specific provision:** PT
There is no specific provision in the directive about damages.	In domestic law, is there a rule whereby **the consumer who suffers a non-performance may obtain damages**? If so, can such rule be derogated from by agreement?	**In most MS, the consumer who suffers a non-performance may obtain damages (mandatory rule):** AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK • **DE:** §283 BGB grants the consumer a claim for damages in the case of non-performance where the duty of performance is excluded because of impossibility; § 281 BGB grants such a claim in the case of non-performance or failure to render performance as owed. If the obstacle to performance already exists at the time when contract is entered into, the claim for damages arises out of § 437 No. 3 BGB in connection with § 311a BGB. • **SE:** If a consumer suffers strict non-performance (no goods delivered) he may rescind the contract according to Section 13, when there is a delay of substantial importance to the buyer, or if the buyer before		

		entering into the contract has informed the seller that the goods must be delivered no later than a certain day and that this is of crucial importance for his entering into the contract. The price, if paid, is then to be returned to the buyer. The consumer may in such cases also claim damages for *delay*, according to Section 14 of the Consumer Sales Act.		
There is no specific provision in the directive.	In domestic law, is there a rule whereby the buyer has remedies, **even when the seller is excused?** If so, can such rule be derogated from by agreement?	**-In some MS the liability of the seller is strict and does not depend on the fault.** **The consumer can request all remedies** (DE, DK, EE, IT, LU, NL, PT) **with the exception of performance** (EL) **or damages** (AT, EL, FI, SI [349], SK) **Except in RO, such rule is mandatory.** **-In LT,** there is no such provision in Lithuanian laws, i.e. in all cases when goods lack of compliance the consumer is entitled to use any of the remedies, except of seller is excused due to the fault of consumer. **-In SE,** there is no general rule referring to the seller being excused. There are however certain rules applicable to cases where there are		**-In many MS, the buyer has no remedy at all when the seller is excused:** BE, BG, CZ, ES, FR, HR, IE **-In some MS, there is no specific provision:** CY, LV, MT, PL

[349] *SI: If the seller is excused, the buyer may not resort to damages, unless in the case that this is contrary to good faith.*

		extenuating circumstances. The Consumers right to claim damages is contingent on the damage being within the control of the seller, in the sense of Section 30 of the Consumer Sales Act. There is also a rule providing the possibility of adjusting the level of damages, in Section 34 of the Consumer Sales Act. If the obligation to pay damages because of the seller's defect or delay would be unduly burdensome given the debtor's (i.e. Sellers) financial circumstances, the damages may be adjusted according to what is reasonable. In ascertaining what is reasonable, one shall consider among other things the compensation debtor's (i.e. Sellers) ability to anticipate and prevent the damages, and other special circumstances. These rules may not be derogated from, to the detriment of the consumer, by agreement. **-<u>In UK,</u>** the consumer is only able to claim rights against the trader, i.e., the other contracting party.		

There is no specific provision in the directive.	In domestic law, is there a rule whereby the buyer may seek remedies, **even if he caused the seller's non-performance**? If so, can such rule be derogated from by agreement?	**-In NL, the buyer may also seek a remedy** for lack of conformity if he caused the lack of conformity[350]. NL provides then a bit higher protection that the other MS		**-In most MS the buyer has no remedy if he has caused the seller's non-performance:** AT, BE, BG, CZ, DE EE, EL, ES, HR, FI, FR, IE, LT, LU, LV, PT, RO, SE, SK • **BG**: general contract law stipulates that in cases of damage or distortion of the goods due to buyer's fault, the buyer may request reduction of the price or compensation • **DE:** If the buyer causes the non-performance, this constitutes a "*Obliegenheitsverletzung*"*. According to § 323 (6) BGB revocation (termination) is excluded if the obligee is solely or very predominantly responsible for the circumstance that would entitle him to terminate (revoke) the contract. This principle expressed in § 323 (6) BGB is also called upon in the case of cure. Thus, in most cases claims by the buyer will be precluded (this may not be the case in singular instances, e.g. if

[350] *NL: However, in reality several obstacles may stand in the way of the buyer being able to exercise such right: 1. Where the lack of conformity did not exist at the moment when risk passed, there is no lack of conformity in the legal sense, hence the seller is not liable. 2. Where the lack of conformity existed at the moment when risk passed to the consumer, but the buyer may be blamed for the defect becoming larger than necessary, this will diminish his right to damages and may stand in the way of other remedies, in particular of repair and replacement, as the good is worse off than need have been the case. The parties may not derogate from these rules to the detriment of the consumer, cf. Article 7:6(1) BW.*

				the buyer is unaware of the defect and has the goods repaired). The claim to damages is precluded when the buyer causes the non-performance because the seller is not responsible for the breach of duty (second sentence of § 280 (1) BGB). **-The damages shall be proportionately reduced**: SI **-The law does not specify if the buyer has remedy:** CY, DK, HU, MT, PL, UK
There is no specific express provision in the directive , but the wording of the text seems to mean that the consumer cannot cumulate remedies:	In domestic law, is there a rule whereby **the buyer may combine remedies**? If so, can such rule be derogated from by agreement?	**-Many MS** allow the buyer to **cumulate remedies:** AT, BG, DK, EE, ES, FI, HU, IT, LT, LU[351], MT, NL[352], RO, SE, SK, UK[353]		**-In several MS the buyer cannot cumulate the remedies:** BE, CZ, EL, FR, HR, IE, PT, SI -**In DE**, the demand for cure and the demand for revocation (termination) or price reduction or damages instead of performance

[351] LU: When there is contract between a supplier and a consumer, the consumer will have remedies provided under the legal guarantee of conformity provided for in Article L.212-1 and following of the Consumer code. The article 212-8 of the Consumer code also states that the previous provisions shall not deprive the consumer of remedies resulting from hidden defects as resulting from articles 1641 to 1649 of the Civil code, or any other contractual or non-contractual claim recognized by the law. If the contract is not subject to the specific rules of the Code of consumption (that is, the contract was not concluded between a consumer and a professional seller), the provisions of article 1184 al. 2 of the Civil code are applicable: "In this case, the contract is not terminated as of right. The party to whom the undertaking has not been performed has the option to force the other to perform the agreement when possible, or ask for termination of the contract with the payment of damages ".
Consequently, based on this article, the buyer can either ask for the enforcement of the sale contract, or for the termination of the sale contract with damages.
In that case, the contract is not terminated as of right. The party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfil the agreement when it is possible, or to request its avoidance with damages
[352] NL: Remedies may be combined unless they exclude each other. For instance, the remedies of damages and repair/replacement, and of damages and termination may be combined, but a claim for repair/replacement excludes a claim for termination or damages replacing a claim for performance
[353] UK: this is subject to a requirement that the consumer cannot recover more than once for the same loss.

Article 3 separate the remedies by "or": **For instance, see article 3 paragraph 2: "**In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair **<u>or</u>** replacement, in accordance with paragraph 3, **<u>or</u>** to have an appropriate reduction made in the price **<u>or</u>** the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6 »				however are mutually exclusive. This becomes clear when considering that the expiration of a reasonable time limit for cure or the dispensability of a specification of a period of time is a necessary precondition (§ 323 (1), (2) BGB). The combination of revocation and price reduction is also not possible (first sentence of § 441 (1) BGB). However, the combination of a claim for damages with the remedies of price reduction or revocation (§ 325 BGB) remains possible. **<u>-The law does not specify</u>** if it is possible to cumulate the remedies: CY, LV, PL
Requiring performance of seller's obligation				
<u>Art. 3 directive 1999/44/EC</u> **3. In the first place, the consumer may require the seller to repair the goods or he may require the**	In domestic law, is there a rule whereby the buyer may **<u>require performance from the seller</u>**? If so, can such rule be derogated from by	**<u>In a few MS, repair or replacement can be claimed by the consumer, without any restrictions</u>** (except probably the case where it is impossible). **These mandatory provision are more protective of the consumer**		**<u>Almost all the MS admit that the buyer may require performance</u> (repair or replacement) without costs for the consumer (mandatory provision):** AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU,

seller to replace them, in either case free of charge, unless this is impossible or disproportionate. A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account: **- the value the goods would have if there were no lack of conformity,** **- the significance of the lack of conformity, and** **- whether the alternative remedy could be completed without significant inconvenience to the consumer.**	agreement? In domestic law, is there a rule whereby the buyer may be denied the right to seek for performance on the grounds that the burden or expense caused by **the performance would be disproportionate** to the benefit that the buyer would obtain (see art.3 §3 of the directive above mentioned)? If so, can such rule be derogated from by agreement?	**than the directive,** because the seller cannot rely on the fact that the burden of expense would be disproportionate to the benefit that the consumer would obtain: **HR, MT.**		IE, IT, LT, LU, LV, NL, PL, PT, RO, SE, SI, SK, UK **-Almost all MS recognise that the consumer cannot require replacement or repair when this is impossible, or when the expense would be disproportionate**: AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, HU, IE, IT, LT, LU, LV, NL, PL, PT, RO, SE, SI, SK, UK **-In PT, there is not such a rule,** but according to Article 4, nr. 5 of that Decree, the consumer may only freely chose to exercise any of the rights provided by Articles 3, nr. 1 and 4, nr. 1 of that Decree, **when it *is possible* or *does not constitute* an *abuse of rights***. Then it can be almost the same. **-**In one MS**, the seller has a right of replacement of the thing as long as its performance is not disadvantageous for the buyer:** EL. Then, the buyer has not the choice between the remedies, when the seller uses his right of replacement. **-In CZ**, there is one provision which limits the buyer's right for remedy in this sense but only in connection with the eventual

				supply of a new thing. Section 2169 of the civil code states that if a thing lacks the properties specified in Section 2161, the buyer may also require the supply of a new thing without defects, **unless it is disproportionate to the nature of the defect**, but where the defect only concerns a component part of the thing, the buyer may only request a replacement of that component part; if it is impossible, he may withdraw from the contract. If, however, it is disproportionate to the nature of the defect, in particular where the defect can be removed without undue delay, the buyer has the right to have the defect removed gratuitously.
Consumer's choice between repair and replacement[354]				
There is no specific provision in the directive.	In domestic law, is there a rule whereby when the consumer requires repair or replacement, **he may withhold performance during**	**-Some MS provide the right of the consumer to withhold performance:** EE, HR, NL, SE	-Many MS do not mention anything special about the right of the consumer to withhold performance.	**Many MS do not mention anything special** about the right of the consumer to withhold performance**:** CY, CZ, IE, IT, LV, PL SI, SK, UK

[354] Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.

	<u>that time</u>? If so, can such rule be derogated from by agreement?		**But <u>it can be possible, under general principles of law</u>:** AT, BE, BG, DE, DK, EL, ES, FR[355], HR, HU, LT, LU[356],PT, RO **In FI, the consumer always has the right to withhold performance <u>to the extent that does not exceed his claim on the basis of the defect.</u>**	
<u>Art. 3 directive 1999/44/EC</u> **3. In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is**	In domestic law, is there a rule whereby **<u>if the consumer requires repair or replacement, he must not be entitled to seek for other remedies</u>** (except to withhold performance)? In this case, when is he	**-In SE, the remedies of rectification (repair) or replacement (delivery of substitute goods) may be combined with withholding performance, as well as damages.** If the Buyer rescinds the contract he is however prohibited from demanding performance, because that would be contrary to the purpose of rescinding.		**<u>Several MS consider that the consumer has the right to seek subsidiary remedies when he cannot claim the primary (repair and replacement) remedies, or when the seller cannot repair/replace the goods</u>** (mandatory provision)**.** They do not fix a period at the end of which the seller will be considered to have failed: CZ, DE,

[355] *FR: the right of the consumer to withhold performance is theoretical to the extent that consumer has already paid the price.*
[356] *LU: the right of the consumer to withhold performance is theatrical to the extent that consumer has already paid the price.*

impossible or disproportionate. A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account: - the value the goods would have if there were no lack of conformity, - the significance of the lack of conformity, and - whether the alternative remedy could be completed without significant inconvenience to the consumer.	entitled to seek for other remedies? If so, can such rule be derogated from by agreement?			EE, LT, PT, SI **-<u>Many MS consider that, when the consumer requires repair or replacement, the seller has a period during which to perform accordingly. It is only after this period, that the consumer could require other remedies,</u>** such as termination of the contract or a reduction in price (mandatory provision) This period varies according to the domestic law: • depends on circumstances: AT • reasonable time: BE, FI, HR, NL, UK • one month: BG, FR, LU, LV, SK • 15 days: RO **-In a few MS it is <u>not possible to cumulate the remedies, except for claiming damages</u>.** Thus the consumer can claim damages, even if he has required repair or replacement: **DK, EL, MT.** But he cannot require another remedy, even after a certain time. **-In FI, the right to claim damages is always available** when the prerequisites for damages exist, but for the other remedies the consumer must wait

				a <u>reasonable time</u>, at the end **of which the seller will be considered to have failed.** **-In HU,** the consumer may change the remedies, but he has to bear the switching costs, if it is not caused by a seller's fault. Thus, if the seller has not repaired or replaced the good in an appropriate period, the consumer can change the remedy without having to support any cost. But there is no fixed period during which the seller has the possibility to repair or replace. **-In some MS, there is no specific provision:** CY, IE, IT, PL
Return of replaced item[357]				
<u>Art. 3 directive 1999/44/EC</u> 4. The terms "free of charge" in paragraphs 2 and 3 refer to the necessary costs incurred to bring the	In domestic law, is there a rule whereby, **<u>when there was replacement of the goods, the seller has the right to recover the goods originally provided</u>**? If, so is it	**-In FI, <u>it depends on the nature of the good</u>**. If the defective good that was originally provided will cause costs for the consumer, then the seller is obliged to take it back, but if the consumer can easily get rid of the defective good, then there is no obligation for the seller to take it back.		**<u>-In most MS the seller has the right, when he replaces goods, to recover the goods originally provided, at his own expense (mandatory provision):</u>** AT, BG, CY, CZ, DE, DK, IE, EL, ES, FI, FR, IE, IT, LT, LU, LV, LU, MT, NL, PL, RO, SE, SI, UK

[357] *Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*

goods into conformity, particularly the cost of postage, labour and materials.	at his own expense or at the consumer's expense? If so, can such rule be derogated from by agreement?			**-In some MS, there is no <u>specific provision:</u>** BE, HR, HU, LU, SK
Nothing is expressly provided in the directive about the costs for the consumer for the use of the defective good **But ECJ has decided that:" Article 3 of Directive 1999/44 / EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale and guarantees of consumer goods, must be interpreted as precluding national legislation which allows the seller, assuming that he sold goods affected by a lack of conformity, to require the consumer compensation for use of nonconforming goods until their**	In domestic law, is there a rule whereby the consumer has (or has not) to pay **<u>compensation for the use he has made of the defective goods</u>** before replacing it? If so, can such rule be derogated from by agreement?			**<u>-In many MS the consumer has nothing to pay for any use of the replaced item, in the period prior to the replacement (mandatory provision):</u>** AT, BG, CZ, DE, DK, EL, ES, FI, FR, HU, IT, PL, RO, LT, LU, PL, SK **<u>-A few MS</u>** do not contain specific provision **but national reports consider that <u>under ECJ decision (</u>**ECJ 17 April 2008, case C-404/06, [2008] ECR, p. I-2685 (Quelle AG)), the consumer <u>has nothing to pay</u> <u>for any use of the replaced item, in the period prior to the replacement</u>: EE, NL • **<u>EE</u>** : <u>Estonian courts interpret Art. 189 para 1 of the LOA in such way due to the ECJ case 404/06 Quelle AG from 18 April 2008.</u> **- <u>A few MS provide that the consumer has to pay</u>** compensation for the use he has made of the defective goods before replacing it**:** BE, LV

replacement by a new well." (ECJ 17 April 2008, case C-404/06, [2008] ECR, p. I-2685 (Quelle AG)).				**-<u>In one MS</u>**, there is not specific provision **but <u>under case law, the consumer has to pay</u>** compensation for the use he has made of the defective goods before replacing it: • PT: There is not such an explicit rule in Portuguese Law. In spite of this, the courts can come to the conclusion, supported by general principles of good faith (Article 762 nr. 2 CC), abuse of rights (Article 334 CC) and unjustified enrichment (Article 473 CC) that after replacing the defective good a compensation is due (see for this STJ 5.5.2015, Proc. n° 1725/12.3TBRG.G1.S1, a consumer buys a vehicle, which is considered a defective good, giving him the right to terminate the contract; the seller is obliged to receive the vehicle and to reimburse the value of it, but the value is to be calculated as to the day of the sentence which does not correspond to the original value as to the day of the purchase; the consumer had to pay compensation for the use he has made of the

				defective good (corresponding to 59,000 km travelled during 3 years and a half). Also in this sense STJ 30.9.2010, Proc. n° 822/06.9TBVCT.G1.S1. **-In some MS, there is <u>no specific provision</u>:** CY, HR, MT, SE, SI, UK • SE: There is no such rule in the legislation, other than concerning case where the Consumer rescinds the contract. According to Section 44 of the Consumer Sales Act, if the purchase is rescinded, the buyer is obligated to any return (Swe: "*avkastning*") the goods have yielded and to pay a reasonable fee for other benefits he has had from the goods. It is possible that such a rule can apply ex analogia to cases where the Consumer returns a defective good, after having acquired a non-defective god through a replacement according to the rules of the Consumer Sales Act. That would seem to be in line with other cases of restitution of Swedish Law. However, the

				legal situation is not clear.
Right to withhold performance[358]				
There is no specific provision in the directive.	**In domestic law, is there a rule whereby consumers may withhold performance as long as the trader has not regularly performed his own obligations? If so, can such rule be derogated from by agreement?**	**-SE provides such a right in the remedies of the consumer.** **-Many MS do not provide such a right in the remedies of the buyer. But, the consumer may withhold performance, on the basis on the ordinary law. It is mandatory provision for B2C contracts:** AT, BE, BG, CZ, DK, EE, EL, ES, FR, HU, LT, LU, MT, NL, PT, RO, SI, SK • **RO:** In a B2C contract, a derogating term would be considered to be unfair and repressed by the provisions of Law 193/2000 on unfair terms in consumer contracts. As mentioned in Annex c) of Law 193/2000 on unfair terms, it is considered unfair a contractual term "obliging the consumer to fulfil all his obligations where		**-Several MS do not provide such a right in the remedies of the buyer:** CY, IE, LV **-In some MS, there is no specific provision:** IT, UK

[358] *Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*

		the seller or supplier does not perform his". -**Some MS do not provide such a right in the remedies of the buyer. But, the consumer may withhold performance, on the basis on the ordinary law. However, the ordinary law is not mandatory** on this point: DE, HR, PL • **DE**: As long as there is no obligation to pay in advance, the buyer has a right to withhold payment arising from § 320 BGB. § 320 BGB can only be derogated from by individual agreement. • **HR:** Pursuant to general rules on performance from Article 358, paragraph 1 of the COA, in bilateral contracts, a party is not obliged to perform the contract if the other party does not perform its obligation, which would entitle a consumer to withhold his/her performance until the trader fulfils its part of a contract. The rule from Article 358, paragraph 1 is not of mandatory nature. • **PL** : This rule can be derogated from by agreement -**In FI,** the consumer can withhold		

		performance as long as the trader has not performed. The consumer must not "*withhold an amount that evidently exceeds the claims that he is entitled to*" on the basis of the breach of contract		
There is no specific provision in the directive.	In domestic law, is there a rule whereby the **right to withhold** can be done as a **preventive remedy** when the consumer must perform prior to the seller but it is reasonable to believe that the seller will not perform at his term? If so, can such rule be derogated from by agreement?	**Many MS provide that the right to withhold (even if it is based on ordinary law) can be used as a preventive remedy.** • **It is mandatory provision for B2C contracts or it can be derogated but not to the detriment of the consumer:** AT, BG, CZ, DK, EE, FI, HU, LT, MT, NL[359], PL, RO, SE, SI ○ **AT:** Even, if the consumer must perform prior to the seller, he may still withhold his performance pursuant to § 1052 phrase 2 ABGB if the trader's performance is threatened by his bad financial circumstances, unless the consumer has known or had to know of those circumstances. This is applied analogously (case-law) when it can		**-Some MS do not provide withholding performance. So it cannot be preventive:** CY, IE, LV, PT **-Some MS do not provide that withholding performance is a preventive remedy for the buyer:** BE, EL, ES, FR, LU **-Under UK law,** there is no such rule. However, if the seller's non-performance amounts to a repudiatory breach of the contract, the consumer could accept the repudiation and bring the contract to an end. **In some MS, there is no specific provision:** IT

[359] *NL: art. 6:263 BW sets out the following conditions: (1) the performance he withholds, is proportionate to the anticipated non-performance of the seller; (2) the consumer's obligation is the direct counter-obligation of the seller's obligation; (3) the consumer was informed of the circumstances that give rise to the fear that the seller will not perform his obligation after the contract was concluded*

		be presumed the other party won't fulfil their obligation ○ **RO:** A derogating term would be considered as unfair -Such a rule can be find in the ordinary law on a few MS, but the ordinary law on the MS is **not mandatory** on this point: DE, HR **-Under SK law:** there is a special rule towards the selling action regulated in Section 12 (2) ActPCDDS according to which, during sales events or before the deadline for withdrawal period it is prohibited to require or accept from the consumer transactions constituting price of the goods or service or part thereof; the same applies in the case of advance payment linked to the reimbursement rates for goods or services or a charge associated with the procurement or supply of goods or services provided. Seller shall not encourage the consumer for the performance according to the first sentence. It is a mandatory provision.		

There is no specific provision in the directive.	In domestic law, is there a mandatory rule which provides cases where this **preventive withholding can only be partial**?	**-Many MS provide that this right (even if it is based on ordinary law) can be used as a partial remedy:** AT, BG, DK, EE, EL, ES, FI, FR, HU, LT, LU, NL, RO, SK		**-Some MS do not allow this right (even if it is based on ordinary law) to be used as a partial remedy:** BE, CZ, MT, PT -**Several MS do not provide such a right in the remedies of the buyer:** CY, IE, LV, **In a few MS, it is not provided that withholding performance can be partial. So, the solution is uncertain.** DE, HR, SE, SI • **SE**: There is no explicit rule about anticipated partial breaches. The following would only be relevant in cases of B2C Sales of goods agreement, where the parties have agreed on payment in advance, and successive delivery. It does not seem unlikely that a judge faced with such a case would apply Sections 43 and 61 of the Sales of Goods Act ex analogia, resulting in a right for the consumer/buyer to preventively withhold payment for a future delivery, where it is evident after the purchase that the seller's conduct or financial circumstances are such that

				there are strong grounds for for believing that he will not meet a substantial part of his obligations. The buyer may then, for his part, suspend completion and withhold performance (i.e.) payment, for the future delivery in question. **-In PL,** the partial remedy is provided, but in favour of the seller. If the buyer delays the payment or if, given the buyer's financial condition, it is doubtful that the price for any part of any items that are to be supplied later will be paid on time, the seller may refrain from supplying further items sold. **In some MS, there is no specific provision:** IT, UK
Art. 3 directive 1999/44/EC **5. The consumer may require an appropriate reduction of the price or have the contract rescinded:** **- if the consumer is entitled to neither repair nor replacement, or**	In domestic law, is there a rule whereby **the consumer may terminate the contract without going to justice in case of non-performance by the trader?** Should this non-performance respect some conditions (not			**Regardless of the possible hierarchy of remedies mentioned above, all MS consider that the consumer can terminate the contract by notice, without having to refer to a court:** AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK • **AT:** Termination of the

- if the seller has not completed the remedy within a reasonable time, or - if the seller has not completed the remedy without significant inconvenience to the consumer	essential, substantial)? If so, can such rule be derogated from by agreement?			contract is possible when the requirements described above are met (no repair/replacement, significant defect). It must be asserted before court (the same applies to a claim for reduction of the price) (cf. *Zöchling-Jud* in Kletečka/Schauer, ABGB-ON[1.02] § 932 mn. 41). Concerning cases where no performance is rendered at all, cancellation of the contract is possible, if the trader is at fault or accountable for this impossibility (§ 920 ABGB). In this case (the same applies in case of default) going to court is not required for the cancellation to take effect (cf. *Gruber* in Kletečka/Schauer, ABGB-ON[1.02] § 918 mn. 25). If the performance becomes impossible by chance however, even a declaration is not needed since the contract 'collapses'. Concerning the requirements, they cannot be derogated from in case of warranty to the detriment of a consumer (§ 9 (1) KSchG). In case of non-performance as mentioned

				secondly, the complete elimination of the right to cancel the contract under § 920 ABGB is considered as unfair; the same applies, when disproportionate legal positions are created. An extension of this right is possible, when individually negotiated (§ 6 (2) no. 1 KSchG). For details on all of this cf. *Gruber* in Kletečka/Schauer, ABGB-ON[1.02] § 918 mn. 44 ff.) Concerning the forms of assertion, they cannot be derogated from by agreement; however, the problem will not arise when consensus can be achieved before. Possible would be to agree on arbitration for such a case, which would however need to be individually negotiated in B2C (§ 6 (2) no. 7 KSchG). • **BE:** Termination of the contract without judicial intervention is possible in Belgian common law in bilateral contracts when: - Serious breach of contract; - Judicial intervention has no sense because of the urgency or the loss of trust and; - The debtor is notified and

				he knows about the fact that the creditor (consumer) wants to terminate the contract (and has given the reasons why). The termination without judicial intervention needs to be considered as an exception. • **ES:** consumer contracts can be terminated out of courts –it is usual in some contracts economically not very important- and, certainly, commercial guarantee may also recognise this possibility. For hidden defects (in sales other than consumer sales), art. 1486 SpCC remains silent on this point. • **FR:** French law does not expressly allow the consumer to terminate the contract without going to justice in case of non-performance. But case law allow the consumer to terminate the contract without going to justice in case of serious non-performance

<u>Art. 3 directive 1999/44/EC</u> **5. The consumer may require an appropriate reduction of the price or have the contract rescinded:** **- if the consumer is entitled to neither repair nor replacement, or** **- if the seller has not completed the remedy within a reasonable time, or** **- if the seller has not completed the remedy without significant inconvenience to the consumer.**	In domestic law, is there a rule whereby **<u>the consumer may seek for judicial termination of the contract in case of non-performance by the seller</u>**? If so, can such rule be derogated from by agreement?			**-Regardless of the possible general hierarchy of remedies mentioned above, which exists in most MS, <u>corresponding rule exist in most domestic law</u>[360]:** AT (see just above), BG, CY, EL, ES, FI, FR, IE, IT, LT, LU, LV, NL, PL, PT, RO, SE, SI, SK, UK **<u>In most of these MS, this rule is a general contract rule which is not intended for consumer protection:</u>** • **<u>AT</u>**: In every contract with mutual obligations, there is included an implied termination clause (article 1184 C.C.). There are several conditions: Reciprocal agreement, Formal notification of the party who does not fulfil its obligations, Serious shortcoming. The judge will first investigate if the execution in kind is possible. • **<u>BE</u>**: In every contract with mutual obligations, there is included an implied termination clause (article 1184 C.C.). Termination of the contract without judicial intervention is possible, but needs to be considered as an exception.

[360] *The answers of the MS show that there is no precedence between termination without going to court and judicial termination, when the both are admitted.*

				• **BG**: Generally, the consumer does not need to seek for judicial termination of the contract (Art. 114 CPA). However, it is admissible in case of a dispute, for example if the trader claims that the contract is not terminated or that the contract cannot be terminated, the consumer to seek confirmation from the court that the contract has been terminated. **These rules cannot be derogated from by agreement.** • **CY:** This is always an option since the aggrieved party will never be denied the right to resort to justice. • **DK:** either party may call on a court to determine the termination under the general provisions of the Procedural Code. **Derogation from access to the courts would most likely be considered an unfair term** under Section 36 of the Act on Contracts. • **EL:** Article 542 of the Greek Civil Code provides that "The Court may, although a purchaser has instituted legal proceedings for rescind of the sale, only decide a

				reduction of price or replacement of the thing, if in the circumstances the Court considers that a rescind is not justified.”. • **ES:** : **in general contract law,** art. 1124 SpCC allows the Court to terminate the contract in case of non-performance. • **FI:** In Finnish law, a court can also confirm that a party has the right to terminate a contract. There is, however, no specific remedy called “judicial termination”. • **FR:** In every contract with mutual obligations, there is included an implied termination clause (article 1184 C.C.). FR provides also a provision which is **aimed to protect consumers**. Article L. 211-10 paragraph 3 of consumer code[361].**It cannot be derogated from by agreement** (Art. L. 211-17). • **HU**: Section 6:214 of the Civil code: [Termination by court order] : These

[361] *FR: « If repair and replacement, are impossible, the buyer can make good and get refund the price or keep the good and get to some of the price.*
The same option is open to him:
1. If the requested solution, proposed or agreed under article L. 211-9 can be implemented within the period of one month following the claim by the buyer;
2. Or if that solution cannot be without great inconvenience to it given the nature of the property and use that research.
The resolution of the sale cannot however be imposed if the lack of conformity is minor.

				provisions shall apply mutatis mutandis if the contract is terminated by court order. • **IE:** The non-performance must amount to a fundamental breach of the contract, or repudiatory breach of the contract, or breach of a condition in a contract for the sale of goods or supply of services. • **LT:** Article 6.2282(2) of the Civil Code: The consumer whose rights have been violated by the entrepreneur shall be entitled, in accordance with the procedure established by laws, to seek redress by applying to consumer protection authorities or court. • **PL:** the consumer may terminate the contract basing on general contractual responsibility rules but only in particular situations – there in no general termination clause. The party to the contract **(not only the consumer)** may terminate the contract in case of impossibility and in case of default. • **PT:** it is admitted for civil contracts (J. Brandão

				Proença, *A Resolução do Contrato no Direito Civil*, Coimbra: Coimbra Editora, 1996, p. 154-155), the consumer is free to seek for judicial termination of the contract in the case of non-performance by the trader • **RO**: the rule allowing the buyer to seek for judicial termination of the contract in case of non-performance by the trader is **not specific to B2C contracts only**, as it is a general rule applicable to contracts generally. • **SE**: There are **no special rules for the current B2C cases,** instead they fall under general rules of civil procedure. • **SK**: there is a **general provision** in Section 507 (1) CC, according which unless the defect can be rectified and unless the thing can be used due to this defect in the agreed way or properly, the transferee may demand cancellation of the agreement. Otherwise, the transferee may demand either an adequate discount from the price or a rectification or

				supplementing of what is missing. In the practise, this right of transferee is performed directly without bringing a claim to the court to decide of contact cancellation´s. • **UK**: There is no need to seek court approval for any of the remedies, although a consumer can obviously bring an action before a court to enforce his rights if a trader refuses to comply. **-Some domestic law do not contain such a rule:** CZ, DE, EE, HR
Art. 3 directive 1999/44/EC **6. The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.**	In domestic law, for **what kinds of lack of conformity ("minor" or only "insignificant") termination are excluded?**	**-In some MS the law makes no mention of types of lack of conformity which may be excluded:** BE, EE, LV, UK **Then, they are more protective than the directive.**		**-In some MS termination is not available for minor lack of conformity (**CZ, FR, HU, IE, FI, LT, LU, NL, PL, RO), or for **insignificant defect** (AT, BG, CY, DE, DK, EL, ES, HR, IT, MT, PT, SI). Maybe because of the translation issues, 'minor' means the same as 'insignificant'. **-Under SE law, a defect must be substantial (Swe: "*väsentlig*"),** for the Consumer to have the right to rescind the contract. **-In SK,** the distinction is based on the criterion of defect that may be

				rectified or may be not rectified, (or more defects or a recurrent defect).
Termination for delay in delivery[362]				
There is no specific provision in the directive.	In domestic law, is there a rule which provides **<u>what are the conditions to terminate a contract in a case of delay in delivery?</u>** If so, can such rule be derogated from by agreement? In domestic law, is there a rule which provides, **<u>if the consumer gives notice fixing an additional period of time for performance</u>** and the seller does not perform within that period, that the consumer can terminate the contract? Should the			**<u>-In some MS, the law does not mention such an additional period:</u>** IE, CY, MT • **In IE,** the law doesn't provide such a rule, but only states that "(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time." ("Section 29(2) of the Sale of Goods Act, 1893) **<u>-In several MS the law provides that the consumer has the right, but not the duty, to give to the seller an additional period:</u>** EL, HU, LT, RO, SE, UK

[362] *Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*

	deadline was reasonable? If so, can such rule be derogated from by agreement?			**In several MS a reasonable additional period must be given to the seller. It is a mandatory rule:** AT, BE, EE, LU, NL, PL • **AT:** An extension is possible where individually negotiated; restrictions must not lead to disproportions) **-In several MS a reasonable additional period must be given to the seller when the delay is not fundamental.** BG, CZ, DK, SI, SK. **-Several MS distinguish between the case where the delay is fundamental for the buyer (**who can terminate the contract immediately, without giving the seller an additional period), **and the case where the delay is not fundamental,** and the buyer has to give the seller an additional period before terminating : DE, HR **-Several MS have no other answer than that which concerns the implementation of the article 18 of the Consumer Rights Directive 2011/83/EU. Therefore, it is not relevant:** ES, FR, IT, LV, PT

				-In FI, there is no obligation for the consumer to give the seller an additional period; but even if he or she does not give the seller such an additional period, the consumer must wait an additional reasonable period after delay.
Termination for anticipated non-performance				
There is no specific provision in the directive.	In domestic law, is there a rule whereby **the buyer may terminate the contract before performance is due if the seller has declared,** or it is otherwise clear, that there will be a non-	**-Some MS have such a rule which provides that the buyer may terminate the contract before performance is due, if the seller has declared, or it is otherwise clear, that there will be a non-performance, and it cannot be derogated from by agreement:** AT, BG, CY, CZ, DE, EE, EL, ES, FI, HR, HU, IE, IT, LT, MT, NL, PL, PT, RO, SE,		**In some MS, such a provision does not exist:** BE, DK, FR, LU, LV, SK

	performance? If so, can such rule be derogated from by agreement?	SI, UK • **In one MS, those rules are specifically intended for consumer protection: IT** ○ **IT:** According to art. 61, § 5, and § 4 let. a), It. Cons. Code, the consumer may refuse to admit a supplementary deadline for performance, and he/she may terminate the contract immediately if the seller has expressly declared that he/she shall not deliver the goods. These provisions are mandatory in compliance with art. 66-ter It. Cons. Code, and therefore they cannot be derogated from by agreement. • **In some MS, these rules are general contract rules : AT, BG, CY, CZ, DE, EL, ES, HR, HU, IE, LT, PT, RO, SE, SI, UK :** ○ **AT:** § 919 ABGB states that if a fixed date or period is specified for the performance of a contract, and the failure thereof would five rise to rescission, the party		

		entitled to such rescission must, if he insists upon the performance of the contract, notify the defaulting party of his decision immediately after the time for performance has ended; if no such notice is given, performance cannot thereafter be required. The same rule applies even if the nature or purpose of the contract, as known by the defaulting party, clearly indicates that delayed or further performance is of no interest to the other party. **Derogating from this would be considered as unfair since no factual reason exists for binding the other in such a situation**. ○ **BG:** There is no special regulation in the CPA. Therefore, the general rules apply (Art. 89 OCA). The consumer may terminate the contract before the performance is due if it is clear that the		

		performance is no longer possible. ○ **CY:** A renunciation of the contract that is a complete refusal to perform it by one party before the time of performance arrives does not amount, by itself, to a breach of contract, but a party may rely on it and treat such behaviour as a rescission of the contract, giving rise to a right of action ○ **EL:** Article 385 of the Greek Civil Code states that it shall not be required to set a time period for the debtor placed under notice to furnish his performance: 1. if it appears from the whole attitude of the debtor that such step would serve no useful purpose. 2. if after having placed the debtor under notice to no avail the creditor has no interest in the performance of the contract. ○ **ES:** In general contract law, case law accepts anticipatory breach		

		when the debtor declares that he/she will not perform (SSCJ 20.3.2010). ○ **IE:** the general case-law in Irish contract law recognises the concept of "anticipatory breach" which would entitle the innocent party to rescind the contract. The Innocent party must show that the other party acted in such a way so as to provide a clear and absolute intention that it would not perform its obligations, and that the words or conduct of the party would be clear and absolute to a reasonable person taking into consideration all of the circumstances at the time of termination. In addition to this, the innocent party must have a subjective belief that the other party will breach the contract ○ **PT:** this hypothesis is clearly admitted by the case-law ○ **UK:** There are general rules at common law on		

		repudiatory breaches, and these apply. More specifically, if a trader has refused to deliver goods, then the consumer can terminate the contract: s.28(6)(a) CRA 2015 • **In some MS, these rules are general contract rules but it is especially provided that those contract rules apply also to consumers: EE, FI, NL** ○ **EE:** Under the Art. 117 para 1 of the LOA, the buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance. Such rule cannot be derogated from by agreement in detriment to the consumer (Art. 237 para 1 of the LOA). ○ **FI:** The Sale of Goods Act (355/1987) Section 62, which is applied also to consumer sales according to CPA (38/1978) Chapter 5 Section 29, gives the consumer a right to terminate the contract		

		in a situation of anticipated non-performance. Section 62 of the Sale of Goods Act provides that if it becomes clear that a breach of contract entitling a party to avoidance will take place, that party may declare the contract avoided even prior to the date of performance. The said rule cannot be derogated from by agreement to the detriment of a consumer. ○ **NL:** art. 6:80, para. 1, BW, which sets out the following conditions : (a) if is clear that performance without breach is impossible; (b) if the seller has indicated that he will breach his obligation under the contract ; or c) the buyer has good reasons to fear that the seller will breach his obligation under the contract on the basis of circumstances the buyer became aware of after the contract was		

		concluded, the buyer subsequently has informed thereof and the seller did not declare his willingness (and ability) to perform as agreed within a reasonable period set by the buyer in his notice to the seller. The parties may not derogate from these rules to the detriment of the consumer, cf. Article 7:6(1) BW.		
Scope of right to terminate partial termination[363]				

[363] *Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*

There is no specific provision in the directive.	In domestic law, is there a rule which provides **<u>what are the conditions to justify partial termination and not termination of the contract as a whole in case of non-performance by the seller?</u>** Is the divisibility of the seller's obligations such a condition? If so, can such rule be derogated from by agreement? In domestic law, is there a rule whereby **<u>there are cases where the partial non-performance of a divisible obligation is such as to justify termination of the contract as a whole</u>**? If so, can such rule be	**<u>In NL, divisibility of the seller's obligation is not a condition.</u>** **<u>Partial termination may be justified where termination of the contract as a whole is not justified given:</u>** • the specific nature of the non-performance • or the gravity thereof • and the consequences that termination of the contract as a whole would have for the seller **<u>In many MS there is a principle that the termination can be partial only if the non-performed obligations are divisible:</u>** AT, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, LT,MT, PL, PT, RO, SE, SI, SK, FI[364], UK **<u>But, for some of those MS, it is not the only condition</u>**: • For some MS, **<u>the idea is, not to oblige the consumer to accept partial performance, if he cannot be expected to accept that, or if it has no interest in the partial performance</u>** (DE, HR, HU) • For other MS, the idea **<u>is, not to oblige the consumer to accept partial performance,</u>**		**<u>In some MS, partial termination is not regulated:</u>** BG, BE, DK, IT, LV **<u>In some MS, partial termination is not recognised:</u>** CY[366], LU.

[364] *FI: the consumer has the right to terminate the contract as a whole if, by reason of the interdependence of the different parts,* ***<u>the consumer would suffer substantial detriment if the termination were only partial.</u>***

[366] *CY: if part of the contract is not performed in relation to the delivery of the goods, then the only remedy for the consumer is the right to compensation.*

	derogated from by agreement?	**<u>if he would suffer material inconvenience by being obliged to accept partial performance</u>** (EL, SE) • For other MS, the idea **<u>is, not to oblige the consumer to accept partial performance, , if it would be damaging to separate the goods</u>** (SI). • For some of them, **<u>termination can be partial when the consumer chooses partial termination</u>**: AT (the divisibility of the obligations is to be judged by the parties' intent), CZ, LT, PL, PT[365], RO, SK		

[365] *PT: there is an alternative for the creditor "to choose between unilaterally terminating the transaction or demanding provision of what is possible".*

There is no specific provision in the directive.	In domestic law, is there a rule which provides what are the conditions to justify termination of the contract as a whole, in case of non-performance breach of an **indivisible obligation** of the seller? If so, can such rule be derogated from by agreement?	**-In AT,** if the obligation is indivisible, the buyer may terminate the contract as a whole after granting an additional reasonable period. **In NL,** if the obligation is indivisible, the buyer may terminate the contract as a whole if partial termination is unjustified, given: • the specific nature of the non-performance • or the gravity thereof • and the consequences that termination of the contract as a whole would have for the seller . **In several MS it depends on whether the non-performance is significant** (DK, EE, HR, FI, IE, LU, MT, SE,) **-In several MS it depends on whether the creditor (here the buyer) has an interest in partial performance:** DE, HU, PL[367], EL, SI **In RO, partial termination is possible only when the obligations are divisible.** Then, where obligations are indivisible, the buyer can terminate the whole contract without		**In some MS, this is not regulated: BE, BG[368],** ES, FR, IT

[367] *PL: The party may rescind the entire contract if partial performance is meaningless due to the nature of the obligation, or due to the purpose of the contract intended by that party, which was known to the defaulting party.*

[368] *BG: There is no special regulation in the CPA. Therefore, the general contract rules of OCA may apply and the consumer is not obliged and cannot be obliged to accept partial performance, so the divisibility of the seller's obligations should not prevent the termination of the contract by the consumer in case of partial performance.*

		other conditions. **In LT,** the right to terminate the whole contract is an unconditional right of the consumer, **but the principles of good faith, reasonableness and proportionality are also applied.** **In PT, there is an alternative for the creditor "to choose between unilaterally terminating the transaction or demanding provision of what is possible"** **-In CY,** Sales of Goods Law 10(I)/1994- Article 38 provides "Unless otherwise agreed, the buyer of the goods is not obliged to accept their partial delivery" and aarticle 13 provides: "contractual clauses or agreements which are entered into with the seller prior to his/her knowledge for lack of conformity, and which, directly or indirectly, impede or limit the rights which are provided by the respective Legislation, do not bind the consumer." **-in CZ,** Section 2004 of the Czech Civil Code provides : (1) Upon withdrawal from the contract, the obligation is extinguished from the beginning. (2) If a debtor provides a partial performance, the creditor may		

		withdraw from the contract only in respect of the nondischarged part of the performance. However, if a partial performance is irrelevant for the creditor, the creditor may withdraw from the contract in respect of the whole performance. **-In RO:** there are general provisions (not particularly using the term "indivisible obligations" of the seller), that enumerate the cases in which the termination of the contract as a whole is justified by the seller's conduct in breach of an contractual obligation: a) whenever the utility of the performance ceased within a certain period of time or the immediate performance was urgently due; b) whenever the debtor intentionally made the performance impossible by his actions; c) whenever the debtor has manifested obvious refuse to perform or when the debtor repeatedly refuses or neglects to perform for an obligation implying repetitive performance; d) whenever the non-performance concern the duty to pay a sum, contracted in the exercise of a business; e) whenever the obligation was borne from an extra contractual illicit conduct. -**In SK:** Under Section 575 (3) CC if		

		there is a partial impossibility of performance the creditor may terminate the contract as a whole. The provision is general but in B2C relations it may be interpreted as mandatory one provided that it entitles the consumer to terminate. Section 575 (3) CC : 3) If the impossibility concerns only a part of the performance, the duty shall become extinct only as for this part; however, the creditor may withdraw from the agreement as for the rest of performance. However, if it follows from the nature of the agreement or from the purpose of the performance that was known to the debtor at the moment of conclusion of the agreement that performance of the rest has no economic relevance for the creditor, the obligation shall become extinct in the whole extent unless the creditor notifies the debtor without undue delay after he learned of the impossibility of the part of performance that he insists on the rest of the performance. **-In UK:** There is a general right of rejection, but exercisable only for a short period.		
Termination means				

Art. 3 §5 directive 1999/44/EC (see above)	What are the means of the consumer to terminate the contract? **Can such means be excluded by contract?** In domestic law, is there a rule whereby the seller cannot fix formal requirements to be met? If so, can such rule be derogated from by agreement**?**			-In most MS, termination without going to court is possible (see above) and **no form or very simple forms must be kept. Except in AT, ES, IE, these are mandatory provisions:** AT, BE, CY, DK, EE, ES, FI, FR, HR, HU, IT, LT, LU, NL, PT, SE, SI, UK **The MS mention:** • **A clear notice of the intention to terminate**: CY, DK, EE, FI (oral termination is possible), FR, HU, IT, SE, UK • **Ordinary declaration**: SI • **Unilateral statement**: HR • **Prior notice of dissolution:** LT[369] • **a formal notice ("mise en demeure") ** to perform before making a judicial claim. Although case law admits unilateral termination without notice in case of emergency: **LU, FR** • **Written declaration**: NL • **extrajudicial notice to the other party:** PT. **-Under RO law, three means**

[369] *LT: Article 6.218 of the Civil Code: On the grounds set out in Article 6.217 of this Code, the aggrieved party may dissolve the contract unilaterally without going to a court. The party shall be bound to give the other party a prior notice of dissolution within the time limit set in the contract or, if none set in the contract, within thirty days before the effective date.*

				can be used: ○ a given notice of unilateral termination without an additional time for performance, based on a resolution clause ○ a given notice of unilateral termination setting an additional time for performance ○ judicial termination based on an action in a court of law. -**Fixing of formal requirements would be considered as unfair condition:** FR, HU, LT, LU, RO **But some MS do not provide that the seller cannot fix formal requirements to be met**: BE, HR, IT -**In a few MS, the formal requirements are set in the law. These rules cannot be derogated from by agreement to the detriment of the consumer:** BG, DE, LV **Under CZ law: the formal requirements are set in the law or are stipulated by the parties .**

Right to reduce the price[370]				
Art. 3 directive 1999/44/EC **5. The consumer may require an appropriate reduction of the price or have the contract rescinded:** **- if the consumer is entitled to neither repair nor replacement, or** **- if the seller has not completed the remedy within a reasonable time, or** **- if the seller has not completed the remedy without significant inconvenience to the consumer**	In domestic law, is there a rule whereby the consumer who suffers a partial non-performance, may **require a reduction of the price** if he accepts this performance? If so, can such rule be derogated from by agreement?			**In all the MS the consumer has the right to require a reduction of the price, when accepting non-performance:** AT, BE, BG, CY, CZ, DE, DK, EL, ES, FI, FR, HR, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK
There is no specific provision in the directive.	In domestic law, is there a rule whereby, if the buyer may reduce the price, **he is entitled to recover the excess already paid from the seller?** If so, can such rule be	**In many MS, when the consumer reduces the price he is entitled to recover the excess already paid to the seller:** AT, BE, BG, CY, CZ, DE, DK, EL, ES, FI, FR (general contract law), HR, IE, IT, LT, LU, MT, NL, PT, RO, SE, SI, SK, UK		**One MS do not specify that the consumer is entitled to recover the excess already paid from the seller:** LV

[370] Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.

	derogated from by agreement? In domestic law, is there a rule which provides, if the buyer may reduce the price, how much is the reduction? If so, can such rule be derogated from by agreement?	**Several MS do not specify the amount of the reduction:** BG, EL, **For other MS, it should be an adequate amount with regard to the extent and nature of the defect** (CZ), **or an appropriate amount (**DK, CY, MT, UK). **-The price can be reduced in proportion to the difference in value between the good in defect-free condition and the real value at the time of the conclusion of the contract:** DE, ES, SE **In some MS, it should be a reasonable amount, with a special method of calculation** (AT[371]), **or it should be proportionate to the decrease in the value of the good** (EE, HR, HU, FI, SI, PL) **or to the lack of conformity** (NL, LU, RO) -**Under PT law,** 1. If the sale is limited to part of the object, (…) the price relating to the valid part of the contract is the one that figures therein, if it has been listed as a part of the overall price. 2. If it has not been listed, the reduction is made by means of an appraisal. The appraisal or evaluation can be		

[371] *AT: There is a special method of calculation called 'relative calculation method', by which the ratio between reduced price and reduced value must equal the ratio between original price and original value (of the performance if it were flawless).*

		extrajudicial or judicial, in the sense that if the parties do not agree with an extrajudicial evaluation it will be evaluated in the court (cfr. Pires de Lima and Antunes Varela, *Código Civil anotado*, vol. II, 4th ed., reprint, Coimbra 2010, note 2 under Article 884, p. 176; Neto, *Código Civil anotado*, 18th ed., Lisbon 2013, note 3 under Article 884, p. 881). This rule cannot be derogated by agreement.		
There is no specific provision in the directive.	In domestic law, is there a rule which provides, if the buyer has the right to require a reduction of the price, **is he also entitled to recover damages for the loss thereby** compensated? If so, can such rule be derogated from by agreement?	**Many MS provide that if the buyer has the right to require a reduction of the price, he is also entitled to recover damages for the loss thereby compensated:** ES, IT • **ES:** Price reduction could be encompassed in the remedy that consists on damages. In any case, art. 117.2 RCPA expressly states that damages can always be combined with other remedies. • **IT: Damages can be claimed under two cases:** o To compensate the reduction of value of defective goods. Should this situation occur, the Italian scholarship proposes two different solutions: damages can be claimed		**-The consumer cannot also claim damages for the loss thereby compensated:** AT, CY, HU, RO

		together with *any* of the remedies listed in art. 130 It. Cons. Code; or they can be claimed only together with reduction of price or rescission of the contract. ○ To compensate any other loss deriving from the defective goods. Should this situation occur, damages can be claimed whatever the remedy triggered under art. 130 It. cons.code. Liability for losses derived from defective goods shall be charged to the seller, unless he/she proves the innocent breach in compliance with the general rules on contractual liability (art. 1218 It. civil code). If damages deriving from defective goods concern other goods or consumer's health, then arts. 114-127 It. Cons. Code on products'		

		liability would apply. **-In LU,** article L. 212-5 (2) last al. provides that "*The professional is also required for all damages to the consumer".* As a result, **the consumer can always ask for damages if he has suffered injury which is not fully compensated by other remedies provided in for lack of conformity.** **-The consumer can claim damages for any further loss suffered:** AT, BG, CY, CZ, DK, DE[372], EE[373], EL[374], FI, HR, HU, LT, LU, LV, MT, NL, RO, SE, SI, SK, UK • **In LT**, Article 6.363 (9) of Civil Code states that "*5. In all cases the buyer shall be entitled to be reimbursed for the losses sustained due to the sale of a thing of improper quality. Defects removal costs will be also considered as losses if the seller has failed to remove them within a reasonable time and such defects were removed by the buyer or by third parties used*		

[372] *DE: the right to damages in Section 80 of the Sale of Goods Act is independent of the other remedies in Section 78.1, which include repair, replacement, reduction and termination. However, from a logical point of view, a reduction in price may have an impact on the possible claim for damages.*
[373] *EE: There is a general rule that reduction of the price will cover all losses. However, court practice accepted claim for damages which are not covered by price reduction. Such rule cannot be derogated from by agreement in detriment to the consumer (Art. 237 para 1 of the LOA).*
[374] *EL: article 543 of the Greek Civil Code: "If at the time the risk passes to the buyer the agreed quality is lacking, the buyer has the right, instead of the rights of article 540, to demand compensation for non-performance of the contract or accumulative with these rights, to demand compensation for the damage not covered from their action. The same applies also in case of provision of defected product due to the seller's fault.".*

		by the buyer". **<u>-In PT,</u>** Article 802, nr. 1 CC provides that the counter performance of the creditor can be reduced (as it in the case of reduction of price). This provision makes clear that the creditor retains the right to be compensated.		
	Other mandatory rules	**<u>In some MS, there are other mandatory rules:</u>** • **<u>AT:</u>** Pursuant to § 9b (1) KSchG, the trader must advise the consumer of these statutory provisions and point out that they are not restricted by the contractual guaranty. The last phrase of this paragraph declares the statements made in the written guaranty binding as well as the statements made in advertisements about it. The trader must provide certain information in the written guaranty, such as name and address of the guarantor and contents and duration of the guaranty in a simple and intelligible manner (§ 9b (2) KSchG). On demand, the consumer must also receive the guaranty in written form or on another durable medium (§ 9b (3) KSchG). A violence of		

		any of these obligations does not impair the validity of the guaranty and entitles the consumer to claim any damage thereby caused (§ 9b (4) KSchG). § 9b KSchG cannot be derogated from (§ 2 (2) KSchG). § 8 KSchG deals with how repair and replacement are to be executed. § 8 (1) KSchG provides that repair and replacement must be performed at the place the object was delivered or to which it was send (inside Austria) or at which the object usually is (given this is inside Austria and not surprising for the trader and sending it is practicable) § 8 (2) KSchG provides that the trader may, if practicable demand that the consumer sends him the object. The trader must bear the risk. § 8 (3) KSchG provides that the trader must bear all necessary costs or repair and replacement. § 8 KSchG cannot be derogated from (§ 2 (2) KSchG). • **BE:** Articles 1649*c* – *f* contains provisions elucidating the rights of consumers in the event of non-conformity by the seller/supplier • **CZ;** Section 2002 of the civil code states that if a party		

		fundamentally breaches a contract, the other party may withdraw from the contract without undue delay. A fundamental breach means such a breach of which the breaching party, at the conclusion of the contract, knew or should have known that the other party would not have concluded the contract had it foreseen such a breach; in other cases, a breach is presumed not to be of a fundamental nature. A party may withdraw from a contract without undue delay after **the conduct of the other party <u>undoubtedly indicates</u> that the party is about to commit a fundamental breach of contract** and fails to provide a reasonable security after being requested to do so by the obligee. • **DE:** The general rules that could come into consideration, i.e. rules concerning the avoidance for mistake (§§ 119 et seq. BGB), and *culpa in contrahendo* (§§ 311 (2), 241 (2) BGB, are generally precluded as the legal guarantee rules in sales law take priority if their scope of applicability takes effect.		

		• **EE:** Under Estonian law the seller is also deemed to be in fundamental breach of a contract of sale if, inter alia, the repair or substitution of a thing is not possible or fails, or if the seller refuses to repair or substitute a thing without good reason or fails to repair or substitute a thing within a reasonable period of time after the seller is notified of the lack of conformity (Art. 223 para 1 of the LOA).In the event of consumer sale, any unreasonable inconvenience caused to the purchaser by the repair or substitution of a thing is also deemed to be a fundamental breach of contract by the seller (Art. 223 para 2 of the LOA). In both cases the consumer is not required to determine an additional term and has the right, inter alia, to terminate the contract (Art. 223 para 3 of the LOA). The consumer may also claim compensation from the seller for such damage as is caused due to use of the thing for purposes other than those intended if the damage arises from the seller providing insufficient information to the consumer, and compensation for damage which is caused to		

		the thing due to the lack of conformity thereof (Art. 225 of the LOA). • **ES:** When the seller does not deliver, consumers can terminate the contract. As a result of termination, art. 66bis, 3 (for sales law, B2C) and art. 110 (for distance sales, B2C) RCPA entitles consumers to recover the sums paid as soon as possible (a maximum period of 30 days is fixed for distance sales). In the event that the seller does not make this payment without undue delay (or within the legal stated period), consumers can claim the double of the sum owed, besides having the right to be compensated for damages, where these exceed that amount • **FI:** CPA (38/1978) Chapter 5 Section 14 provides rules with respect to defectiveness of goods that have been sold subject to an "as is" clause or a similar general reservation and to the rights of consumer thereof. The said provision cannot be derogated from by agreement to the detriment of a consumer. • **FR:** Article L211-13 of the Consumer code states that the provisions of the present		

		section do not deprive the buyer of the right to bring an action on account of latent defects as provided for in Articles 1641 to 1649 of the Civil Code or any other action of a contractual or extra contractual nature to which he is entitled under the law. • **IE:** Under s55 of the Sale of Goods Act 1893 as amended, the implied terms under s12 of the Act concerning the seller's title cannot be excluded, and implied terms under sections 13, 14 and 15 concerning conformity with description, quality, and conformity with sample may not be excluded unless the exclusion is fair and reasonable. • **LU:** Article 6.363 (9) of Civil Code states that in all cases the buyer shall be entitled to be reimbursed for the losses sustained due to the sale of a thing of improper quality. Defects removal costs will be also considered as losses if the seller has failed to remove them within a reasonable time and such defects were removed by the buyer or by third parties used by the buyer. • **NL:** Under Article 7:21(6) BW, in case of a consumer sales contract where the seller is		

		required to repair the lack of conformity but fails to do so within a reasonable period after having received a written notice to that effect from the buyer, the buyer is entitled to have the thing repaired by a third person and to recover the costs thereof from the seller. A claim based on this provision is not a claim for damages but a claim based on the right to enforce performance, which implies that this right may also be invoked if the lack of conformity was caused by *force majeure* (i.e. where the non-performance cannot be attributed to the seller). Instead, where there is no *force majeure*, the buyer can of course also claim damages. In case of termination, the consumer is required to return the goods received. Where the nature of the goods stands in the way of the goods being returned (e.g. in the case of the supply of energy that has already been consumed), the consumer is required only to pay the monetary value that the goods had at the moment of delivery (Article 6:272(2) BW). These provisions are mandatory in a consumer sales contract (Article 7:6(1) BW).		

		• **PT:** Article 6 Sale of Consumer Goods Act gives consumers the **right to a direct claim against the producer and his representatives** (*i. e.* commercial distributors of the producer and authorised centre for alter-sales services). The producer and his representative are jointly liable. The remedy for a direct claim is limited to repair and replacement. Direct Liability is strict and does not depend of negligence or foreseeability. According to Article 6, nr. 2 Sale of Consumer Goods Act, the producer is not directly liable:- If the non-conformity results exclusively from declarations by the seller about the good and its usages, or as result of an improper use of the good; or - If the good was not put into circulation by him; or- If, considering the circumstances, it is likely that the non-conformity did not exist at the time when the good was put into circulation by him; or- If the good was not manufactured neither for sale nor for any other form of distribution with profit goals, or has not been manufactured or distributed within the		

		professional producer activity; or- If more than ten years have passed since he put the product into circulation. According to Article 6, nr. 3 Sale of Consumer Goods Act, these exceptions are also available to the producers' representative. It must be highlighted that, pursuant to article 6, nr. 1 Sale of Consumer Goods Act, the consumer cannot claim repair or replacement if such remedies are impossible or disproportionate when taking into account the full value of the good if there was no lack of conformity, the significance of this lack of conformity for the consumer, and the possibility of an alternative solution arranged without serious inconvenience to the consumer. • **UK:** The main additional right is the so-called "short-term" right of rejection, allowing the consumer to terminate the contract and receive a full refund if goods do not conform to the contract for a period of up to 30 days[375].		

[375] *UK: See s.20 CRA 2015.*

Q 9 - Art. 4 directive 1999/44/EC – Right of redress				
Provision in the directive 1999/44/EC Consumer protection in the directive	**Questions**	**Higher level for the consumer in the mandatory domestic laws than in the directive**	**Broader scope than in the directive**	**Same level of protection in the directive as in domestic law**
Art. 4 directive 1999/44/EC **Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against**	**In domestic law, are there mandatory rules about right of redress of the seller against the producer?**	**-In several MS, such provision has been transposed by a mandatory rule:** BE[376], BG[377], LV, MT, RO **-**In one MS, the right of redress of the seller is based on a mandatory rule which is almost the same as the article 4 of the directive: EE**[378]** **- For several MS, the rule is mandatory, which is why it is**	**-In a few MS, such provision has been transposed by a mandatory rule which refers to contract law in general:** CY[383], DE[384], FR[385] **-In a few MS, the right of redress of the seller is**	**-In several MS, such provision has been transposed by a rule which can be derogated from by agreement:** AT[388], ES[389], FI[390], IT, PT[391] • For a few of those MS, the right of redress of the seller against the producer is subject to **conditions:** • limitation period for

[376] BE: It is not possible for the seller to be opposed by a contractual clause having the effect of restricting or waiving the liability binding on that producer or intermediary (see also BG)

[377] BG: It is not possible for the seller to be opposed by a contractual clause having the effect of restricting or waiving the liability binding on that producer or intermediary (see also BE).

[378] EE: LOA § 228. Liability of producer, previous seller or other retailer to purchaser: "If, in the event of consumer sale, the seller who sells a thing to a consumer is liable for any lack of conformity of the thing to the purchaser as a result of a statement made by the producer, previous seller or other retailer with respect to particular characteristics of the thing, it is presumed that the seller may claim compensation for damage caused thereto from the corresponding person in accordance with the relationship between them and to the extent of the liability of the seller to the consumer".

the person or persons liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by		**mentioned in this column, but the mandatory rule is subjected to conditions such as:** • **Prescription** of the claim: DE[379], EL[380], PL[381] • A **reasonable time** after the buyer discovered the lack of conformity: DK[382]	**provided by general contract law: HU, LU[386]** **-A few MS have no such special rule.** However, the right of redress of the seller is based on a **general**	the claim of the seller: ES[392], IT[393], • The right may only be claimed if the addressee of the redress is a trader himself. This applies for the whole chain (§ 933b ABGB): AT

[383] *CY: Certain Aspects of Consumer Sales and Related Guarantee Law 7(1)/2000 Article 6: "When the end seller (in a chain of transactions) is liable for breach of contract, which stems from an act or omission of the producer, a previous seller (within the same chain of transactions) or any intermediary, the end seller does not lose the right to claim damages from the responsible person(s) within the same chain of transactions, pursuant to general contract law ».*

[384] *DE: The rule cannot be derogated from by an agreement made before the defect was notified to the supplier to the disadvantage of the seller, if the obligee with the right of recourse is not given another form of compensation of equal value.*

[385] *FR: Consumer code provides that "An action for indemnity may be brought by the final seller against the successive sellers or intermediaries and the producer of tangible movable property, pursuant to the principles of the Civil Code". That is a mandatory rule. Pursuant to case law, a direct action of a contractual nature for indemnity may be brought by the final seller against the successive sellers or intermediaries (Civ. 1ère, 9 Oct. 1979 ; Ass. Plén. 7 Feb. 1986).*

[388] *AT: § 933b ABGB (concerning the right of redress) is dispositive law, which means it can be derogated by agreement. However, only within the limits of § 879 (1) and (3) and only in between the members of the same 'chain-link', unless there is consent of the third party (cf. Zöchling-Jud in Kletečka/Schauer, ABGB-ON[1.02] § 933b mn. 29 ff.)*

[389] *ES: According to prevailing doctrinal views, the rule on redress (art. 124.3 RCPA) may be derogated from by agreement, unless it is a standard term.*

[390] *FI: Sale of Goods Act (355/1987) Chapter 6 — Consequences of defect in the goods "Buyer's remedies": "Section 30: If the goods are defective and the defect is not due to any reason attributable to the buyer, the buyer is entitled, in accordance with the provisions of this chapter, (i) to require the seller to remedy the defect or to deliver substitute goods or (ii) to require a reduction in the contract price or (iii) to declare the contract avoided as well as (iv) to claim damages. The buyer may also withhold payment in accordance with section 42 ».This provisions are not mandatory.*

[391] *PT: According to Article 7, the final seller and other parties in the chain have a right to compensation for all damages resulting from the consumer's claim regardless of whether the former seller – the only one against whom the claim can be addressed - was at fault. Nevertheless, according to Article 7, nr. 1, only the previous seller (which is a professional) in the same chain of contracts may be pursued. The right to redress provided by Article 7 may be subject to agreement.*

[379] *DE: German law provides a specific regulation as to prescription of a claim. § 479 — Limitation of recourse claims: "(1) The claims to reimbursement of expenses specified in section 478 (2) are subject to a two-year limitation period after delivery of the thing. (2) The claims specified in sections 437 and 478 (2) of the entrepreneur against his supplier for a defect in a newly manufactured thing sold to a consumer become statute-barred at the earliest two months after the date on which the entrepreneur satisfies the claims of the consumer. This suspension of expiry of limitation ends at the latest five years after the time when the supplier delivers the thing to the entrepreneur. (3) The above subsections apply with the necessary modifications to claims of the supplier and the other buyers in the supply chain against their sellers if the obligors are entrepreneurs".*

[380] *EL: Article 560 (recourse) of the Greek Civil Code: « In the case of successive sales and responsibility of the final seller because of real defects or of lack of agreed qualities, the prescription of the previous seller in his entitlements due to the defect or lack of, starts since the buyer is satisfied, unless preceded by a final judgment against the final seller, so the prescription begins from the finality of the decision ». Article 561 of the Greek Civil Code: « The provisions of the previous article shall apply accordingly in the event of recourse against any previous seller of the same thing ».*

[381] *PL: Art. 576 of the Civil code: "§ 1. Seller's rights expire within 6 months. The limitation period starts on the day the seller bore the costs or should have borne them. §2 If seller's claim is rejected because the defendant was not the person liable, limitation period of the claims against other seller cannot finish until six months after the judgement was eligible for appeal. §4 The provisions of this section cannot be derogated".*

[382] *DK: Section 85 of the Sale of Goods Act provides[382]: "If the buyer intends to rely on a lack of conformity as against a manufacturer or another merchant who, in connection with the contract, has agreed to remedy any lack of conformity, the buyer shall give the seller or the other merchant notice thereof within a reasonable time after the buyer discovered the*

national law.		• The damage pertains to a matter of product liability and falls under the liability of the producer; or the seller knew or ought to have known the defect ; or the defect has occurred after the goods were delivered to the seller: NL	**contract rule which lays on the right of recourse against a person by whom the damage was caused:** CZ[387], LT	**-A few MS have no such special rule:** HR, IE, SE[394] **-In a few MS, this is subject to contractual arrangements between seller and producer:** SK, UK

Q 10- Art. 5 directive 1999/44/EC – Time limits				
Provision in the directive n° 99/44/EEC Consumer protection in the directive	**Questions**	**Higher level for the consumer in the mandatory domestic laws than in the directive**	**Broader scope than in the directive**	**Same level of protection in the directive as in domestic law**

lack of conformity. If he fails to do so, the buyer will lose the right to rely on the lack of conformity. Any notice given within a period of two months after the buyer discovered the lack of conformity shall be a timely notice."

[386] *LU: According to article 1641 of the civil code, the implied warranty ("vices caches") is always transmitted with the good which allows the right of redress of the seller against the producer. There is, otherwise, no mandatory rule about the right of redress of the seller against the producer.*

[392] *ES: The person who is liable to the consumer (the seller or the producer) has one year to pursue a claim against the person who is liable for the lack of conformity. This period shall be calculated from the time at which the remedy has been completed. Furthermore, When the lack of conformity relates to the origin, identity or suitability of the products, in accordance with the nature and purpose of the statutory provisions (art. 124.2 RCPA), it is disputed whether liability of the producer should be direct rather than subsidiary.*

[393] *IT: The final seller who has fulfilled the remedies enforced against him/her by the consumer, may act, within one year from the performance, in recourse against the person or persons responsible.*

[387] *CZ: The seller may invoke against the producer the general provisions on breach of a contractual duty arising from the contract between him and producer. The seller may eventually claim also damages against the producer.*

[394] *SE: When the directive was implemented, Swedish law was assessed to already be in compliance with the demands of article 4, and no legislative action was taken (For the preparatory works, see Prop. 2001/02:134, p. 55).*

Legal guarantee period				
Art. 5 directive 1999/44/EC **1. The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods.**		**-In NL, there is a two years limitation period, but starting from the notification of the defect (Article 7:23(2) BW).** So, this period begins after the delivery, and then it is more favourable to the consumer than the directive. -**In a few MS, there is no such period of guarantee of two years**. • **FI:** consumer code Section 15: Relevant time for defectiveness (1258/2001) "(*1) The defectiveness of the goods shall be determined with regard to their characteristics at the time when the risk passes to the buyer. The seller shall be liable for any defect that existed at that time even if it appeared only later*. » The limit of two years is not provided. • **IE :** there is no limit of two years • **SE:** Section 20 Consumer		**-Most MS have transposed the two years warranty period from the delivery of goods :** • **AT**: § 933 ABGB limits the rights of warranty to two years in case of movable objects • **BE:** two years after the good has been delivered. • **BG:** Consumer Protection Act Art. 105. (2) The seller is liable for any lack of conformity between the consumer goods and the contract of sale, which exists at the time of delivery or which become apparent within two years as from the delivery of the goods even if the seller was unaware of this lack of conformity. • **CY:** The seller is liable against the consumer for any lack of conformity where the lack of conformity becomes apparent within two years (Article 7(1) of the Certain Aspects of Consumer Sales and Related Guarantee Law 7(1)/2000). • **CZ:** The lack of conformity

		Sales Act (1990:932):"*The issue of whether the goods are defective shall be assessed taking into account their condition at the time of delivery. The seller shall be liable for defects existing at such time, notwithstanding that the defects do not appear until a later time.*" No limit is mentioned. • **UK:** There is no 2-year period in English law; In these 4 MS, it is more favourable to the consumer than the directive, because the seller is finally liable during all the limitation period, and the limitation period is longer than two years : • six years: IE, UK • three years: SE[395], FI[396]		must exist at the time of delivering or must occur in 24 months after the delivery (section 2165 of Civil Code) • **DK:** Section 83.1 of the Sale of Goods Act provides: "In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof within a period of two years from the date on which the goods were handed over to the buyer, unless the seller has guaranteed for the goods for a longer period or has acted contrary to the requirement of good faith." • **EE:** the seller is liable for any lack of conformity of a thing which becomes apparent within two years as of the date of delivery of the thing to the purchaser (Art. 218 para 2 sentence 1 of the LOA). • **ES:** According to art. 123.1 RCPA, the seller is liable where the lack of conformity appears within a two-year period following delivery.

[395] *SE: The limitation is three years from the time the buyer received the product (i.e. the delivery). Within this time, the buyer must file a complaint (Swe: "reklamera") with the seller, otherwise he may not claim remedies. This is stated in Section 23 paragraph 3 of the Consumer Sales Act, which is the closest equivalent of article 5 §1 of the directive. The seller cannot shorten this limitation period. Section 24 contains an exception to the rule in Section 23. It reads: "the buyer may claim that goods are defective, if the seller has acted with gross negligence or in breach of good faith or if the defect is such as referred to in Section 18." (Section 18 refers to life threateningly dangerous goods and such goods which are sold in violation of sales bans issued in accordance with Laws, such as the Product Safety Act (SFS 2004:451)).*

[396] *FI: the limitation period in B2C contracts is three years (see Q 35)*

				• **HR:** Pursuant to Article 404, paragraph 4 of the COA, the seller in B2C contracts will be liable if non-conformity becomes apparent within two years as of delivery of goods and in B2B contracts, within six months as of delivery. • **HU:** Section 6:163 [Expiry of a right to warranty]…(2) In connection with contracts that involve a consumer and a business party, the obligees right to warranty shall lapse after two years from the delivery date. • **IT:** According to art. 132, §§ 1 and 4, It. cons code, the seller shall be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods, provided that the seller did not hide the defect with fraud. In this case the limitation period of 5 years provided by the general contract law on fraud shall apply. • **LT :** Article 6.326 (10) of the Civil Code :10. The seller will be liable for the shortcomings of the item become apparent within two years as from delivery of the goods, if the laws or agreement does not provide for longer term.

				• **LU:** Article L. 212-6 of the Consumer Code: To implement the legal guarantee of the professional, the consumer must, by any means, give notice of the lack of conformity within two years from delivery of the goods. • **MT:** Article 78 of the Consumer Act: The trader shall be liable under the provisions of articles 73 and 74 where the lack of conformity becomes apparent to the consumer within two years from the delivery of the goods. This period shall be suspended for the duration of negotiations carried on between the trader and the consumer with a view to an amicable settlement. • **PL:** Buyer's rights expire if the defect was not detected within two years after the delivery of goods • **PT:** According to Articles 5, nr. 1 and 5-A, nr. 1 Sale of Consumer Goods Act, the consumer is entitled to pursue remedies against the seller because of a lack of conformity within two or five years from the date of delivery of the movable or immovable goods,

				respectively. • **RO:** In accordance with art. 16 of Law 449/2003 on the sale of consumer goods and associated guarantees, the guarantee covers the lack of conformity which "becomes apparent within two years as from delivery of the goods". • **SI:** Art. 37b of the ZVPot:(1) The seller shall not be responsible for factual defects which appear two years after the goods were delivered. • **SK:** there is twenty-four months warranty period. -**In a few MS, the MS provide a limitation period of two years, which implements the article 5 of the directive. They do not distinguish between the length of the guarantee and the limitation period**: • **DE:** According to § § 438 BGB, the limitation period generally constitutes two years with respect to tangible goods. By this rule the German legislator wanted to take account of Art. 5 (1) Directive 1999/44/EC. According to § 475 (2) BGB, the limitation period cannot be contractually altered in advance to the detriment of

				the consumer if this leads to a limitation period of less than two years. • **EL:** Article 554 of the Greek Civil Code: The purchaser's rights due to real defect or lack of agreed qualities are barred after five years for the real estate and two years for mobile • **FR:** Article L211-12 of the Consumer Code: "Action resulting from lack of conformity lapses two years after delivery of the product." It is not a prescription period (which could be suspended or interrupted). It is a guarantee period. After two years, there will be no more right to guarantee.
Non expiration of the limitation period before two years				
Art. 5 directive 1999/44/EC **1 …. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall**	Under domestic law, are the rights laid down in Article 3(2) of the directive, subject to a **limitation period**? If it is, at what time from the time of delivery, does this			**All MS consider that the limitation period cannot expire within the period of two years from the time of delivery** (except in case of second-hand goods as mentioned before). Sometimes, it is expressly mentioned in the law, sometimes the

not expire within a period of two years from the time of delivery.	period expire? Can the seller shorten the limitation period?			limitation period is longer than the period of two years of guarantee: AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK • **In BE,** Article 1649quater, §3 CC regulates the limitation period. The right of the remedy based on non-conformity prescribes after 1 year from the moment the consumer notes the non-conformity, however the time limit **may not expire before the end of two years after the good has been delivered**. • **PL:** In polish law – after the reform – it is provided a one year limitation period for buyer's rights, which in B2C contracts cannot finish before the above mentioned 2 years of guarantee period. • **IT** : According to **art. 132, §§ 1 and 4, It. cons code,** consumers' rights are subject to a limitation period of **26 months** from the date of delivery, and in any case the seller shall be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods, provided that the seller did not hide the defect with

				fraud. In this case the limitation period of **5 years provided by the general contract law on fraud** shall apply. In any case, consumers who have been summoned by the seller can enforce their rights without any limitation period, provided that they have given notice of the lack of conformity to the seller within the time limit prescribed by the law • **CZ[397], EE, ES[398], SK:** the limitation period is three years, then it is necessary longer than the period of guarantee. • **In NL**, a buyer may claim a remedy for a lack of conformity that manifests in principle not limited in time: only **a long prescription period of 20 years after delivery** applies under Article 3:306 BW, which states: « *Unless otherwise provided for by law, rights of action are prescribed by twenty years* ».

[397] *CZ: These rights being considered patrimonial rights are consequently subject of standard limitation period according to the articles 619 and 629 of Civil Code. The limitation period is either subjective (3 years) or objective one (10 years). Generally speaking, it is possible to shorten the limitation period but not in the case of contract concluded with the weaker party. The consumer being considered a weaker party is thus protected against such shortening of limitation period (see section § 630/2).*

[398] *ES: Generally speaking, rules on prescription are considered mandatory in the SpCC and, following this, the possibility to shorten the prescription periods is not foreseen in the general law on prescription in the SpCC. By contrast, art. 121-3 Catalan Civil Code (CatCC) admits agreements that modify the legal prescription periods by either shortening or lengthening them. The limits are that the resulting periods may not exceed, respectively, half or double the legally established periods. There is not a rule that states that in a contract between a trader and a consumer this possibility may not apply to the detriment of the consumer. There is not a black-listed standard term as such either.*

				The buyer must, however, prove that the goods do not meet the expectations the buyer may reasonably have had of them at the moment of conclusion of the contract. This in effect means that the buyer must prove, possibly years later, that at the moment of delivery the goods did not possess the qualities the buyer could expect. When he finds out that there is a lack of conformity (or, in non-B2C-contracts, when he ought to have found that out), he must notify the lack of conformity to the seller under Article 7:23 paragraph 1 BW. Paragraph 2 of that article adds that a remedy prescribes in 2 years after that notification. So the initial time to claim non-conformity is long, but once the non-conformity is discovered, the buyer must notify, and then there is a relatively short period of 2 years to undertake legal action. This prescription period (as the general one under Article 3:306 BW) can however be renewed if the buyer informs the seller within that period (in writing) that he still intends to undertake legal action (the prescription is

				barred and a new prescription period starts to run once the letter is received by the seller), cf. Article 3:316 BW. In the four MS cited above where there is no the 2 years guarantee period (IE, FI, SE, UK), the limitation period is longer than 2 years (3 (SE, FI) or 6 years (IE, UK)). Then the consumer is sure not to have less than 2 years to invoke his rights.

Case of the second hand goods				
Art. 5 directive 1999/44/EC **1.The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time**	The article 7 of the directive above mentioned has provided that « *Member States may provide that, in* ***the case of second-hand goods****, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year* ». **Has such a rule been**	**-This rule has not been introduced in many MS. Therefore, it can be considered that the domestic law increases the level of protection because the period for the liability of the seller can not be shorter:** BG, EL, FI, FR[399], IE, LT, LV, MT, NL[400], SE[401]		**-Such a rule has been provided in most MS. The domestic law enable the parties to negotiate individually such an agreement.** AT[402], BE, CY, CZ, DE, ES, HR, HU, IT, LU[403], PL, PT, RO, SK **-Such a rule has been provided as mandatory rule in one MS:** SI[404] **-In a few MS, domestic law does not provide a shorter liability period for second-hand goods, but provides others specific rule in case of second-hand goods:** DK, EE

[399] *FR: Article L211-7 of the Consumer Code (inserted by Law 2014-344 of 17 March 2014): "In the absence of proof to the contrary, any lack of conformity appearing within twenty four months of delivery of the product is presumed to have existed at the time of delivery.*
For second-hands goods, the period mentioned in the first paragraph of this Article is reduced to six months. The seller may refute that presumption if it is incompatible with the nature of the product or the non-conformity invoked" NOTA: Law 2014-344 of 17 March 2014, article 15-II: These provisions shall enter into force two years after its publication.
[400] *NL: Dutch law did not implement any specific rules for second hand goods, which means that the normal rules on conformity apply. The fact that the goods sold were second hand may of course influence what the consumer may expect from the goods. Cf. Loos 2014, no. 30, p. 69. This implies that also the shift of the burden of proof under Article 7:18(2) BW applies. Cf. Hof Arnhem-Leeuwarden, locatie Arnhem (Appellate Court of Arnhem-Leeuwarden, location Arnhem), 25 February 2014, ECLI:NL:GHARL:2014:1388.*
The parties may not derogate from these rules to the detriment of the consumer, cf. Article 7:6(1) BW.
[401] *SE: the Consumer Sales Act does not differ between new and second-hand goods, as regards time limits for making complaints. There was therefore no need to use the opportunity provided in article 7.1 §2.*
[402] *AT: § 9 (1) KSchG pursuant to which the time period for the liability the law provides in case of warranty (§ 933 ABGB) can be reduced to one year. This can however only be done when the object is used (second-hand) and movable (§ 293 ABGB). Also, when the object is a motor vehicle, such a shorter period may only be agreed upon, when since the day the vehicle was registered, one year has passed. Furthermore, such an agreement cannot be included in general contract terms and conditions, but must be negotiated individually.*
[403] *LU: under Article L 212-6 of the Consumer code, for second-hand goods, the seller and the consumer may agree contractual terms or agreements which have a shorter time period than the legal two-year warranty but that period may be less than one year. Nevertheless, for car sales, such a reduction is only valid if the initial entry of service of the vehicle took more than a year before.*
[404] *SI: Article 37b(2) of the ZVPot provides that, in the case of second-hand goods, the seller is liable for any lack of conformity which becomes apparent within one year of delivery of the goods.*

of delivery. **Article 7 (2): Member States may provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year.**	**provided in domestic law?**			• **DK:** Section 76.2 of the Sale of Goods Act does provide: "In a sale of second-hand goods at a public auction where the buyer has the opportunity to be present, the buyer may only rely on the existence of a lack of conformity if it follows from section 76(1)(i)-(iii) of this Act, or if the goods are in a condition substantially worse than the buyer had reason to expect with reference to the circumstances." • **EE:** Art. 106 para 1 of the LOA allows agreeing in advance that seller's liability is precluded or restricted in case of second-hand goods. This agreement is valid in the limits of Art. 106 para 2 of the LOA[405]. **-In UK, there is no such rule under the CRA 2015.** However, in applying the satisfactory quality test, the second-hand nature of the goods could be a relevant criterion, so a more limited durability might be expected.

[405] *EE: § 106. Agreement to release person from liability or to restrict liability (1) An obligor and an obligee may agree in advance to preclude or restrict liability in the case of non-performance of an obligation. (2) Agreements under which liability is precluded or restricted in the case of intentional non-performance or which allow the obligor to perform an obligation in a manner materially different from that which could be reasonably expected by the obligee or which unreasonably exclude or restrict liability in some other manner are void.*

Duty to give notice of the lack of conformity				
Art. 5 directive 1999/44/EC **2. Member States may provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity.** **Member States shall inform the Commission of their use of this**	In domestic law, is there a rule whereby the consumer has a **duty to give notice of the lack of compliance in a determined period** (see article 5§2 of the directive)? If so, can such rule be derogated from by agreement?	-**In several MS, the consumer is not required to give notification**: AT, DE, EL[406], IE, FR, PL[407], UK		-**In most MS the consumer has to notify the seller of the lack of conformity[408]**: • **within two months from discovering the lack of conformity**: BE[409], EE, ES, CY, FI, HR, HU, IT, LU, LV, MT, NL[410], PT, RO, SI, SK, • **no later than 2 months from discovering the lack of conformity, or 14 days if it is a service:** BG • **within a reasonable time**: CZ[411], DK, LT[412], SE[413].

[406] *EL: Such provision was not adopted by the Greek law because it was considered as extremely burdensome for consumers.*
[407] *PL: after the reform of 2014 there is no such duty in B2C contracts. It existed under the Polish law before the reform (2 months period to inform).*
[408] *Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais*
[409] *BE: The law prescribes in article 1649quater, §2 CC that parties can agree upon a certain period where the consumer must notify the seller about the lack of conformity. However, that period shall not be less than two months from the day when the consumer detected the lack of conformity.*
[410] *NL: The consumer has a duty to inform the seller of a lack of conformity within a reasonable period of time after discovery of the defect; a notice within 2 months after actual discovery is in any case considered to be on time, cf. Article 7:23(1) BW. Failure to give notice leads to the loss of all remedies for lack of conformity, as well as to the loss of the possibility to invoke fundamental mistake, fraud and tort, see Loos 2014, p. 94 (critically, with references).*
[411] *CZ: Section 2112 (1): If a buyer fails to notify the defect **without undue delay** after he could have discovered it during a timely inspection and by exercising adequate care, **a court shall not grant him the right arising from a defective performance**. In case of a latent defect, the same applies if the defect was not notified without undue delay after the buyer could have discovered it by exercising due care, but no later than two years after the delivery of the thing.*
[412] *LT: Article 6.348 (1) of the Civil Code:1. The buyer is bound to notify the seller of the breach of any condition of the contract specifying the quality, quantity, range, completeness, containers and packaging of the things **within the time period fixed by law or contract** or where the time period is not fixed - **within a reasonable time** after the breach of a certain condition was discovered or, in view of the type and purpose of the things, ought to have been discovered.*
[413] *SE: the buyer may not claim that the goods are defective, if he does not give the seller notice of the defect within a reasonable time after he discovered or should have discovered the defect (complaint). Notice submitted within two months after the buyer discovered the defect shall always be deemed to have been submitted in a timely manner. In the cases referred to in Section 1, second paragraph, notice concerning the defect may instead be left to the trader. This is according to Section 23 paragraph 1 of the Consumer Sales Act.*

paragraph. The Commission shall monitor the effect of the existence of this option for the Member States on consumers and on the internal market. **Not later than 7 January 2003, the Commission shall prepare a report on the use made by Member States of this paragraph. This report shall be published in the Official Journal of the European Communities.**				
Burden of proof that the lack of conformity exists at the time of the delivery				
Art. 5 directive 1999/44/EC 3. **Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have**	In domestic law, is there a rule which provides who bears **the burden of proof of the lack of conformity at the moment of the delivery**? In domestic law, is there a rule whereby, unless proved otherwise, **any**	**-In BG**, Art 105 para.2 CPA is the same as the presumption provided for in Art. 5 directive 1999/44/EC. But **this rule is mandatory. This rule is introduced in the Consumer Protection Act and therefore, is intended for consumer protection.**		-**Most MS have the same presumption as in the directive:** if the lack of conformity occurs within 6 months of delivery, the seller bears the burden of proof that the defect wasn't present at the time of delivery; If the lack of conformity occurs after 6 months but within the two years as described in the law, then the consumer bears the burden

existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.	**lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery** unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity? If so, can such rule be derogated from by agreement?	**-In a few MS, there is a mandatory rule which lays this presumption. However, the domestic mandatory rule increases the level of protection because the presumption period is longer:** • one year: PL • two years of delivery of the movable goods: PT, FR[414]		of proof that the defect was present at the time of delivery: AT, BE, BG, CZ, DE, DK, EE, EL, ES, HR, HU, NL, LT, LU, RO, SE[415], UK **-One MS has the same presumption as in the directive, but the starting point of the six-month period is the time of purchase and not the time when the risk passes to the buyer. The directive is more protective because the six-months period begins later**: LV **-In a few MS, there is no specific rule relative to burden of proof of the lack of conformity:** FI[416], IE, IT, MT[417] **-In most MS, there is a mandatory rule which provides that, unless proved otherwise, any lack of conformity which**

[414] *FR: As of March 17, 2016, the period of presumption of lack of conformity will be extended to twenty four months for goods and six months for second-hand goods.*
[415] *SE: Section 20 a of the Consumer Sales Act states that a defect which manifests itself within six months from the date of delivery of the goods shall be deemed to have existed at the time of delivery, unless otherwise proven (by the seller) or if it is inconsistent with the nature of the goods or the defect. However, the recent Supreme Court case NJA 2013 p 524 the court confirmed the long standing rule that as a general rule a buyer, whether consumer or not, must prove that there was a defect, and that it existed at the time of delivery (which is the relevant time for assessing whether there is a defect, according to Section 20 of the Consumer Sales Act.)*
[416] *FI: According to Code of Procedure 17:1 a party shall prove the facts that support the action.*
[417] *MT: The burden of proof is on the party that makes the allegations. There are no special rules in this regard and the normal civil law rules apply.*

				<u>becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity</u>: AT, BE, BG, CY[418], CZ, DE, DK, EE, EL, ES, FI, HR, HU, IE, IT, LT, LU, LV, NL, RO, SE, SK[419], UK **<u>In one MS, such rule does not exist:</u>** MT • In MT, article 78 of the Consumer Act states only: "***78.*** *The trader shall be liable under the provisions of articles 73 and 74 where the lack of conformity becomes apparent to the consumer within two years from the delivery of the goods. This period shall be suspended for the duration of negotiations carried on between the trader and the consumer with a view to an amicable settlement. »*

*[418] CY: the rule mentioned is **<u>quite like a presumption</u>** of the existence of lack of conformity at the time of the delivery, if the defect appears within **<u>24 months</u>** of delivery. Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*

*[419] SK: the rule mentioned is **<u>quite like a presumption</u>** of the existence of lack of conformity at the time of the delivery, if the defect appears within **<u>24 months</u>** of delivery. Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*

Art. 5 directive 1999/44/EC **1. The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of**	In domestic law, is there a rule which provides, **if the incorrect installation by the seller is considered as a lack of conformity, when must this lack exist in case of incorrect installation by**	-For a few MS, in the rule relative to the incorrect installation by the seller, there is no provision as to relevant time for establishing conformity. **However, a relevant provision specifies that the defect must be existent at the time the**		**-For many MS, in the rule relative to the incorrect installation by the seller, there is no provision as to relevant time for establishing conformity** (such as the time when the installation is complete or such as the time when the consumer had reasonable for installation). They only

the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.	**<u>the seller?</u>** If so, can such rule be derogated from by agreement?	**<u>risk passes and that the risk passes with transfer of the goods:</u>** DE[420], EE[421], EL[422], FI[423], HR[424], NL, SE • **<u>NL:</u>** Whether or not there is a lack of conformity is to be determined at the time when risk passes to the consumer. This is normally the moment of delivery, Article 7:10 BW		provide that incorrect installation is considered as a lack of conformity when executed by the entrepreneur himself or the consumer using an instruction: AT, BE, BG, CY, ES, FR, IE, IT, LU, LV, PT, SE **-<u>In many MS, the rule relative to the incorrect installation by the seller has not been transposed (see also question 7) so there is no provision as to relevant time for establishing conformity:</u>** CZ,

[420] DE: There is no specific provision in German law as to the question when the lack of conformity in terms of an incorrect installation by the seller must exist. According to the first sentence of § 434 (1) BGB, the defect must be existent at the time the risk passes. The general rule in § 446 BGB provides that the risk passes with transfer of the goods. An installation by the seller can take place before or after transfer of the goods. In the case of installation before transfer, the general rule on passing of risk at the time of transfer remains applicable without any adaption. A lack of conformity in terms of an incorrect installation is, however, particularly relevant in cases when the good itself is not defective at the time of transfer and the installation is carried out afterwards. This may consequently lead to a defect of the good itself which then – as an exception – marks the relevant moment for passing of risk, but it is not necessary to have a claim for lack of conformity for the incorrect installation alone is sufficient. Thus, in the latter case, passing of risk does not occur until the (incorrect) installation has been completed. § 434 BGB cannot be derogated from by agreement to the detriment of the consumer (§ 475 (1) BGB). In contrast, § 446 BGB is not named in § 475 (1) BGB and thus in principle it can, also in consumer sales contracts, be derogated from by agreement.

[421] EE: There is no specific rule about when the lack must exist in cases of incorrect installation. General rule shall be applied: the seller is liable for any lack of conformity of a thing which exists at the time when the thing is delivered to the purchaser even if the passing of the risk of accidental loss of or damage to the thing is agreed for an earlier date (Art. 218 para 1 sentence 2 of the LOA). Such rule cannot be derogated from by agreement in detriment to the consumer (Art. 237 para 1 of the LOA).

[422] EL: Article 536 "[Incorrect installation] of the Greek Civil Code: The thing does not correspond to contract also in the case of its incorrect installation, if the installation is part of the contract and is fulfilled by the seller. The same stands also when the incorrectness of the installation made by the buyer is due to the seller's omission to provide him with the right instructions.
This provision should be combined with article 537 of the same code: "The seller is liable, despite of his culpability, if the subject-matter at the time the risk passes to the buyer (…) ».

*[423] **FI :** CPA Chapter 5, **Section 12a** — Defect arising from installation or lack of instructions (1258/2001) (1) If the installation or assembly of the goods is included in the contract of sale and if the goods have been installed by the seller or by someone else on the behalf of the seller, the goods shall likewise be defective if they do not conform, owing to erroneous installation or assembly, to what has been provided in section 12; and **Section 15** — Relevant time for defectiveness (1258/2001) (1) The defectiveness of the goods shall be determined with regard to their characteristics at the time when the risk passes to the buyer. The seller shall be liable for any defect that existed at that time even if it appeared only later.*

[424] HR: general rule from Article 400, paragraph 1 of the COA, according to which a seller is liable for non-conformity which existed at the moment of passing the risk, will apply accordingly.

		provides, cf. Loos 2014, p. 74. As Article 7:18(3) BW explicitly provides that incorrect installation by the seller is to be equalled to non-conformity, one may assume that delivery is not complete and therefore risk does not pass until the installation is completed. • **SE:** The Section 20, the defect must have existed when the goods were *delivered*. Domestic law considers that the finishing of the installation would be deemed equivalent to delivery. This would also conform to the rules of services (in the Consumer Services Act, Section 12), where the relevant time for assessing defectiveness, is "when the service is completed".		DK[425], HU, LT, MT, PL, RO, SI, SK, UK **-In a few MS: there is no explicit such rule. However, doctrinal opinion considers that the risk passes when the installation is complete:** AT, LT • AT[426]: The lack must exist at the time of completion of the installation. Pursuant to § 9a KSchG the seller is responsible for all damage to the goods caused by incorrect installation even if the installation takes place after the goods have already been transferred to the buyer (*Kathrein*, Gewährleistung im Verbrauchergeschäft, ecolex 2001, 428f). • **LT:** It should be presumed that this lack of conformity should exist after installation of device made by the seller.

[425] *DK: As set out in question 7-6, the Sale of Goods Act does not explicitly address the issue of installation by the seller, but in judicial practice the Act has been interpreted to cover also installation, as long as the installation does not constitute the dominant element of the contract. In this manner, the mandatory conformity requirements will also apply to the installation of contract goods.*

[426] *AT: Cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*

Other rules?				
	In domestic law, are there others mandatory consumer protection rules about the **time of lack of conformity**?	**-In a few MS, there are others mandatory consumer protection rules about the time of lack of conformity. There rule increase the level of protection of the consumer:** • **EL:** Article 557 of the Greek Civil Code: The seller may not invoke the prescription of previous articles (i.e. articles 555, 556) if he concealed or withheld fraudulently the defect or the lack of agreed quality. Article 558 of the Greek Civil Code: The buyer may, even after supplement of the prescription, exercise by objection his rights from the defect or the lack of agreed quality, if he alerted the seller for them within the prescription period. • **ES:** According to art. 123.3 RCPA, the seller must provide documentary evidence of the delivery of the product		**-In several MS, there are others mandatory consumer protection rules about the time of lack of conformity. There rule do not increase the level of protection of the consumer:** • **AT:** When the supplier is at fault for the lack of conformity, the statute of limitation for the claim pursuant to § 933a ABGB (see 8-7)) is three years, starting from when the recipient became aware of the damage (= lack of conformity) (§ 1489 ABGB; total maximum of thirty years). • **BE:** The consumer's action shall be time-barred within a period of one year from the day the lack of conformity was detected, although that period cannot expire before the end of the two-year period specified in article 1649quater §1 CC. • **LT:** Article 6.348 of the Civil Code states that "1. The buyer is bound to notify the seller of the breach of any condition of the contract specifying the

		to consumers exercising their right to repair or replacement, stating the delivery date and the lack of conformity leading to the exercise of this right. Similarly, the seller has to provide the consumer with documentary proof of delivery, stating the date of the delivery and the repair carried out, if any, along with the repaired or replacement product. • **PL:** The legal guarantee period is extended if the expiration date is longer, to the end of expiration date[427]. This rule is a general one, not only intended to protect the consumers. But it is **mandatory only in B2C contracts**, and not in B2B contracts. So it is a general rule, but with a specific regulation in the sphere of consumer protection.		quality, quantity, range, completeness, containers and packaging of the things within the time period fixed by law or contract or where the time period is not fixed - within a reasonable time after the breach of a certain condition was discovered or, in view of the type and purpose of the things, ought to have been discovered. 2. In case of failure by the buyer to perform the obligation laid down in paragraph 1 of this Article, the seller shall have the right to refuse to fully or in part meet the buyer's demands to replace the things, to deliver the missing things, to eliminate the defects of the things, to complete the things, to pack the things or deliver them in containers or to replace the containers or packaging, provided that he proves that following the breach of the obligation by the buyer his demands can no longer be met or that meeting of the demands would cause the seller unreasonable expenses compared to those the seller would have incurred if the

[427] *PL: Art. 568 C.C: "If the expiration date given by the seller or a producer finishes after two years from the delivery, the seller is liable till the end of expiration date".*

				buyer duly notified the seller of the breach of the contract.3. If the seller was aware or could not have been unaware of the non-conformity of the things delivered by him to the conditions of the contract of purchase-sale, he shall lose the right to invoke the rules laid down in paragraphs 1 and 2 of this Article. • **LU:** For used car sales, the seller and the consumer may agree, by a written contract clause negotiated individually, on a warranty period shorter than the legal two-year warranty but it is only valid if the first the initial entry of service of the vehicle took place more than a year before (Art. L 212-6 Consumer code). • **SK:** According to Section 626 CC the rights from liability for the defects of the property to which the warranty period applies shall become extinct if they are not exercised within the warranty period. The rights from the liability for the defects of perishable property shall be exercised no later than on the day following the purchase, failing which the rights shall become extinct. Where used property is

				concerned, the rights from the liability for defects shall become void if they are not exercised within twenty-four months of the used property takeover by the purchaser, or within the period agreed between the seller and the purchaser under Section 620 (2). **-In some MS, there is no others mandatory consumer protection rules:** BG, CZ, DE, DK, EE, FI, FR, HR, IE, IT, LV, MT, NL, PT, SE, UK

Q 11 - Art. 6 directive 1999/44/EC – Guarantees				
Provision in the directive 1999/44/EC Consumer protection in the directive	**Questions**	**Higher level for the consumer in the mandatory domestic laws than in the directive**	**Broader scope than in the directive**	**Same level of protection in the directive as in domestic law**

Art. 6 directive 1999/44/EC **1. A guarantee shall be legally binding on the offeror under the conditions laid down in the guarantee statement and the associated advertising**	In domestic law, is there a rule which provides, in B2C contracts, that a **guarantee shall be legally binding on the offeror under the conditions laid down in the guarantee statement and the associated advertising** (see art. 6 §1 directive 1999/44/EC)? If		**-In several MS, almost the same rule applies to contract in general concluded by a seller with a buyer (either consumer or business)**: CZ[428], EL[429], FI[430], HR[431], SK[432]	**-In most MS, such provision has been implemented by a mandatory rule:** AT, BE, BG, CY, DE, DK[433], EE, ES[434], FR, HU[435], IE, IT, LT, LU, LV, NL, RO, SI, UK **-In a few MS, almost the same rule is provided in a mandatory rule:** MT[436], PT[437]

[428] CZ: Section 1919 (1) which applies to any kind of contract provides that: „If a transferor assumes quality guarantee, he guarantees that the subject of performance will be, for a definite period after the discharge, fit for use for the stipulated purpose and that it will retain the stipulated properties; where no properties have been stipulated, the guarantee applies to the usual purpose and properties. (2) If a guarantee is not stipulated in a contract, the transferor may assume it by a declaration in the guarantee statement or by indicating the guarantee period or its "use by" or "best before" dates on the packaging. If a contract stipulates a guarantee period different from that indicated on the packaging, the stipulated guarantee period applies. If a guarantee statement specifies a guarantee period longer than the period which is stipulated or indicated on the packaging, the Langer guarantee period applies". Section 2113 which applies to purchase contracts provides that "Quality guarantee
By a quality guarantee, a seller undertakes that a thing will be fit for use for the usual purpose for a certain period or that it will retain the usual properties. Specification of a guarantee period or the "use by" date of a thing on the packaging or in advertising has the same effect. A guarantee may also be provided for an individual component part of a thing".
[429] EL: Article 559 (guarantee provision) of the Greek Civil Code: « If the seller or a third party has provided guarantee for the thing sold, the buyer has, over the offeror who guaranteed, the rights arising from the guarantee statement in accordance with the terms contained therein or the associated advertising without impairing his rights which stem from the law ».
[430] FI: Section 15b — Warranty information (1258/2001) (1) The warranty shall clearly indicate the following information: 1. the contents of the warranty and the fact that the buyer has statutory rights and that the warranty does not restrict these rights; and 2. the party giving the warranty, its period and area of validity and the other information necessary for the filing of claims under the warranty.
(2) On the request of the buyer, the warranty shall be given in writing or in electronic form so that the information cannot be unilaterally altered and that it remains accessible to the buyer. (3) The buyer is entitled to invoke the warranty even if it does not meet the requirements laid down in this section."
[431] HR: 3 Guarantee for the conformity of the sold thing Liability of the Seller and Manufacturer Article 423 (3) "The guarantee binds under the conditions under which it has been issued regardless of the form in which it has been issued (guarantee letter, oral statement, advertisement, etc.) but the buyer is entitled to request a written guarantee or guarantee in some other durable medium, accessible to him, to be issued".
[432] SK: On the basis of a declaration stipulated in the letter of warranty given to the buyer, the seller may provide a warranty exceeding the extent of the warranty stipulated in this Act. In the letter of warranty, the seller shall specify conditions and extent of this warranty.
[433] DK: The Act on Marketing[433] provides in Section 12.1: "To consumers, a declaration of a guarantee or similar arrangement may be provided only if such a statement gives the consumer a considerably better legal position than otherwise provided by existing legislation."
[434] ES: Act on Retail Trade (L. 7/1996) [= ART] Art. 12 […] "2. Products intended for sale may carry a commercial guarantee, which shall oblige the person offering it to honour the conditions laid down in the warranty and the respective advertising. Any such additional commercial guarantee offered by the seller must in any event meet legal requirements in respect of guarantees for consumer goods".
[435] HU: The text itself does not mention associated advertising directly. However, according to the general rules, public statements are covered.
[436] MT: Article 83. (1) A commercial guarantee shall be drawn up in written form in a clear and legible manner, in plain language and it shall comply with the following: (h) state clearly that the consumer enjoys certain rights at law in relation to the sale of goods to consumers and that those rights are not adversely affected by the guarantee.

	so, can such rule be derogated from by agreement			-**In one MS, there is almost the same rule. However, it is optional in the sense that is binding only if agreed by the parties:** PL[438] **-In one MS, there is no explicit such rule:** SE[439]
2. The guarantee shall: **- state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee,**	In domestic law, is there a rule whereby the **guarantee shall state that the consumer has legal rights under applicable national legislation** governing the sale of consumer goods **and make clear that those rights are not affected by the guarantee?** If so, can		**-In several MS, almost the same rule applies to contract in general concluded by a seller with a buyer (either consumer or business). The consumer is entitled to claim his rights according to given warranties**: CZ[440], FI[441], HR[442], SK[443]	**-In most MS, corresponding provision has been implemented by a mandatory rule:** AT, BE, BG, CY, DE, EE, EL, FR, HR, HU[444], IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, **-In one MS, the mandatory rule is less clear:** DK[445]

[437] *PT: - Consumer Protection Act (Act nr. 24/96 of 31st July 1996) Article 7 (General right to information) […] 5 – "Concrete and objective information contained in the advertising messages for a particular good, service or right shall be considered part of the content of the contracts to be signed after its disclosure. Any contractual clauses that run contrary to this information shall be considered unwritten".*

[438] *PL: Art. 577.§ 1: "The guarantee is given by guarantor's statement which lists guarantor duties and buyer's rights if the goods do not possess the qualities described in this statement. Guarantee statement may be done by advertisement". Art.579: "the guarantee shall state that the consumer has legal rights under the legal warranty and these rights are not affected by the guarantee".*

[439] *SE: At the implementation of the directive it was deemed unnecessary to legislate such a rule, since Swedish Law was already in compliance with article 6 §1. See the preparatory works, Prop 2001/02:134 pp. 61-62.*

[440] *CZ: Section 2166 (1) "(2) If necessary, the seller shall, in an understandable manner, explain in the confirmation the content, extent, conditions and duration of his liability as well as the manner in which the rights arising from the liability can be asserted. In the confirmation, the seller shall also state that other rights of the buyer related to the purchase of the thing are not affected. Failure to fulfil these duties does not prejudice the validity of the confirmation".*

[441] *FI: "Section 15b — Warranty information (1258/2001) (1) The warranty shall clearly indicate the following information:*

3. the contents of the warranty and the fact that the buyer has statutory rights and that the warranty does not restrict these rights; and

4. the party giving the warranty, its period and area of validity and the other information necessary for the filing of claims under the warranty.

(2) On the request of the buyer, the warranty shall be given in writing or in electronic form so that the information cannot be unilaterally altered and that it remains accessible to the buyer. (3) The buyer is entitled to invoke the warranty even if it does not meet the requirements laid down in this section."

- set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and	such rule be derogated from by agreement? Is there a rule which provides that the guarantee shall set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial			-**In a few MS, almost the same rule is provided in a mandatory rule:** SE[446], UK[447] **-In ES[448], almost the same rule is provided in a mandatory rule**. However, art. 6.5 of the Dir. 99/44, on the validity of the guarantee that

[442] HR: 3 Guarantee for the conformity of the sold thing Liability of the Seller and Manufacturer Article 423 "(5) The guarantee shall contain the buyer's rights arising from the guarantee and a clear stipulation that the guarantee does not affect other rights belonging to the buyer as per other legal grounds. (6) The guarantee shall contain details required by the buyer to be able to exercise his rights, especially guarantee period, regional scope of the guarantee and the name and address of the person who issued the guarantee".
[443] SK: There are no specific rules in CC. CC contains only general rules which must be used in connection with the regulation in ActPC:
- according to Section 502 (3) CC the certificate of warranty shall contain the name and surname, business name of the seller, registered office or place of business of the seller, content, scope and conditions of warranty, warranty period, and information required to claim the warranty. If the certificate of warranty fails to contain all of the required elements, this shall not invalidate the warranty;
- according to Section 620 (4) (5) CC at the purchaser´s request, the seller is obliged to provide the warranty in writing (certificate of warranty). If the nature of the property so permits, it shall suffice to issue a proof of purchase instead of a certificate of warranty. On the basis of a declaration stipulated in the letter of warranty given to the buyer, the seller may provide a warranty exceeding the extent of the warranty stipulated in this Act. In the letter of warranty, the seller shall specify conditions and extent of this warranty.
According to Section 10a (1) (f) (g)ActPC the seller is required before the conclusion of the contract or if the contract is awarded based on the order the consumer before the consumer dispatches the order, unless such information is obvious, given the nature of the product or service to the consumer in a clear and understandable way
- guidance on the seller's liability for defects or services under the general regulation (Sections 622 a 623 CC),
-the information about the existence and details the guarantee provided by the manufacturer or seller under stringent principles as establishing a general regulation (Section 502 CC), if it is the manufacturer or seller provides, as well as information on the existence and terms of assistance and services provided to consumers after sales or services, when such assistance is provided. The consumer is entitled to claim his rights according to given warranties.
[444] HU: the Cabinet Decree 151/2003 governing mandatory guarantees for certain durable consumer goods contain such requirement.
[445] DK: Section 12.2.s1-2 of the Act on Marketing provides: "If a guarantee is provided, the trader must in a clear and simple way inform the consumer of its content and give the information necessary to enforce the guarantee. In addition, traders must in a clear and unambiguous way make it clear that the consumer's mandatory rights under the law are not affected by the guarantee."
[446] SE: There is such a rule in Section 22 of the Marketing Act (SFS 2008:486), which contains the current Swedish implementation of art 6 §2 and 6 §3 of the directive. Section 22 paragraph 1 reads: "A trader, who in his marketing offers too be liable by a guarantee or similar undertaking for some time for a product or part thereof, or for a characteristic of the product, shall at the purchase provide the buyer with clear information on the content of the undertaking and data are necessary for the buyer to make claims under it. Information shall also be provided that the buyer's statutory rights are not affected by the undertaking." This legislation is part of the Swedish law public law, the law of markets (Swe: "offentlig rätt", "Marknadsrättslig"), and cannot be derogated from by agreement. Whether or not the consumer can rely on the guarantee or not, is a question of interpretation of the specific guarantee, according to the doctrine of interpretation of contracts. Violation of Section 22 och the Marketing Act is sanctioned by giving the consumer possibility to claim damages, according to Section 37 of the same Act.
[447] UK: There is no express rule to that effect but the guarantee itself will be contractually binding.
[448] ES: There is no explicit reference to "plain intelligible language".

address of the guarantor. **5. Should a guarantee infringe the requirements of paragraphs 2, 3 or 4, the validity of this guarantee shall in no way be affected, and the consumer can still rely on the guarantee and require that it be honoured.**	scope of the guarantee as well as the name and address of the guarantor (see art. 6 §2 directive 1999/44/EC)? If this is not respected, can the consumer rely on the guarantee and require that it be honoured?			infringes those requirements has not been transposed into Spanish law.
3. On request by the consumer, the guarantee shall be made available in writing or feature in another durable medium available and accessible to him. **5. Should a guarantee infringe the requirements of paragraphs 2, 3 or 4,**	In domestic law, is there a rule which provides, on request by the consumer, **the guarantee shall be made available in writing or feature in another durable medium available and accessible to him** (see art.6 §3 directive 1999/44/EC)? If so, can such rule be derogated from by agreement? If the rule is	-In some MS, the guarantee shall be drawn up in written form, in writing or feature in another durable medium available and accessible to the consumer. **The fulfilment of this obligation does not depend on a "*consumer's request*". Therefore, the rule increases the level of protection of the consumer:** EL[449], FR[450], MT[451], PT[452], LU[453], SE[454]	**In several MS, almost the same rule applies to contract in general concluded by a seller with a buyer (either consumer or business).** On demand, the consumer (or the business) must receive the guarantee in written form or an another durable medium: CZ, FI[455], HR[456], SK[457]	**In many MS, corresponding provision exists. On demand, the consumer must receive the guarantee in written form or an another durable medium. It is a mandatory rule:** AT, BE, BG, CY, DE, EE, IE, IT, LT, NL, PL, RO, SI, IK **In a few MS, on demand, the consumer must**

[449] *EL: Article 5 par. 4 subsections a and b of Law 2251/1994: « When the consumer is given guarantee, the supplier must give the guarantee in writing or through any other technical means that can be available to and accessible by the consumer. If the supply pertains to new products with long life (durable consumable goods), a written guarantee must be provided ».*

[450] *FR: the guarantee shall be drawn up in written form only. Article L211-15 of the Consumer Code Modified by Law 2014-344 of 17 March 2014 – art 15 (V): "Commercial guarantee means any contractual agreement of a business with regard to the consumer for the return of the purchase price, replacement or repair of the good, in addition to its legal obligations to ensure conformity of the good. The buyer shall receive a written commercial guarantee".*

[451] *MT: the guarantee shall be drawn up in written form only. 83. (1) « A commercial guarantee shall be drawn up in written form in a clear and legible manner, in plain language (…) ».*

[452] *PT: The "warranty statement" (declaração de garantia" must be made available in writing or featured in another durable medium available and accessible to the consumer (Article 9, nr. 2 Sale of Consumer Goods Act).*

the validity of this guarantee shall in no way be affected, and the consumer can still rely on the guarantee and require that it be honoured.	not respected, can the consumer rely on the guarantee and require that it be honoured?		• **CZ:** the consumer must receive the guarantee only in written form.	**receive the guarantee only in written form. It is a mandatory rule:** DK, LV **-In ES, on demand, the consumer must receive the guarantee available in writing or feature in another durable medium available and accessible to him**. However, art. 6.5 of the Dir. 99/44, on the validity of the guarantee that infringes those requirements has not been transposed into Spanish law.

[453] LU: according to Article L. 212-11, the guarantee shall be made available to the consumer in writing or in another durable medium available to him and accessible to him, in French or German depending on the choice of the consumer.
[454] SE: Section 22 paragraph 2 of the Marketing, which reads: "The undertaking and the information shall be provided in writing or in some other readable and durable form that is accessible to the buyer." This goes further than the directive. The reason for it was consumer protection (See the preparatory works, prop. 2001/02:134 p. 64, for further explanation of the reasons). Section 22 paragraph 2 of the Marketing, which reads: "The undertaking and the information shall be provided in writing or in some other readable and durable form that is accessible to the buyer." This goes further than the directive. The reason for it was consumer protection (See the preparatory works, prop. 2001/02:134 p. 64, for further explanation of the reasons).
[455] FI:" Section 15b — Warranty information (1258/2001) (2) On the request of the buyer, the warranty shall be given in writing or in electronic form so that the information cannot be unilaterally altered and that it remains accessible to the buyer. (3) The buyer is entitled to invoke the warranty even if it does not meet the requirements laid down in this section."
[456] HR: "Guarantee for the conformity of the sold thing Liability of the Seller and Manufacturer Article 423 "(3) 3) The guarantee binds under the conditions under which it has been issued regardless of the form in which it has been issued (guarantee letter, oral statement, advertisement, etc.) but the buyer is entitled to request a written guarantee or guarantee in some other durable medium, accessible to him, to be issued".
[457] SK: According to Section 620 (4) (5) CC at the purchaser´s request, the seller is obliged to provide the warranty in writing (certificate of warranty). If the nature of the property so permits, it shall suffice to issue a proof of purchase instead of a certificate of warranty. On the basis of a declaration stipulated in the letter of warranty given to the buyer, the seller may provide a warranty exceeding the extent of the warranty stipulated in this Act. In the letter of warranty, the seller shall specify conditions and extent of this warranty. According to Section 10a (1) (f) (g)ActPC the seller is required before the conclusion of the contract or if the contract is awarded based on the order the consumer before the consumer dispatches the order, unless such information is obvious, given the nature of the product or service to the consumer in a clear and understandable way - guidance on the seller's liability for defects or services under the general regulation (Sections 622 a 623 CC), -the information about the existence and details the guarantee provided by the manufacturer or seller under stringent principles as establishing a general regulation (Section 502 CC), if it is the manufacturer or seller provides, as well as information on the existence and terms of assistance and services provided to consumers after sales or services, when such assistance is provided. The consumer is entitled to claim his rights according to given warranties.

				-**In one MS, the domestic law requires that the guarantee must be handed over/made available to the consumer in a format which ensures its legibility for the period covered be the guarantee:** HU[458].
	In domestic law, is there a rule whereby **the guarantee shall be drafted in one or more languages of the Community**? If yes, **which languages** (see art.6 §4 directive 1999/44/EC)? If so, can such rule be derogated from by agreement? If the rule is not respected, can the consumer rely on the guarantee and require that it be honoured?			**-In many MS, the guarantee must be given in the national language:** BG, DK, EL, ES[459], HU[460], IT, LT, PL, PT, SK **-In a few MS, the guarantee must be given in at least one of the official language of the MS:** CY[461], MT **-In LU,** the guarantee shall be accessible to the consumer, **in French or German depending on the choice of the consumer.**

[458] *HU: under the Cabinet Decree 151/2003 governing mandatory guarantees for certain durable consumer goods, if the rule is not respected, the consumer can rely on the guarantee and require that it be honoured.*
[459] *ES: However, art. 6.5 of the Dir. 99/44, on the validity of the guarantee that infringes those requirements has not been transposed into Spanish law.*
[460] *HU: the Cabinet Decree 151/2003 governing mandatory guarantees for certain durable consumer goods contain such requirement.*
[461] *CY: Article 8(4) of the Certain Aspects of Consumer Sales and Related Guarantee Law 7(1)/2000 prescribes that the guarantee has to be drafted in at least one of the official languages of the Republic of Cyprus (Greek and Turkish), provided that the language is an official language of the European Union. As such the guarantee in Cyprus has to be drafted at least in Greek in Cyprus since Turkish is not an official language of the European Union.*

				-In a few MS, the guarantee must be given in an easily understandable language, taking into consideration the language of the region where the goods or services are delivered to the consumer: BE, SI[462] **-In two MS there is no specific rule on the language of the guarantee. All information provided to a consumer shall be in national language**[463] : EE, FR **In several MS, such provision has not been transposed:** AT, CZ, DE, FI, HR, IE, LV, NL, RO, SE
	In domestic law, are there **other mandatory consumer protection rules about the guarantees**?	**In several MS, there are other mandatory consumer protection rules about the guarantees:** AT, BG, DK, EE,EL ES, FI, FR, HR, LT, MT, SI • **AT**: Damages can also	**In a few MS, the general contract law provisions contains some other rules on guarantees which cannot be derogated from to the detriment**	**No other mandatory rules**: BE, CY,CZ, DE, IT, LU, LV, NL, PL[468], PT, SE[469], SK, UK

[462] *SI: Article 18(1) of the ZVPot provides that the guarantee shall be drafted in Slovene language if goods are intended to be marketed in the territory of Slovenia. No derogation is possible. The consumer can still rely on the guarantee if the seller does not comply with this rule (Art. 18(2) of the ZVPot).*

[463] *EE: All information provided to a consumer shall be in Estonian unless the consumer has agreed to provision of information in another language (see Art. 4 para 4 of the CPA). Such rule cannot be derogated from by agreement in detriment to the consumer (Art. 237 para 1 of the LOA).*

		be claimed, when a guaranty in the sense of § 880a ABGB is the case. In such a case, the performance of a third person is promised. § 9b KSchG still applies, however[464]. • **BG:** Art. 121: "Infringement of any of the requirements of Art.	**of the consumer: HU[465], IE[466], RO[467]**	

[468] *PL: In the legal doctrine there is a dispute whether the rule of art.581 CC is mandatory. This provision states that in case of repair the guarantee period is prolonged by the period of repair and in case of replacement the guarantee period runs from the beginning. This provision used to be mandatory before 1989 and some authors still hold that the mentioned provision maintains mandatory character but this position is questionable.*

[469] *SE : The national report indicates that "Seller is required to give certain additional information before the purchase, according to Section 22 a of the Marketing Act". However, that information is related to pre-contractual information. Section 22 a*
In contracts other than distance and off premises contracts pursuant to Chapter 1 Section 2 of the Act (2005: 59) on distance contracts and off premises contracts, the trader before entering into the contract shall give the consumer clear and comprehensible information about warranties or similar undertakings, as well as the assistance and service related after-sales,

[464] *AT: § 9b KSchG:*
(1) When an entrepreneur undertakes to a consumer to improve or replace any defective good, to refund the purchase price or otherwise make good the defect (commercial warranty), he shall also inform the consumer of the legal warranty imposed on the person handing over the good and shall point out that such legal warranty shall not be limited by the commercial warranty. The entrepreneur shall be bound by the promises made in the warranty statement and its content as notified in his advertising.
(2) The warranty statement shall include the name and address of the warrantor and, in simple and straightforward terms, the content of the warranty, including but not limited to the term and geographical application and all other information necessary for drawing on the warranty. If the warranted features are not made clear from the statement, the warrantor shall be liable for the good to have those features customarily required of it.
(3) The commercial warranty shall be furnished to the consumer at his request in writing or by another permanent data carrier that the consumer can make use of.
(4) If the warrantor violates Paras 1 through 3 above, this shall not affect the validity of the commercial warranty. The warrantor shall furthermore be liable to the consumer for any loss or damage caused by such violation.

[465] *HU: The general contract law provisions contain some other rules on guarantees which cannot be derogated from to the detriment of the consumer. See: Civil Code art 6:171, 6:172, 6:173*

[466] *IE: Sections 15-19 of the Sale of Goods and Supply of Services Act 1980 impose the general requirements relating to guarantees in all sales contracts in Ireland.*

[467] *RO: Other mandatory provisions are contained in article 1716 of the Romanian Civil Code, applicable to both B2B and B2C contracts and concerning the guarantee agreements, implying that these are either a guarantee offered to the consumer by the seller or supplier for a longer term than the two-year term stated in Law 449/2003 on the sale of consumer goods and associated guarantees (a) (for instance, a three-years term stated in a contractual guarantee for the conformity of the product), either a guarantee offered in a B2B contract, not covered by Law 449/2003 on the sale of consumer goods and associated guarantees (b).*
In accordance with art. 1716 of the Civil Code, "(1) Apart from the guarantee for unobvious deficiencies, the seller who agreed on a certain time of guarantee for the conformity of the goods shall, in the case of a deficiency manifested during the established period, repair the goods on his expenses. (2) Should the repairing of goods be impossible or should it imply a longer period of time that the one established un the contract or in a specific legal provision, the seller shall replace the goods. In lack of a period of time established for the repairing or the replacement of goods, in the contract or in a specific legal provision, the time of repairing or replacement shall not surpass 15 days from the date on which the buyer requested the replacement. (3) Should the seller not be able to replace the goods in a reasonable period of time, according to the circumstances, the seller has the duty, upon the buyer's request, to refund the price against the returning of the goods".

		118 and Art. 119 does not affect the validity of the commercial guarantee, and the consumer can still rely on the said guarantee and require that what is stated in the commercial guarantee statement be honoured” • **DK:** The 2 years limitation in section 83.1 does not apply where “the seller has guaranteed for the goods for a longer period or has acted contrary to the requirement of good faith.” • **EE: Art 230 para 4 of the LOA provides that in the event of consumer sale, it is presumed that:** 1) the guarantee grants the purchaser the right to demand the repair of the thing or delivery of a substitute thing without charge during the guarantee period; 2) a new guarantee with the same duration as the original guarantee will be granted for things replaced during		

		the guarantee period; 3) if a thing is repaired during the guarantee period, the guarantee is automatically extended by the length of the period of repair. **Under the general rules, applicable also to consumer sales contract there are following mandatory rules: Art. 230 para 2 of the LOA** provides that a guarantee period begins to run as of the delivery of the thing to the purchaser unless a later time for the beginning of the guarantee period is prescribed in the contract or letter of guarantee. If the seller is required to dispatch the thing to the purchaser, the guarantee period does not begin to run before the thing is delivered to the purchaser. The running of the guarantee period is suspended for the time when the purchaser cannot use the thing due to a lack of		

		conformity for which the guarantee is liable. Art. 230 para 3 of the LOA provides that it is presumed that a guarantee against defects covers all defects of a thing which become apparent appear during the guarantee period.-Art. 230 para 4 of the LOA provides that the procedure for exercising rights arising from a guarantee against defects shall not be unreasonably cumbersome to the purchaser. • **EL: Article 5 par. 3 of Law 2251/1994** states that during the sale, the supplier must inform the consumer about the possible duration of the product's life. Possible duration of the product's life is a reasonably expected period during which the product can be used according to its purpose, even after a repair or a replacement of spare parts, until wear resulting from its		

		regular use renders either the product useless or its further use financially disadvantageous. The consumer is informed by the supplier about the possible duration of the product's life through any means available, such as a relevant note in the instructions of use or guarantee brochure. Proving that this information has been given to the consumer is the supplier's responsibility. Every physical or legal entity which provides, in the context of his professional, commercial or business activity, directly to the consumer consumable products, is obliged to repair the product, within the limits of the guarantee provided for it either in the contract or by law, free of charge. If the product is no longer covered by the guarantee, but it is still within the possible duration of its life, the		

		supplier must ensure to its repair and the provision of its spare parts. **Article 5 par. 4 subsections e, f, g of Law 2251/1994** states that the guarantee must be in compliance with the rules of good faith and cannot be retracted by the excessive exceptions covenants. The duration of the guarantee must be reasonable compared to the possible duration of the life of the product. In particular, for peak technology products, the duration of the guarantee must be reasonable compared to the period for which these products are expected to remain modern from a technology point of view, if this period is shorter than the estimated duration of their life**. Article 5 par. 5 subsections b, c, d of Law 2251/1994:** If there is a replacement of a product or of its spare parts, the guarantee is		

		automatically renewed for all its duration with regard to the new product or spare part. If during the guarantee period the product shows a flaw and the supplier refuses or takes longer than necessary to repair it, the consumer is entitled to ask for the replacement of the product with a new one of equal value and quality or to withdraw the contract. If the period required for the repair exceeds fifteen (15) working days, the consumer is entitled to ask for temporary replacement of the product during the period • **ES:** According to art. 125.3 RCPA: The period in which claims may be made to demand compliance with the provisions of the additional commercial guarantee shall expire six months after the end of the guarantee period. • **FI:** According to CPA		

		(38/1978) Chapter 5 Sections 15a (2), if the warranty was given by a person other than the seller, either at a previous level of the supply chain or on behalf of the seller, the goods are also considered defective. The seller is, however, not liable for a warranty given by a previous level of the supply chain for a defect that he would not otherwise be liable for, if the seller shows that it has clearly notified the buyer of the same before the conclusion of the sale. • **FR:** When the buyer asks the seller to carry out repairs covered by his contractual guarantee, the period of any resultant shutdown of seven days or longer shall be added to the unexpired term of the guarantee. The said period shall run from the time when the buyer requests assistance or the time when the product in question is taken out of		

		service pending repair, should this be subsequent to the request for assistance. • **HR:** Articles 424-429 of the COA contain specific provisions regulating request for repair and replacement (Art 424), extension of guarantee period (Art 425), rescission of a contract and reduction of price (Art 426), costs of the transportation (Art 427), liability of several manufacturers (Art 428) and time-limit for exercising rights (Art 429). • **LT:** Article 6.335 of the Civil Code: 1. The law or the contract may provide that the warranty of quality of things given by the seller is valid for a certain period of time. In this case the warranty shall be valid for all its component parts unless otherwise established by the law or the contract. 2. The period of warranty shall start to run from the moment of		

		delivery of things unless the contract provides otherwise. 3. Where obstacles within the seller's control prevent the buyer from using the things for which a period of warranty of quality has been set, the warranty period shall not run until the seller removes the obstacles. 4. Unless otherwise determined in the contract, the period of warranty shall be extended for the period the buyer was unable to use the things due to the defects, provided the buyer duly notified the seller of the perceived defects. 5. The component parts shall have the same period of warranty of quality as the principal thing, which shall commence to run together with the period of warranty of quality of the principal thing, unless otherwise provided by the contract.		

		6. If the seller replaces a thing or its component part with a fixed period of warranty of quality, the period of warranty of quality that has been fixed for the replaced thing or its component part shall be applied with respect to the thing or the component part presented in replacement, unless the contract provides otherwise. Article 6.338 of Civil Code: 1. Unless the contract or laws establish otherwise, the buyer shall have the right to file claims regarding the defects of the things sold, provided they were established within the time period specified in this Article. 2. Where the time period of warranty of quality or fitness for use of the item of the thing has not been established, the buyer may file claims regarding the defects of the thing within a reasonable time but not		

		later than within two years from the day of sale of the thing, unless a longer time period is provided by law or the contract. The time period for filing claims in respect of the defects of the thing transported or conveyed by post shall run from the day of arrival of the thing to the appointed destination. 3. Where the time period of warranty of quality of the thing has not been fixed, claims regarding the defect of the thing may be filed provided the defects are established within the period of warranty. If the period of warranty of quality valid for the component parts is shorter than the period of warranty of quality of the principal thing, the claim regarding the defects of the component part may be filed within the period warranty of quality of the principal thing. Where a period of warranty of quality		

		applied in respect of the component part is longer than that of the principal thing, a claim regarding the defects of the component part discovered within the period of warranty may be filed regardless of the expiration of the period of warranty of quality of the principal thing. 4. The buyer may file claims regarding a thing, in respect of which a time period of fitness for use has been fixed, provided the defects are discovered within the time period of fitness for use of the thing. 5. Where the period of warranty of quality fixed for a thing in the contract is less than two years and the defects of the thing are discovered after the expiration of the time period but not after the lapse of two years from the day of delivery of the thing, the seller shall be liable for the defects of the thing if the buyer		

		proves that the defect appeared before the delivery of the thing or due to the reasons which appeared before the delivery and for which the seller is liable. • **MT:** The guarantee when explained in writing must be in one of the official languages of the country. • **SI:** In a case of goods for which the guarantee is mandatory, the guarantee shall contain also information on the time period after the expiration of the guarantee in which the guarantor still offers repair and reserve parts (Art. 16 of the ZVPot).		

Q 12 - Art. 7 directive 1999/44/EC – Binding nature				
Provision in the directive n° 99/44/EEC Consumer protection in the directive	**Questions**	**Higher level for the consumer in the mandatory domestic laws than in the directive**	**Broader scope than in the directive**	**Same level of protection in the directive as in domestic law**

Art. 7 directive 1999/44/EC **1. Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as**	In domestic law, if the seller concludes with the buyer any **contractual terms or agreements before the lack of conformity is brought to the seller's attention,** which directly or indirectly waive or restrict the rights resulting from this Directive shall, is this contract term binding	**-Many MS don't recognise contractual arrangements either before the consumer** has knowledge of the defect **or after the consumer has knowledge of the defect. Therefore, these domestic law are more protective than the directive:** BE, BG[470], CY, DK, EE, HU, IT[471], LT, PL, SE, SI, SK[472], UK **-For a few MS, contractual terms or agreements are not valid not only if the lack of conformity was brought to the seller's attention, but if more others requirements are met.** Therefore, the domestic law are more protective than the directive: AT, ES, LU • **AT:** The consumer's actions must clearly		**In many MS, contractual arrangements concluded before the lack of conformity was brought to the seller's attention are void. Such arrangements are valid after the lack of conformity was brought to the seller's attention:** CZ, DE[475], EL, FI, FR,

[470] *BG: Consumer Protection Act, Art. 111. (1), provides that "Any agreement or contract concluded with the seller before the lack of conformity of the consumer goods with the contract of sale becomes apparent, which restricts or waives the liability of the seller under this Section, is null and void". It could be considered that a contractual agreement is valid if the consumer knows about the defect. However, doctrinal opinion considers such agreement cannot be binding on the consumer, because it will contradict to the mandatory rules discussed in the above sections.*

[471] *IT: As for the validity of an agreement derogating from conformity after the consumer has communicated the non-conformity to trader, Art. 134, § 1, It. Cons. Code is not clear and Italian scholarship has therefore two different views. According to a first opinion giving much importance to contractual freedom, agreements subsequent to non-conformity notice to trader are possible and therefore valid. According to a second opinion giving much importance to consumers' protection, agreements subsequent to non-conformity notice to trader are presumed to be unfair (as they would result in a limitation of traders' liability), and they shall therefore be subject to the judge's evaluation in compliance with arts. 33 ff It. Cons. Code.*

[472] *SK: According to Section 54 (1) CC contractual conditions regulated by a consumer contract may not depart from this act to the detriment of the consumer. In particular, the consumer may not waive his rights granted by this act or by other special regulations designed to consumer protection in advance, or otherwise impair his position under the contract.*

[475] *DE: § 475 (1) BGB does not cover agreements after the lack of conformity was brought to the seller's attention. Argumentum a contrario it can be concluded that these agreements are valid, but only with regard to a specific defect which must have been brought to the seller's attention by the consumer. An agreement on a general exclusion or restriction with regard to all (latent) defects is not possible, even after notice of the specific defect. This results from an interpretation of the § 475 (1) BGB in light of the Directive 1999/44/EC*

provided for by national law, not be binding on the consumer. Member States may provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year.	on the consumer? In domestic law, if the seller concludes with the buyer any contractual terms or agreements after the lack of conformity is brought to the seller's attention, which directly or indirectly waive or restrict the rights resulting from this Directive shall, is this contract term binding on the consumer?	and unambiguously suggest that he seriously intended to waive his rights. It is not sufficient that the defect is merely perceptible. A seller may give specifications of the object that clarify which properties that commonly would be expected are missing in the particular case[473]. • **ES:** The consumer must waive consciously his/her legal or contractual rights after the moment when the lack of conformity appears, provided it is a negotiated term. The consumer could be interested in that agreement if he/she receives in exchange another right or a minor price. • **LU:** The consumer must declare to have learned of the lack of conformity at the time of conclusion of the contract, stating the nature thereof **-In a few MS, contractual arrangements are not mentioned:** LV, MT[474]		HR[476], IE, NL, PT, RO

[473] *AT: However, this option may not be used to circumvent § 9 KSchG which is why global indications (e.g. 'defects of any kind must be expected') are not valid (for more details cf. Apathy in Schwimann/Kodek, ABGB Praxiskommentar4 § 9 KSchG mn. 2).*

[474] *MT: 91. (1) Without prejudice to any other remedies at law, a consumer may institute civil proceedings against a guarantor who fails to observe any of the terms or undertakings stipulated in a commercial guarantee. (2) The court may in any civil proceedings instituted under this Part - (a) order the guarantor to take such remedial action as may be necessary to observe the terms of the guarantee, or (b) order the guarantor to perform his obligations under the commercial guarantee to its satisfaction within such period as the court may establish. In doing so the court may order the guarantor to pay to the consumer a sum not exceeding one hundred and twenty euro (€120) for each day of default in case of non-compliance after the lapse of the period established by the court.*

[476] *HR: Article 408 COA: (1) Parties to a contract may limit or fully exclude the seller's liability for material defect of a thing. (2) A provision of the contract on limiting or excluding liability for defects of things shall be void if the seller was aware of the defect and failed to notify the buyer thereof, and also where the seller imposed such a provision by making use of his monopolistic position, or as regards to a commercial contract. (3) A buyer who has renounced his right to terminate the contract on account of a defect of a thing shall retain other rights in connection with these defects*

Art. 7 directive 1999/44/EC **2. Member States shall take the necessary measures to ensure that consumers are not deprived of the protection afforded by this Directive as a result of opting for the law of a non-member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States**	In domestic law, are there others mandatory rules to **protect consumers against the circumvention of the mandatory provisions** of the directive 1999/44/EC?	**Many MS provide others mandatory rules to protect consumers against the circumvention of the mandatory provisions of the directive 1999/44/EC:** AT, BG, DE, EL, PT, RO, SE, UK • **AT:** § 879 (1) and (3) ABGB apply, as always, and prevent any deviation from dispositive law that's grossly detrimental. According to these provisions, "(1) A contract which violates legal prohibition or moral principles is void. (2) [...] (3) A clause contained in general terms and conditions or contract forms, which does not address a main obligation is void if it is grossly detrimental to one party, considering all circumstances of the case". • **BG:** Art. 59 CPA prohibits the circumvention of the mandatory provisions of the directive 1999/44/EC as a result of opting for the law of a non-member state as the law applicable to the contract. • **DE:** German law contains a mandatory rule to protect against such a circumvention. The second sentence of § 475 (1) BGB provides that §§ 433-435, 437, 439-443, 474-494 BGB (transforming the mandatory provisions of the directive 1999/44/EC) apply even if circumvented by other constructions. • **EL:** o Article 5 par. 6 of Law 2251/1994: In any case the responsibility of the vendor for real defects or absence of the agreed qualities is subject to the application of the stipulations of the Civil Code. Any waiver of consumer protection as per those stipulations, before the disclosure of the defect or		**In many MS, there are no others mandatory rules** to protect consumers against the circumvention of the mandatory provisions of the directive 1999/44/EC: BE, CY, CZ, DK, ES, FI, FR, HR, HU, IT, IE, LT, LV, MT, NL, PL, SI

		the absence of the agreed quality, is not valid. Any dispute arising from the sale of consumable products which is brought before the Greek courts, regardless of the law applicable on it, is settled based on the application of the Greek law governing the sale of consumable products to the extent that they provide better protection to the consumer. ○ Article 332 (agreement regarding responsibility on account of a fault) of Greek Civil Code: Is null any prior agreement excluding or limiting the responsibility resulting from fraud or gross negligence. Is also null a prior agreement excluding the responsibility of a debtor even for a slight negligence if the creditor is a servant of the debtor or if responsibility arises from the functioning of an undertaking (enterprise) in respect of which a prior concession was granted by the Authorities. The same applies even if the exemption clause is contained in contract term not individually negotiated or whether with this clause the debtor excludes himself from liability for infringement of goods deriving from the personality and mainly of life, health, freedom or honour. ○ Article 333 of the Greek Civil Code: A person whose responsibility is determined solely by reference to		

		the diligence usually exercised in the conduct of his own affairs shall not be exonerated of the responsibility arising from gross negligence. ○ Article 334 (responsibility resulting from the fault of an underling) of the Greek Civil Code: 1. A debtor shall be responsible as for his own fault in respect of the fault of persons whom he employs in order to furnish a performance. 2. Such responsibility may be limited or excluded in advance except of the cases of article 332. • **PT:** ○ 1°) Other mandatory rules provided by the *Sale of Consumer Goods Act*: - Transmission of the rights laid down by Article 4 to third-party purchaser of the goods (Article 4, nr. 6); - Transmission of the time limits laid down by Article 5, nr. 1 to goods that replace the defective goods; the new goods benefits then of the entire guarantee period provided by Article 5, nr. 1 (Article 5, nr. 6); - Application of the *Sale of Consumer Goods Act* to contracts having a close connection with the territory of the Member States, which are nevertheless governed – by choice - by the law of a non-member State which is less favourable to the consumer (Article 11). - Imposition of fines in the case of		

		violation of: -The guarantee period to repair or to replace the defectives goods provided by Article 4, nr. 2 (30 days maximum for movables; a reasonable time, taking account of the nature of the defect for immovable property) (Article 12-A, nr. 1 lit. *a*); The duty of information relating to obligatory elements of the guarantee indicated by Article 9, nr. 3 (Article 12-A, nr. 1 lit. *b*). - Imposition of accessory penalties when the gravity of the offense justifies it: -Temporary closure of installations or establishments (Article 12-B, nr. 1 lit. *a*): -Interdiction to exercise the commercial activity (Article 12-B, nr. 1 lit. *b*); -Exclusion from entitlement to public benefits or aid (Article 12-B, nr. 1 lit. *c*). ○ 2°) Other mandatory rules provided by the *Consumer Protection Act*: - Right to compensation for property damage and other damages that result from the supply of defective goods or services (Article 12, nr. 1). • **RO**: There is a mandatory rule imposing on the seller or supplier the duty to		

		demonstrate upon the consumer's request, at the time on which the contract is concluded, the specific usage and functions of the goods which are subject to the sale[477]. • **SE:** there is also the possibility of adjusting or disregard a contractual term which is deemed *unconscionable* according to the first paragraph of Section 36 of the Contracts Act (1915:218), which is generally applicable to all types of contracts. According to the second paragraph of Section 36, upon determination of the applicability of the provisions of the first paragraph, particular attention shall be paid to the need to protect those parties who, in their capacity as consumers or otherwise, hold an inferior bargaining position in the contractual relationship[478]. • **UK:** Regulation 5(7) of the Consumer Protection from Unfair Trading Regulations 2008 would make this a misleading action, and this attracts both administrative and criminal sanctions. **-In some MS, any clause contrary to the provisions corresponding to the directive is**		

[477] *RO: Art. 59 Consumer Code, Law 296/2004 – "The seller or supplier has a duty to demonstrate upon the consumer's request, the specific usage and functions of the goods which are subject to the sale, according to the particular circumstances." The duty of specific demonstration of usage is pending on the consumer's explicit request and favours the immediate discovery of obvious malfunctions due to a lack of conformity. In Romanian Law, the consumer does not have a duty to solicit the examination or a demonstration of the specific usage of the goods at the time the contract is concluded, yet he has the right to request for such a demonstration. Should the consumer have requested for an immediate demonstration of the goods functioning, the seller or supplier must comply with the mentioned request.*

[478] *SE: The legal situation is not clear on this subject, but a purpose to circumvent mandatory provisions could also (if the above mentioned ways of dealing with the situation fail) make it possible to deem a contractual term void, according to general principles of Swedish contract law, cf the Supreme Court case NJA 1997 p. 93. If a sanction of voidness is appropriate is to be judged in the individual case, dependent on the circumstances of the case, but also, the purpose of the violated rule, the need for a sanction of voidness for the sanctioning of the rule and the consequences such a sanction can inflict, for instance on parties acting in good faith.*

		null and invalid: EE, LU, SK • **EE:** Estonian LOA provides a general rule (Art. 237 para 1 of the LOA) about the mandatory nature of provisions concerning consumer sale: in the event of consumer sale, agreements which are related to the legal remedies to be used in the case of a breach of contract and which derogate from the provisions of the law to the prejudice of the purchaser are void • **LU:** Art. L. 211-6 - Consumer code: "(1) The consumers may not waive the effective protection they benefit under this book. (2) Any clause contrary to the preceding paragraph shall be deemed null and invalid" • **SK:** According to Section 52 (2) CC Provisions on consumer contracts, as well as all other provisions that regulate legal relations where consumer is a party, shall be applied at all times when this is to the benefit of the party who is consumer. Different contractual stipulations or agreements, the content or purpose of which is to circumvent this act, shall be invalid. In all legal relationships involving a consumer is always preferred the use of provisions of the Civil Code, even if there shall otherwise be used rules of commercial law.		

II/ National mandatory consumer protection rules applicable to contractual obligations in B2C contracts for sales of tangible goods at a distance, in areas where there is no European *acquis*

6.- In this particular area there is no European acquis. This section covers simple mandatory contract law rules within the meaning of Article 6(2) of the Rome I Regulation, i.e. rules of contract law which cannot be derogated from by agreement, in B2C contracts.

This part of the study deals with all the mandatory rules which could be invoked by a consumer on the basis of this provision. The tables that follow will distinguish in particular between the mandatory rules that were made for the consumer and those made for all contracting parties, but that the consumer can benefit from.

Two remarks on the methodology we followed in case there is an overlap in the protection granted to consumers by a Member State:

- When a Member State (MS) has **both a general rule and a special rule protecting the consumer**, that Member State will appear in the first column concerning the MS whose rules are aimed at consumers
- When a MS has a rule, derogation from which is accepted **in limited cases**, this rule will appear with the provisions which cannot be derogated from. It will be in the column 2 if the rule is specifically designed for the consumer , or in column 3 if the rule concerns all contracting parties, regardless of whether they are consumers or not.

We are going to distinguish chronologically four periods:

- The pre-contractual period (A)
- The period of formation of the contract (B)
- The period of performance (C)
- The period of termination and after termination (D).

A/ Pre-contractual period

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not specifically made to protect consumers	No mandatory rule, or no rule at all
	Q13: Various: Protection of the future consent of the consumer		
Duty to raise awareness of not individually negotiated contract terms			
Is there a mandatory provision that requires the trader to raise awareness of the consumer on not individually negotiated contract terms?	**Some MS have such a mandatory rule protecting especially the consumer:** BG, EL, LU, SI • **BG:** There are special consumer protection rules which require the trader to provide the consumer with the general terms prior to the conclusion of the contract (Art. 147a[479] and Art. 147b CPA[480]). • **EL:** Article 2 par.1 of Greek Law 2251/1994 provides that: "Terms that have been set forth in advance for future contracts (general terms for transactions) are not binding to the consumer if, upon compilation of the contract, the consumer was innocently unaware of them as, and most	**Some MS have such a mandatory rule, but it protects the weaker party or the other party and not especially the consumer**: AT, BE, CZ, DE, EE, ES, FI, HR, LT • **AT:** in order for such terms to be binding, the trader has to raise awareness. The consumer must have had the possibility to notice the said terms before entering the contract. The acceptance of such terms can also be given tacitly (§ 863 (1) ABGB), however,	**Some MS do not have such a rule**: CY, DK[486], FR, LV, MT, NL[487], PL, SK, UK[488].

[479] *BG:* ***Art. 147a. (1)*** *In case of a general contract the consumer is bound only in case where the clauses have been presented to him or her and he / she has consented to them.(2) The consent of the consumers with the general terms is verified through their signatures. (3) The trader or its representative must submit to the consumer a signed copy of the general terms.(4) The burden of proof for the consent of the consumers and the receipt of the general terms is for the trader.(5) A clause for consent to the general terms of the contract and declaration of their receipt by the consumer, included in the individual contracts is not a proof of acceptance of the general terms and their receipt by the consumer.*

[480] *This text concerns the change of the general terms.*

[486] *DK: but Section 38b.1.s2 of the Act of contract provides that the "trader has the burden of proving that a contract terms have been individually negotiated", and this term can be unfair*

[487] *NL: But, in Dutch law, the trader is required to offer the consumer a reasonable opportunity to become acquainted with the standard terms. To that end, he is required to give or send a copy of the terms to the consumer before or at the conclusion of the contract, cf. Article 6:234(1) BW.*

[488] *UK: it is sufficient for consumers to be made aware of the existence of general terms before a contract is concluded.*

	particularly, in cases when the supplier does not indicate the existence of these terms or deprives the consumer of the possibility to acquire knowledge of their content.". According to article 2 par. 10 subpar. (a) of the same law: "The stipulations of this article are applicable for any term of the contract that had not been subject to individual negotiation." • **LU:** Article L. 211-1 of the Consumer code refers, with regard to the rules relating to the knowledge and acceptance of the general terms of a contract between professional and consumer, to Article 1135-1 of the Civil code. And according to this article 1135-1: "*The general conditions of a standard contract may only be imposed by one of the parties to the other party if the latter was able to acknowledge them when signing the contract and whether he or she should, according to circumstances, be regarded as having accepted them. It is for the party who claims that a clause in a contract was not individually negotiated to prove it".* It indirectly imposes on the trader to raise the awareness of the consumer on not individually negotiated contract terms. Nothing prohibits expressly a derogative agreement but in most authors' opinion, it might be considered as imperative by the	this is handled very strictly and requires that the consumer knew or would have had to know that the trader only contracted under his general contract terms • **BE:** article VI.2, 7°CEL provides that the trader has to share on the non-individually negotiated contract terms before the conclusion of the contract. • **CZ:** there is such rule aiming only to adhesion contracts and protecting the weaker party (consumer included). Section 1799 of the civil code provides that "*a clause in a contract of adhesion which refers to the terms stipulated outside the actual text of the contract is valid if the weaker party has been acquainted with the clause and its meaning or if it is proved that the meaning of the clause must have been known to him.*" • **DE:** According to § 305 (2) BGB, standard business terms only become part of a contract	

	Luxembourg judge. • **SI:** Art. 22(2) of the ZVPot[481] provides that the contract terms are binding on the consumer only if the trader has raised the awareness of the consumer on the full text of these terms in the pre-contractual phase. -A few MS have this rule , but **only for certain terms:** HU, RO, SE, • **HU:** Section 6:79 of the civil code provides that "any term granting the right to the business party to demand extra payments in addition to the consideration due for the fulfilment of the primary commitment shall form part of the contract only if the consumer has expressly accepted it after having been informed thereof". • **RO:** In terms of formal requirements, the trader must **obtain the consumer's written consent** in order for these terms to be binding, should any of these terms concern restrictions or exclusion of liability, unilateral termination of contract, right to withhold performance, other party's exclusion from the benefit of a suspending time period, exclusion or limitation of remedies, contractual exclusiveness, tacit reinforcement of contract, applicable law, arbitration clauses or territorial competency modification clauses.	if the user (i.e. the trader), raises the buyer's awareness of the terms by referring the consumer to them and by giving him the opportunity to take notice of their contents. • **EE:** Art. 37 para 1 of the LOA provides for this obligation. This provision cannot be derogated from by agreement. • **ES:** GCTA contains mandatory provisions that pose this requirement in relation to standard terms (which by definition are not individually negotiated contract terms). GCTA applies equally to B2C and B2B contracts. In addition, Art. 80 Revised Consumer Protection Act (L. 1/2007 and further amendments) [RCPA] provides that "Consumer contracts that use terms not individually negotiated, … must comply with the following requirements: … b) Accessibility and legibility, so that consumers are able to become acquainted with the existence and	

[481] *SI: Art. 22 of the ZVPot: (2) Contract terms are binding on the consumer only if he has been made aware of the full text of the pre-contract.*

	SE: If the terms are considered **surprising, burdensome or unexpected,** the trader is obligated to take further measures to make the consumer aware of them. Failing to do so, the terms will be considered not to be part of the contract (case law)	content of the contract prior to its conclusion. Under no circumstances shall this requirement be satisfied when the font size of the contract is less than one millimetre and a half or when the insufficient contrast with the background would make the reading difficult". This special rule of consumer law is not so precise as a duty to raise awareness on not individually negotiated contract terms. • **FI:** Contract terms that are not individually negotiated become part of the contract only if (1) they are included in the contract text or (2) the trader has expressly referred to such terms at the time of the conclusion of the contract and the other party has had a chance to acquaint himself to the terms before the conclusion of the contract. The terms not individually negotiated must be available to the other party and he must have reasonable period of time to explore them or to	

		acquire them to be explored[482]. This rule cannot be derogated from by agreement to the detriment of a consumer. The said doctrine has been developed in the case law and it is specifically aimed to protect the weaker party to a contract. In addition, in Finnish law, the trader has an obligation to draw the consumer's attention on unexpected and harsh terms in a contract that is not individually negotiated. Such harsh contract terms are not binding if the trader does not raise awareness of the consumer about them before the conclusion of the contract[483]. If a contract term that is not individually negotiated is considered to be harsh on the consumer, the obligation to draw the consumer's attention on it cannot be derogated from by agreement to the detriment of a consumer. The said doctrine is	

[482] *Finnish Supreme Court case 1996:45.*
[483] *Finnish Supreme Court case 1997:4 and Mika Hemmo, Sopimusoikeus I 2003, p. 162-170.*

		specifically aimed to protect the weaker party to a contract. **-Two MS demands that the party knew or should have known the term which has not been individually negotiated:** IT, HR • **IT:** Apart from art. 117, § 6, d.lgs. 1 September 1993, n. 385 , there are no special statutory provisions that require a trader to raise the awareness of the consumer on not individually negotiated contract terms. But a feeble form of protection is provided by art. 1341, § 1, civil code, that recognises the effectiveness of contractual terms not individually negotiated, provided that the offeree should have been aware of the standardised terms using reasonable care. Moreover, contractual terms added by the parties shall prevail over standardised terms (art. 1342, § 1, It. civil code). • **HR:** Pursuant to Article	

		295, paragraph 4 of the COA, general contract terms (i.e. contract terms which have not been individually negotiated) must be publicised in an ordinary manner and pursuant to paragraph 5 of the same Article, such general contract terms will bind the other party only provided that this party knew or should have known of such terms at the time of entry into contract. **-One MS provides that standard conditions prepared by one party, shall be binding to the other, only if that party had an adequate opportunity of getting acquainted with the said conditions: LT** • **LT:** Part 2 of Article 6.185 of Civil Code provides that "Standard conditions prepared by one of the parties shall be binding to the other if the latter was provided with an adequate opportunity of getting acquainted with the said conditions."	

		-One MS includes this rule in the duty to inform: PT[484] • **PT:** Pursuant to Article 6 General Contract Terms Act, the contracting party using general contractual terms *must inform* the other party, *according to the circumstances, of other aspects included in the terms, that (require?) clarification*. All clarification that is reasonably requested must also be provided. **-One MS provides for this rule, but only for certain terms: IE[485]** • **IE:** A number of exclusion clauses in contracts for the sale of goods and/or the supply of services will not have effect unless they are fair and reasonable and have been specifically drawn to the buyer's attention – specifically, ss 39 and 40 of the Sale of Goods and Supply of	

[484] *Article 6 (Duty to inform) General Contract Terms Act (Decree-Law 446/85)*
1 – The contracting party using general contractual terms shall inform the other party, according to the circumstances, of other aspects included in the terms, that justify clarification.
2 – All clarification that is reasonably requested must be provided

[485] *IE: Certain exclusions clauses in contracts for the sale of goods and/or the supply of services will not have effect unless they are fair and reasonable and have been specifically drawn to the buyer's attention – specifically, ss39 and 40 of the Sale of Goods and Supply of Services Act 1980*

		Services Act 1980.	
If this is the case, **how this obligation should be performed?** Is a simple reference to these terms in a document signed by the consumer enough?	-**Generally, a simple reference to the general terms in the individual contract** and the provision that the consumer has received and agreed with the general terms **is not enough** (BG, SI, contra: LU). But in SE, it depends on the case. • **In BG**, the obligation is performed by presenting the general terms to the consumer and receiving his consent on the said terms[489] with his signature. The trader shall provide the consumer with a copy of the general terms signed by the trader[490]. • **In RO**, for those terms about which the consumers need protection (see above), the trader must **obtain the consumer's written consent.** • **In SI,** it is considered that the consumer was aware of the full text of the contract terms, if the company specifically pointed to them and if they were easily accessible[491]. • **In LU,** to meet this requirement the trader should, in principle, have the consumer sign these conditions. Case law, however, considers that a simple reference to the general conditions in the contract signed by the consumer	A simple reference to these terms in a document signed by the consumer is **not sufficient** in several national laws (DE: if it is hidden on an inconspicuous spot of the document, HR, HU), while it is **sufficient** in others (EE: on the condition that the other party has the opportunity to examine their contents) • **In DE,** the trader has to refer the other party to the contract to the standard terms explicitly or, where explicit reference is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into. • **In FI,** the terms not individually negotiated must be available to the other party and he or she must have a reasonable period of time to explore them or to acquire them	

[489] *BG: Art. 147a, Para. 1 CPA*
[490] *BG: Art. 147a, Para. 3 CPA*
[491] *Art. 22(3) of the ZVPot*

	may satisfy the requirements of Article 1135-1 of the Civil code[492]. • **In SE,** it depends on whether the terms are considered surprising, burdensome or unexpected, and also on the length of such a document, and whether or not any contested term has been, so to speak, tucked away in the document or otherwise been presented in a secluded manner. This can be considered to be part of the doctrine of interpretation of contracts of Swedish law. The relevant cases are often formulated casuistically, giving the possibility to consider what is reasonable in the individual case, with regards to all the facts of it.	to be explored. • **In HR,** prior publication of general contract terms means that a consumer must have a chance to be acquainted with general contract terms before he or she signs the contract. This will usually be done by publishing general terms of contract in newspapers, uploading them on the web pages of a trader, leaving brochures containing general contract terms in the business premises of the trader, etc. • **In HU,** these terms must also be handed over/made available to the consumer.	
Duty to inform, good faith			
Are there rules on pre-contractual obligation to provide information which cannot be	Regardless of the disclosure requirements from the directive 2011/83/UE, RO's Consumer Code provides for **a general pre-contractual obligation to provide**	-Regardless of the disclosure requirements from the directive 2011/83 or indirectly from the unfair commercial practices	According to a few MS, there is **no more duty to inform,** than what is required in the directive

[492] *"Where the person to whom the general conditions are opposed has affixed his signature on a contract in which it is mentioned that by signing he declares having received the general conditions and the special conditions governing the contract, having read and approved the contract, it cannot challenge their perfection" (O. Poelmans, "Droit des obligations au Luxembourg – Principes généraux et examen de jurisprudence", JTL, p. 72; Cour d'appel, 18 décembre 2002, Pas. 32, p. 393).*

derogated from by agreement, without taking into account the Consumer Rights Directive n° 2011/83/UE which is not in the scope of the study?	**information**. There is a mandatory rule on the pre-contractual obligation to provide information, in Art. 27 (b) Consumer Code (Law 196/2004)[493], according to which "*The consumers have the following rights: (b) to be* ***completely, correctly and precisely*** *informed on the* ***essential characteristics of the products and services, so that the decision to buy matches their needs*****." It can be more favourable to the consumer than article 5. 1 a) of directive 2011/83/UE** ("the main characteristics of the goods or services, to the extent **appropriate** to the medium and to the goods or services") or article 6. 1 a) for distance contracts. -**Some MS provisions are more favourable to the consumer than the directive 2011/83/UE**: For example[494]: • **Information on off-premises contract:** o Some MS require that information be supplied about the **period of validity of the offer or of the price**: CY, LV, LT[495], LU[496] (where information	directive[500], **the MS in general have rules on pre-contractual liability, which impose to the trader to provide information to the other party, and the obligations based on it cannot be derogated from by agreement:** DE (*culpa in contrahendo),* EE, FR (cases law)[501] , HR, IT, PT, SE (*culpa in contrahendo*)… • **In EE,** there is a general rule on pre-contractual obligation to provide information which cannot be derogated from by agreement (Art. 14 para 1 and 2 of the LOA). This rule applies to all contracts and not only to consumer contracts. • **In FR,** case law has established a pre-contractual information duty which cannot be derogated from by agreement. In addition,	2011/83/UE: HU, LV, MT, NL (but the principle of good faith can apply), UK (there is no obligation to inform as such, but there is a control under the doctrine of misrepresentation, whereby the accuracy of any information given by a trader is tested).

[493] *See also Consumer's right to complete and accurate pre-contractual information is stated in Art. 45 Consumer Code (Law 196/2004), according to which "The consumers have the right to be completely, correctly and accurately informed on the essential characteristics of the products and services, including on the financial services offered, so that the decision to buy be based on a rational choice and matches their economic interests, as well as to be able to use the products safely, in accordance with their specific destination."*

[494] *Cf Study "Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais; and Study "Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE)", by M. Behar-Touchais.*

[495] *In LT, Article 6.163 (1, and 4) of the Civil Code provides also that "1. In the course of pre-contractual relationships, parties shall conduct themselves in accordance with good faith.... 4. The parties shall be bound to disclose to each other the information they have and which is of essential importance for the conclusion of a contract."*

	is required about invoicing currency). ○ **Information regarding the identity and address of the trader** Some MS require that information be given about the **<u>supplier's shop closest to the consumer:</u>** EL[497], CY. Some MS demand that information be supplied about **<u>the registered number of the trader</u>**: BG, CZ[498], CY, LT. Some MS impose information **<u>about the service provider</u>** from which the trader has obtained a certificate: LU. ○ **Information regarding contractual terms:** Some MS impose information about the period of validity of the offer or of the price: CZ, IE, CY, LT, LU, SI, FI • **In what language?** ○ **<u>CZ:</u>** the **<u>consumer has the choice of language</u>**, between his or her mother tongue and	article 1129 of the Draft contract law of 25 Feb. 2015 provides for a pre-contractual duty of information which cannot be derogated from by agreement. **<u>-More often, the obligation to provide information is based on the principle of good faith: HR, IT, PT</u>** • **<u>In HR</u>**, pre-contractual duty to provide information generally stems from the good faith principle. • **<u>In IT</u>**, Art. 1337 It. civil code expresses the general provision of pre-contractual liability based on the general duty of good faith imposed by the law on both parties during negotiations. According to the traditional construction	

[496] *In LU, the obligation to provide consumers with accurate and not misleading information is reflected in the general duty of good faith. According to Article 1134, "agreements lawfully entered into have the force of law for those who have made them. They may be revoked only by their mutual consent, or for causes allowed by law. They must be performed in good faith". The courts have used the paragraph 3 of this article to extend the requirement of good faith to the stage of formation of the contract.*

[500] *For instance: DK: Section 3.1 of the Act on Marketing provides: "Traders may not use misleading or undue indications or omit material information if this is designed to significantly distort consumers' or other traders' economic behaviour on the market".*

[501] *Article 1129 of the Draft contract law project provides a pre-contractual information duty which cannot be derogated from by agreement*

[497] *In EL, the duty to inform in the pre-contractual period is based on good faith*

[498] *In CZ, there are also rules on pre-contractual liability. Section 1728 of the civil code provides that "(2) When negotiating a contract, the contracting parties shall notify each other of all the factual and legal circumstances of which they know or must know, so that each of the parties can verify the possibility to conclude a valid contract and the interest of each party in concluding the contract is evident to the other party."*

	one of the official languages of the European Union or one of the countries forming the European Economic Area • **Exceptions concerning the sale of movable goods** o Some MS do not provide exceptions for "automatic vending machines": BG, IE. o Some MS do not provide exceptions for off–premises contracts, where the total price is under 50 euros: BG, CZ, IE, CY, LU, SI, SK. **-Some MS** (respecting Directive 2000/31/EC) **require more information than the directive 2011/83/UE**, especially information about codes of conduct and **the fact that these codes can be looked up electronically**: BG, CZ**,** EL, LT, LU, AT[499], FI, HU, NL, PL, RO Some MS require **additional information**: BG (details of public register, relevant authority exercising control…), LT (information on all actions to be taken in order to correct input errors and not only technical actions), LU (commercial register, VAT number, …)	given by courts and by Italian scholarship to this provision, one of the duties deriving from the general clause of good faith is the duty to provide the counterparty with any relevant information that might influence his/her consent. • **In PT**, it is also based on the principle of good faith. Article 227 of the civil code, provides that **"**1. Whoever negotiates with another for the conclusion of a contract should proceed, both in the preliminaries and in its formation, in accordance with the rules of good faith, under penalty of being liable for the damage caused with fault to the other party. 2. Liability shall be barred in accordance with article 498." **-Many MS implement the rule of *culpa in contrahendo*:** DE, SE (see also in the left column AT)	

[499] *AT has also rules on pre-contractual liability, which impose to the trader to provide information to the other party. They are based on culpa in contrahendo Pursuant to these rules, however, it is recognized that the other party must be given information that can be discerned as of major importance to them in order to prevent great damage. This principle is general and not limited to consumer contracts.*

		• **In DE,** the legal institution of *culpa in contrahendo* (c.i.c., §§ 280 (1), 311 (2), 241 (2) BGB) constitutes the most important rule on pre-contractual obligations to provide information. Such an obligation to inform can be imposed if the infringing party could reasonably expect such information according to good faith and by applying generally accepted standards. • **In SE**, There is an obligation to give certain information[502]. General rules of *culpa in contrahendo* apply in this period.	
1) Can the principle of good faith be invoked to protect a consumer **against a behaviour of the trader, during the pre-contractual period?** Does the principle of good faith constitute a special rule to protect consumers or is it a general	1/ In two MS, notwithstanding the general principle of good faith, **there is a special text for the consumers.** • **In LV**, the Article 21 of Consumer Protection Law states that "*In organising the selling of goods or provision of services, professional diligence **and honesty** with respect to*	1)**In most MS, the principle of good faith can be invoked to protect a consumer** against a behaviour of the trader during the pre-contractual period, but **it is a general rule**, not a rule especially made for consumer: AT, BG, CY[504], CZ, DE, DK, EE,	-**In 3 MS, there is no principle of good faith at all**: IE[526], MT, UK. -**In IE, a few lower courts have granted relief on the basis of unconscionable**

[502] *SE: that information will be part of the contract unless expressly agreed otherwise.*

principle of contract law which applies to all types of contracts? **2) If the consumer can invoke good faith, how does**	*consumers shall be observed*." • **In PT**, pursuant to Article 9, nr. 1[503] Consumer Protection Act**,** the consumer has the right to have his economic interests protected, ensuring that his legal consumer relationships guarantee material equality of the participants, **loyalty and good faith** during the preliminary phases, drafting and enforcement of the contracts. This provision cannot be derogated from by agreement.	EL, ES, FI, FR, HR, IT, LT, LU, NL, PL, RO, SI. -**In several MS, it is not exactly good faith, but it is closer:** BE, SE, SK • **BE:** bad faith is included in the fault. • **SE:** the principle of good faith has been debated; a contract can be made void if the circumstances surrounding the conclusion of the contract are considered to be in violation of "*tro och heder*", which literally translates to faith and honour, but closely resembles the doctrines of good faith and fair dealing of other countries. Other than that, general rules of *culpa in contrahendo* apply, to cases where, despite negotiations having occurred, no contract has been entered into. • **SK:** where applies the principle of good moral.	**bargains** but there is no refined principle. In contrast, good faith is used in the definition on unfair terms (see above) -**For one MS, good faith is a general principle, but it cannot be invoked directly**: HU

[504] CY: but there is a special rule for good faith in unfair terms.
[526] A few lower courts have granted relief on the basis of unconscionable bargains but there is no refined principle.
[503] PT: Article 9. Right to the protection of economic interests: "1- The consumer is entitled to have protection of his economic interests; legal consumer relationships guarantee material equality of the participants, loyalty and good faith during the preliminary phases, negotiation and enforcement of the contracts.[…]".

your law define it? What are the functions of good faith in your law?		2) -**In most MS, there is no legal definition:** AT , BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, IT,LT, LU, PL, PT[505], RO, SE, SI -**In NL, there is a legal "definition".** Article 3:12 BW provides that in determining what reasonableness and equity require generally accepted principles of law, current juridical views in the Netherlands, and the particular societal and private interests of the parties must be taken into account. **-But in the MS which have no legal definition, it is defined in doctrine or in case law:** • **Some MS have a definition which refers to the conduct of the party:** BG, DE, HR, FI[506], LU, SI. o **In BG**, Art. 8, Para. 2 OCA stipulates that the parties to a	

[505] *PT: But the meaning of good faith is specified by the law in certain situations: for example Article 243 CC (Effects of simulation towards bona fide third parties):… 2. Bona fide means that simulation was ignored at the time when the respective rights were constituted."*
[506] *Cf Study about CESL and 14 national laws cited above p.6*

		contract should **act in a way** not to abuse the rights conferred on them by law. ○ **In DE**, the general principle of good faith, as provided in § 242 BGB, is not restricted to the protection of consumers but has to be considered in the whole area of private law. It can generally be invoked **to protect the consumer against particular behaviour** by the trader during the pre-contractual period[507]. ○ **In HR**, pursuant to Article 4 of the COA, in creating obligations and exercising the rights and obligations from such obligations, parties are obliged to adhere to the good faith principle. Good faith principle is considered to be a « general clause » or « legal standard »	

[507] DE: In the past the principle of good faith has been used in particular to create duties to protect; these duties are now mainly based on § 241(2) BGB. In conjunction with § 311 (2) BGB (which states that a legal relation with duties under § 241 (2) BGB can also come into existence in the pre-contractual period) the consumer can bring claims for damages ("culpa in contrahendo") resulting from pre-contractual behaviour by the trader. There is thus no need to invoke the general principle of good faith in this respect if the requirements of § 311 (2) BGB are met.

		which generally instructs parties **how to act or how to behave in an obligation,** whereas it is left to the jurisprudence and legal doctrine to determine specific content of this instructive rule, i.e. to determine specific forms of behaviour that parties are bound to follow. ○ **In FI,** the principle of good faith can be invoked to protect a consumer **against the behaviour of the trader** during the pre-contractual period. However, there is no provision in the legislation on the matter[508]. ○ **In LU,** good faith **requires the parties to a contract to behave correctly**, in accordance with the requirements of life in society, and	

[508] *Section 33 of Contracts law (228/1929) provides also that "A transaction that would otherwise be binding shall not be enforceable if it was entered into under circumstances that would make it incompatible with honour and good faith for anyone knowing of those circumstances to invoke the transaction and the person to whom the transaction was directed must be presumed to have known of the circumstances."*

		prescribes duties that add to their contract"[509]. ○ **In SI,** Art. 5(1) of the CO provides that, when concluding obligational relationships and when exercising the rights and performing the obligations deriving from such relationships, the participants must observe the principle of conscientiousness and fairness. Thus, the principle of good faith can be invoked to protect a consumer **against a behaviour of the trader** also during the pre-contractual period. • **In some cases, the definition refers to the care in the legitimate interests of the other party:** DE, PT, IT ○ **In DE**, § 242 BGB only provides that "an obligor has a duty to perform according to the requirements of good faith, **taking**	

[509] *O. Poelmans, Droit des obligations au Luxembourg, Larcier 2013, No. 146.*

		customary practice into consideration." Good faith can be described as the leading socio-ethical **perception of consideration of other person's legitimate interests**, probity and loyalty. ○ **In IT,** Art 1337 It. civil code prescribes on the prospective parties of a contract a general duty to bargain in good faith, although the bargain may never evolve into a contract. It implies **the idea of protecting the counterparty's interests within the limits of a sustainable sacrifice**. ○ **In PT,** in a decision regarding the pre-contractual period, the STJ also states that to "*act in good faith is to act with diligence, care and corresponding **loyalty to the legitimate interests of the counterparty**; it is to*	

		have an honest and conscientious conduct, is to have a line of correctness and probity in order not to undermine the legitimate interests of the other party it is not to proceed so as to achieve the opposite results which a reasonable consciousness could tolerate"[510]. • **Some MS refer also to the criteria of reasonableness: CZ, LT[511]; others refer to practices characterised by honesty:** AT, DE, DK, LV[512], CY, EE, ES, FR, PT. ○ **CZ** law distinguishes between subjective good faith and objective good faith. **Subjective good faith** is a psychological category. It is an	

[510] *STJ, 30.10.1997, Proc. n° 98A516I; see also STJ, 29.01.2004, Proc. n° 03B4187.*
[511] *study cited above*
[512] *study cited above*

3) **If the consumer can invoke good faith, what is the nature of the contract or tort liability of the sanction of good faith?**		internal state of a legal person or a natural person being convinced of the correctness of his/her actions, which brings to that person juridical protection. **Objective good faith (fairness)**, on the other hand, is understood rather as a legal principle with a certain moral content, which is very close to the category of good manners. ○ **In PL,** authors define it as a "justified lack of knowledge". ○ **In RO,** good faith is often considered as being synonymous with fair dealing, that is, the just, equitable and open way of dealing between the parties to a contract, including the duty of transparency. **Functions:** • **The fall-back function**	

		<u>of good faith</u>, which protects against fraud, threats and unfair exploitation, is not mentioned in MS laws, but the protection exists in other ways (see defect of consent, etc.). • The **<u>shield function,</u>** whereby this duty may preclude the party in breach from exercising or relying on a right, remedy or defence: BG, EL[513],CY, DE, ES, FR, HR, LT,NL, SK[514]. In general, the sanction for breaching good faith is the denial of judicial protection: CZ, DK, AT[515]. • **<u>The interpretative function</u>** exists especially in AT[516], BG, DE, EL[517], FR, LT, SE. • **<u>The additional function</u>**, which means that the contract contains the obligations required by good faith, even if they	

[513] *cf. Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and fourteen national laws ((BG, CZ, DK, EL, IE, CY, LV, LT, LU, MT, AT, SI, SK, FI)", by M. Behar-Touchais*
[514] *cf study mentioned above*
[515] *For three both, cf study mentioned above*
[516] *cf study mentioned above*
[517] *cf study mentioned above*

		are not expressed in the contract: CZ[518], DE, EE (gap filling), EL[519], HR, LT, LV, LT, LU[520],NL. • There is also **a function to validate or void a contract, be it a complete validation (**DK, LV, LU, SI), or a partial validation: LT[521] • Good faith may **allow the judge to modify the contract:** SE (contra: DE). • The **sword function,** whereby the party in breach is liable for damages[522] for any loss thereby caused to the other party: BG, CY, DK, EL, ES, FR, HR, LT, LU, LV, NL, RO, SE[523]. 3) **The sanction of good faith** has a contractual nature in EE, LU It is a matter of tort law in BG (but there is a discussion), CZ, ES, FR, and IT[524]. In several MS,	

[518] *cf study mentioned above*
[519] *cf study mentioned above*
[520] *for LV, LT and LU: cf study mentioned above*
[521] *cf for LV, LU, LT: for study mentioned above*
[522] *In SI it is possible on the requirements for liability for damages, but is it not automatic*
[523] *for BG, DK, EL, CY, LU, LV cf study mentioned above; for HR, cf Study « Comparison of mandatory consumer protection provisions in the Common European sales law proposal and six national laws ((HR, HU, NL, PL, RO, SE), by M. Behar-Touchais.*
[524] *IT: However, there is an important and authoritative thesis according to which pre-contractual liability has a contractual nature*

		it depends on the situations: CY, EL DE, RO, PT[525]. In AT, it is quasi-contractual liability (but on culpa in contrahendo and not really good faith). In HR, pre-contractual liability is considered by the authors as a third type of liability, existing alongside contractual and extra-contractual liability.	
Unfair commercial practices			
1)What are the unfair trade practices that are most often condemned by the Courts, concerning B2C sales at a distance (specifically online) ? **2)Are there rules which cannot be derogated from by agreement and which provide that are forbidden or restricted**	**1) -Some MS have no case law or just a few court decisions on unfair commercial practices:** CZ, HR, IE, LU, NL, UK (except criminal cases about doorstep selling) -In fact, f**or the other MS, there is a majority of misleading practices** CY, DE, EE, EL, ES, FI, FR, HU, IT, LT, RO, SE, SK. We find also often undesired promotional calls ("cold calling") (DE), unsolicited spam (DK, ES), advertising games (or "advergames") (AT, DE, ES, FR)… **2) Prohibition:** Beyong the prohibition of unfair commercial practices stated by the directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, there are some texts which	**2) Some of these practices are prohibited in certain circumstances by antitrust law** (the sales at a loss or the tie-in sales from a dominant	

[525] *PT: a decision of the Supreme Tribunal de Justice on November 2004 stated that "the pre-contractual liability regime (Article 227 CC), must be built from the application of contractual liability rules or tortious liability, whichever is considered more appropriate to the case" (STJ, 18.11. 2004, Proc. n° 04B2992).*

- **sales at a loss,** - **the refusal to sell to the consumer,** - **lottery games,** - **pyramid selling,** - **tie-in sales,** - **sales with bonuses,** - **discounting,** - **comparative advertising with confusion,** **etc. ?**	prohibit certain conduct by traders. They are most often founded on **unfair competition law**, but they only concern the consumer: • **the refusal to sell to a consumer is prohibited in several MS[527]:** BG (only when it is a discrimination), DE, DK, PT, RO ○ **In BG,** there is no general explicit prohibition. In accordance with ordinary commercial and contract law regarding the conclusion of the contract, however, traders would be obliged to conclude a contract when they have made a public offer/invitation. Further, the Discrimination Protection Act (DPA) prohibits the refusal to sell to customers based on discrimination grounds (Art. 37, Para. 1 DPA). ○ **In DE**, these practices are covered by §§ 3 et seq. *Gesetz gegen den unlauteren Wettbewerb* (UWG; Act Against Unfair Competition). The refusal to sell to a consumer is prohibited in No. 6[528] of said Annex.	undertaking). The aim of antitrust law is the protection of the market, but also "*the welfare of the consumer*" – which does not mean that antitrust law provides consumers with a special protection. -Other practices are prohibited especially by **unfair competition law, or by laws on online games:** • **sales at a loss** even if the undertaking does not have a dominant position (ES, FR, LU, PT,RO) • **lottery games,** are regulated, and they can be forbidden or restricted when they are connected to sales (AT, BG, FI, FR)[529]. • **pyramid selling,** are often forbidden (AT,ES, FR, PL, PT, RO)[530] • **tie-in sales** can be forbidden if certain conditions are met (RO)[531] • **sales with bonuses** (FI,	

[527] *The refusal to sell to a consumer is also prohibited in France; it also constitutes an unfair practice under article L. 120-1 of the French Consumer Code.*
[528] *DE: n°6 of the annex **(to Section 3 subsection [3])** provides "Illegal commercial practices within the meaning of Section 3 subsection (3) shall cover:…6. making an invitation to purchase goods or services within the meaning of Section 5a subsection (3) at a specified price in a situation where the entrepreneur, with the intention of promoting different goods or services instead, then demonstrates a defective example of the goods or services, or refuses to show the consumer the goods or services advertised, or refuses to take orders for the goods or services or to perform the advertised service within a reasonable time; (…)"*
[529] *See also in the left column : DE*
[530] *See also in the left column : DE and DK*

	○ **In DK,** refusal to sell to an individual consumer may constitute a breach on the general provision in Section 1.1 of the Act on Marketing: "Traders subject to this Act shall exercise good marketing practice with reference to consumers, other traders and public interests." ○ **In PT,** The Decree-Law n.º 57/2008 of 26 Mars 2008 on unfair commercial practices prohibits the refusal to sell to a consumer (Article 8, lit. *f* and *g*); ○ **In RO**, the refusal to sell to a consumer is forbidden by a mandatory rule included in **Art. 63 Governmental Ordinance 99/2000 on the sale of tangible goods and supply of services: "**The refusal to sell to a consumer is forbidden unless justified by legitimate reasons, in accordance with the provision of the law." • **And more generally, the discrimination between consumers, which are prohibited by two MS: BG and ES** ○ In ES, Art. 16.1 UCA forbids discriminating consumers regarding	RO unless these are identical to the products or services)[532] • **discounting is often regulated** (AT, ES, RO) • **comparative advertising** is allowed if it is not confusing/misleading (AT, CZ, ES, FI, FR, RO,)[533] **-Other forbidden practices:** In FR, closing-down sales and unpacking sales are forbidden or regulated. In addition, the online sale of certain products can be prohibited (for example: in AT, sale of medicine online is illegal; In FR, it is also illegal as long as the seller does not own an actual pharmacy)	

[531] *See also in the left column : DK*
[532] *See also in the left column : DK*
[533] *see also in the left column BG, DE, and DK*

	prices and other conditions of sale, unless there is a just cause.		

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q14 Various: Pre-contract			
Are there rules about purchase options in sale of tangible goods, which can be applicable to a sale at a distance? If so, are such rules specifically aimed at protecting consumers and can such rules be derogated from by agreement?		-Several MS provide rules about **right of pre-emption** in certain situations (AT: a right of pre-emption cannot be assigned to a third person or transferred to the heirs of the person to whom the right belongs; FR: the right of pre-emption of a co-owner can apply in a sale of goods; ES for joint-owners). **-Several MS require parallel forms or formal requirements:** PT, RO • In PT, purchase options are only valid in writing if certain conditions exist;	There are no rule in most MS (BE, BG, DK, FI, HR, IE, LT, LU, LV, NL, PL, SE, SI, SK, UK) or there are rules which can be derogated from by agreement (DE,HU). For example, HU has general provisions on the contractual right of pre-emption (which has to be in a written form), but they can be derogated from by agreement, because the right is based on the will of the parties.

		• In RO, both pact on the purchase option and the declaration of acceptance must respect the formal requirements laid out by the specific legal provisions on the conclusion of the sale contract. **-**One MS provides a mandatory rule which may apply in case of purchase options in sale at a distance and which concerns **auction** (EE: Art. 10 of the LOA). In case of a tender, the buyer or seller will make an offer which is binding until a better tender is made. Rules can be applied to sale at a distance. These rules are not specifically aimed at protecting consumers. In consumer sales these rules cannot be derogated from by agreement in detriment to the consumer (Art. 237 para 1 of the LOA). **-**One MS provides **that a purchase option must be for a determined period of time**. This is a mandatory rule (IT).	

Are there rules about deposit, and prepayments? If so, are such rules specifically aimed at protecting consumers and can such rules be derogated from by agreement?	There are rules which cannot be derogated from, by agreement, in some MS, but **no real trend emerges** -One rule aims **at preventing the seller to require too much in advance:** in NL, under Article 7:26(2) BW, a consumer can only be required to pay half of the contract price before delivery. The parties may not derogate from this provision **by way of standard terms[534]:** such a term in standard terms is deemed to be unfair (Article 7:6(2) BW). -A few rules aim **to inform the consumer of the deposit or the payment in advance, and to give him the means to prove it:** BE, BG, RO[535], SK • **In BE**, if the consumer has to make a prepayment in the context of the agreement, the trader is required to give him **a purchase order** Article VI.88 CEL[536].	One MS[542] has provisions which cannot be derogated from by agreement, but which can apply to all buyers, even if they are not consumers: FI • Finnish law **forbids agreements of forfeiture** which allow the seller to keep the deposit pledged as a security for an obligation if the obligation is not performed. This general rule cannot be derogated from by agreement to the detriment of a consumer.	**Some MS have rules about deposit and prepayments in contracts but they can be derogated from by an agreement:** CZ, DE, EL, FR, HU, LT, LU, PT, SE • **In CZ,** Section 1807 of civil code, states that "*what one party gave to the other before concluding a contract is presumed to be an advance payment*" And section 1808 (2) provides that "*If the person who provided the earnest fails to discharge the debt, the other party may retain the earnest. If this party provided an earnest, it is entitled to request that it either be given twice as much, or that the debtor discharge the debt, or that it be provided with compensation for damage if discharging the debt is no longer possible*". • **In DE,** in reciprocal contracts, such as a sales contract, performance is to take place concurrently (§ 320 BGB), thus the consumer is generally only obliged to pay concurrently with

[534] But they could derogate to this provision by individually negotiated term.
*[535] Romanian law has also general provisions : Romanian law provides that "Each time that a contract has been terminated for reasons which are not imputable to any of the parties, the party who made a prepayment has a **right to complete refund**." (Art. 1546 Civil code). This is a mandatory rule in both B2C and B2B contracts, as it would be contrary to the principle of good faith to stipulate the recipient's right to keep the prepayment in the cases in which the non-performance is caused by unforeseeable events.*
[536] BE: this text states that « Upon sale, any company must issue an order, when the goods are delivered or the service provision is delayed, in whole or in part, and that a deposit is paid by the consumer. The sayings of the order requiring him who appointed him, notwithstanding any general or special conditions, other or otherwise. The King may determine the particulars to be included on the order form. »

	• **In BG**[537], in B2C contracts, article 334 of the commercial act (CA) provides that "the agreement for advance payment of the price must be **in writing**. If the seller fails to deliver the goods, he shall owe interest from the date of receipt of the price. In such a case the price paid shall be considered earnest money". The written form protects the consumer. • **In RO**, the seller or supplier has a **duty to provide formal means of proof concerning prepayment,** when the delivery of the product or the supplying of the service takes place **after** the prepayment of part of the price by the consumer (Art. 67 Consumer Code (Law 296/2004)[538]. • **In SK**, There is a special regulation in ActPCDDS. According to its section 3		delivery of the object of purchase by the seller. This rule is not specifically aimed at protecting consumers and can be derogated from by agreement, i.e. it is generally possible to agree on advance performance by either of the parties. However, standard terms requiring excessive advance payments from the consumer are ineffective according to § 309 No. 2 BGB (black list term). • **In EL,** article 402 of the Greek Civil Code provides that « If upon the conclusion of a contract, earnest money has been paid, it shall unless otherwise provided be deemed to have been given to cover the prejudice resulting from the non-performance of the contract ». And article 403 adds that « the party responsible for non-performance of a contract shall forfeit the earnest money he gave or shall repay double the amount received. In case of a doubt, an obligation further to compensate shall not be excluded reduced however by the amount

[542] *See also RO in the left column*
[537] *In BG, there are also general rules which provide rules regarding deposits in contracts. Article 93 of the Obligations and Contracts Act (OCA) stipulates that deposits serve as a guarantee for the conclusion of the contract. These rules are not aimed at consumers specifically. These rules can be derogated from by agreement.*
[538] *RO: Art. 67 Consumer Code (Law 296/2004): "Should the delivery of the product or the supplying of the service take place after the prepayment of part of the price, the seller or supplier must provide to the consumer a document according to specific provisions of law or a written proof of the prepayment, in respect of the contractual terms agreed by the parties."*

	(1) q) the seller shall provide to the consumer **information** regarding duty to pay any deposit or prepayment on sellers' demand[539]. -A few rules concern **the right of the consumer to terminate or rescind the contract** when he or she has made a payment in advance, and the effect on the amount paid in advance: AT, ES • **In AT**, when the consumer has paid in advance part of the price **before instalments, its right to rescind the contract strengthened under certain conditions** (§ 27 KSchG)[540] • **In ES,** there is not really a special rule about the right of the consumer to terminate the contract when he has made a prepayment. But there is a rule which applies specifically in B2C		of the earnest money » • **In France**, Article 1590 of the Civil code states that "*If the promise of sale has been made with the payment of earnest money, each party may recede from the contract.* *The party who gave the earnest money by forfeiting it.* *The party who received the earnest money by returning double the amount.*" • **In LT**, Article 6.228 of the Civil Code provides that "…*when advance payment has been indicated in the customer agreement and the customer has failed to pay within the term indicated in the contract it shall be considered that the customer has refused from the contract except if otherwise provided under the contract*" • **Luxembourg** law distinguishes between "arrhes" (deposit) and "acompte" (downpayment). In case of a deposit, the contracting party initially pays a sum to the other, if she then changes her mind, she will lose the deposit, or

[539] *SK: ActPCDDS section 3 (1) q) provides that "Before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner ... where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader..."*

[540] *AT: § 27 KSchG states that " The consumer may rescind a contract for the delivery of a movable tangible asset, whereby the consumer undertakes to pay the purchase price in advance by instalments, if the commodity is identifiable solely by declaration of the contractual parties or if the price is not fixed in accordance with prices applicable at the date when the contract is made, and for as long as the contract has not been completely performed by both parties. § 4 shall apply mutatis mutandis to the return of payments already made."*

	contracts, which provides that consumers may exercise their rights to terminate the contract **without incurring any kind of sanction such as the loss of amounts paid in advance**. Terms that exclude these rights are prohibited (art. 62.3 RCPA)[541]. It is a protection of the amounts paid in advance. -In one MS, **the protection of the consumer consists in a right to receive interests**: SI • **In SI,** Article 41 of the ZVPot provides that "If the trader implicitly or explicitly conditions the purchase of goods or services to a partial or full prepayment and delivers goods or performs services after receipt of the advance, the trader shall be liable to the consumer upon delivery of the goods or services, to calculate and pay interest at the rate at which they are remunerated deposits, fixed for over three months. The provision of		she can choose to keep the contract. According to Article 1590 of the Luxembourg Civil code: *"If the promise of sale has been made with the payment of earnest money, each party may recede from the contract.* *The party who gave the earnest money by forfeiting it.* *The party who received the earnest money by returning double the amount."* • **In PT**, According to Article 440, if, upon the signature of the contract or subsequently, one of the parties gives the other party something that matches, in part or in full, the consideration to which they are obliged, this delivery is considered as total or partial anticipation compliance, unless the parties wish to attribute to the delivered thing the quality of down payment**.** Pursuant to Article 442, nr. 1, 2 and 3, when a down payment is made, the rendered amount should be ascribed to the consideration due, or returned when such ascription is not possible (nr. 1). If the person who makes the down payment does not comply with the obligation due to cause ascribable to her, the other party can retain

[541] *see questions 4 to 6 on unfair terms.*

	the preceding paragraph shall not apply if the prepayment is paid within less than 3 working days before the date of the supply or the provision of services begins. The provisions of this Act relating to the prepayment shall not apply in the case when a company makes a purchase of goods or services with the delivery of the deposit".		the rendered amount as its own. If non-compliance with the contract is due to the latter, then the former can ask for a doubled rendered amount, or, if the property mentioned in the promised contract has been transferred, he can ask for its value, or for the right to be transferred or created over such property, objectively established on the date of non-compliance with the promise, after deduction of the agreed price. • **In SE,** the Consumer Sales Act contains rules about the Sellers right of payment when the Consumer uses his right of cancellation pursuant to Section 37 of the Act. In such cases, a Seller may be entitled to keep a deposit/prepayment made by the Consumer, according to Section 41 paragraph 2 of the Act, provided, firstly that **there is a contractual provision** where he has reserved this right, and secondly that the amount is not unreasonably high. **-Some MS have no such rule**: DK[543], EE, HR, IE, LV, MT, PL, , UK.

[543] *DK: but if no agreement about deposit or prepayment has been entered into between the seller and consumer, and the seller withdraws money from the consumer's account prior to delivery, this may constitute a violation of the general provision on good marketing in Section 1.1 of the act on Marketing*

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q15- Other mandatory rules			
Are there other contract law provisions which are not specifically aimed at protecting consumers but which protect contracting parties generally and which are applicable to contractual obligations in B2C contracts for sales of tangible goods at a distance, and in particular online , in the pre-contractual period? If so, can such rules be derogated from by agreement?	-In SE, there is a **general rule which protects the consumer in a specific manner,** because the text mentions the **particular attention that must be brought to the consumer**. That is the reason why we present this provision in this column. Section 36 of the Contracts Act provides that "*a contract term or condition may be modified or set aside if such term or condition is **unconscionable having regard to the contents of the agreement**, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances, and circumstances in general. Where a term is of **such significance for the agreement that it***	Notwithstanding the rules on the duty to inform and good faith[544], several MS have other rules which cannot be derogated from: • **rules about apparent mandates which protects a party who has faith in the power of one person to represent another, when it is legitimate to trust him: AT, FR** ○ In AT, there are rules about apparent authority which protect the confidence put in the authority of one person to represent another, where there is a trustworthy appearance of this person attributable to the one apparently represented[545]. This principle can also be found in § 1029 (1) phrase 2 and	Notwithstanding the rules on the duty to inform and good faith[547], where applicable, **most MS have no other rules that may not be derogated from by agreement**: BG, CZ, DK, EE, EL, ES, FI, HR, HU, IE, IT, LT, LV, MT, NL, PT, SI, UK.

[544] *LU: the current attitude of the Luxembourg courts is to impose a **duty to inform to contractors who does not know, when the professional contractor knows or should have know information whose importance is decisive for the consent of the other** must therefore inform that legitimately it ignores this information or trusts the other party; see also LT. But it is linked with the good faith duty*

[545] *for details cf. Bydlinski, Bürgerliches Recht I[6] mn. 9/25 ff*

	would be unreasonable to demand the continued enforceability *of the remainder of the agreement with its terms unchanged, the agreement may be modified in other respects, or may be set aside in its entirety. Upon determination of the applicability of the provisions of the first paragraph,* ***particular attention shall be paid to the need to protect those parties who, in their capacity as consumers or otherwise, hold an inferior bargaining position in the contractual relationship."*** This rule cannot be derogated from by agreement.	§ 1030 ABGB. This cannot be derogated from. ○ In FR[546], case law recognizes the theory of apparent mandate when a party is deceived about the powers of the other party, by a legitimate error. • **liability of the trader for the act of his representative or his employee**: AT • **Duty to take into account the rights, legal interests and other interests of the other party**: DE. ○ In DE, BGB imposes on the parties, in particular, duties to perform and duties to protect, depending on the circumstances of the specific case. In case of negligent or intentional breach of these duties, a party cannot claim performance but only damages (under § 280 (1) BGB), in particular also in form of annulment of the	

[547] *Or culpa in contrahendo mentioned above in Q13: Cf PL: According to art. 72 CC§ 2 a party which enters into or conducts negotiations in breach of good custom, in particular without intending to execute a contract, is obliged to remedy any damage which the other party suffers by the fact that it was counting on the contract being executed. This is a mandatory provision*

[546] *Art. 1112-2 of the civil code issued of french contract law reform applicable from 1er October 2016, provides also that "Whoever uses without authorization confidential information obtained during negotiations incurs extra-contractual liability ».*

		contract if the harm suffered results in the conclusion of a contract. • **Rules on protection on personal data: SK**	
Are there contract law provisions especially designed for online contracts (or online sales) which are not specifically aimed at protecting consumers but which protect contract parties generally which are applicable to contractual obligations in B2C contract for sales of tangible goods at a distance, and in particular on line, in the pre-contractual period? If so, can such rules be derogated from by agreement?		All the MS have provisions for sales on line, but they are relevant especially from the implementation of the Directive 2011/83/UE and the e-commerce directive 2000/31/EC. So, we do not mention them in detail in this study, because the Directive 2011/83/UE is excluded from it. **We are interested only by what is beyond the European acquis.** **The MS have no specific other rules, except the following one**: • **In ES**, Act 34/2002, 11.7, Information Society Services and Electronic Commerce (ISSECA, BOE n. 166, 12.7 [last modified 10.5.2014]) governs commercial communications by electronic means. Art. 19 ISSECA states that the rules on **personal data protection, competition law and publicity** shall apply. Art. 20 to 22 ISSECA contain mandatory rules concerning electronic communications: Commercial promotions must specify in a clear and	

		comprehensible manner the preconditions of access on and participation in them (art. 20.2 ISSECA). • **In SK**, if a commercial communication offering goods and services includes a special offer such as a rebate, bonus, gift, consumer game or competition, the special offer must be distinguishable from the basic offer for the recipient of services and the terms and conditions that must be fulfilled to profit from or participate in the special offer must be easily accessible, comprehensible and unambiguous.	

B/ Period of formation of the contract

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q16 Error [548]			
Does domestic law recognise? **the error of fact or law**?		**-Some MS have mandatory rules, but these are general rules, which can apply to the consumer, but which are not made for him**: • **For one MS, which admit error of fact or law**, **derogations is not possible before the error was discovered (CZ)** • For others, the parties to the contract cannot derogate from these rules **when that creates a risk for the protection of the weak party[549]:** DE (standard terms context), EE (the rule can be derogated from, except in B2C contracts). • For most of the MS, error of fact or law is **admitted by a general rule** and it cannot be derogated from: AT, EL, CY, FR, HU, IT, LT, LV, PL, RO, SK. • For a few MS, error of fact or law are not both recognised. Only one of	-Some MS have such provision in ordinary law but it is **not mandatory**: BE, DK, IE, LU, NL, PT -A few MS admit **just one sort of error,** either error of factor error of law, but the rule can be derogated from: ES, HR. -Some MS **do not have any specific rule about the error of fact or law**: BG, FI, UK, but in these two last MS (FI[550] and UK), it is discussed by doctrine.

[548] Mistake and error are synonymous. Not to use the two terms, we have chosen to use the one that was most used in the 28 national reports.
[549] In other cases, derogation is possible.
[550] There is a discussion in doctrine. However, errors of fact or law can lead to invalidity, if the prerequisites of the provision regulating invalidity on the grounds of acting contrary good faith and fair dealing are fulfilled (Contracts Act (228/1929) Chapter 3 Section 33)

		them is regulated by the national law: ○ **SE and MT** do not recognize error of law but admit error of fact and it is a general mandatory rule. More precisely, in MT, article 975 of the civil code states that « *An error of law shall not void the contract unless it was the sole or principal inducement thereof*. » ○ **SI** recognizes provisions on error in motive for gratuitous contract. They protect contract parties generally. Derogations are not possible.	
Does domestic law require that the error be decisive (without the error, the party would not have concluded the contract or would have done so only on fundamentally different contract terms)?		**-For some of the MS there is a general mandatory rule which requires the decisive character of the error**: AT, BG, CZ, CY, DE (implicitly), EE (expressly), EL, HR, HU, LT, PL, RO, SI, SK[551]. • **In AT**, it is called the principle of causation. • **In BG**, Article 28 of the Obligations and Contracts Act (OCA) provides that **"***An error as to the subject shall constitute grounds for invalidation of the contract provided the error concerns significant properties of the subject…*". Indirectly, the law requires the error to be decisive.	**Several MS have such provisions in general law but it is not mandatory:** ES, HR, LU, NL, IE. • In IE, these rules can be derogated from as long as there is a valid agreement in the first place. -**In LU, if the error is a lack of consent, it must first have had a major influence on consent**. It must have been decisive for the consent of the party asserting it. It must be such that if the other party had not committed, he

[551] *SK: The principle has an exception: according to CC section 49a.," the error need not to be decisive in case when the error was caused by the other person intentionally."*

		• **In CZ**, Section 583 of the civil code states that "*Where a person made an act in **error concerning a decisive circumstance** and the error was caused by the other party, the juridical act is invalid*". • **In DE,** according to § 119 (1) BGB, there has to be a causal link between the error and the declaration of intent. The declaration can only be avoided if it can be assumed that the declarant would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case. • **In EE**, Art. 92 para 2 of the LOA provides a rule that error should be of such importance that a reasonable person similar to the person who entered into the transaction would not have concluded the contract in the same situation or would have entered into the transaction under materially different conditions. • **In ES**, The Spanish civil code (SpCC) requires that the error be decisive. • **In FR,** it is required that the mistaken party would not have concluded this contract without the error. • **In PL**, generally the error must be decisive, both objectively and subjectively. An error can only be relied on, if it justifies the	would not have consented. The error must have been caused at the time of the exchange of consent, alteration or disappearance of the cause of the obligation of the other party. But the rules about error can be derogated from by agreement. **-For a few MS, decisive character is not expressly required by law but it is a condition added by case law and authors** and it can be derogated from: BE, MT, PT, UK. For one MS there is no such rule: DK

		supposition that, if the person making the declaration of intent had not acted under the influence of the error and had judged the case reasonably, he would not have made such a declaration. • **In RO,** in order to obtain contract avoidance for error, the error has to be decisive. According to art. 1207(2) of the Civil code, the error is decisive: 1. if it concerns the nature or the object of the contract;2. if it concerns the identity of the object of the performance, a quality of the object or any other fact considered to be essential by the parties and in the absence of which the contract had never been concluded;3. if it concerns the identity of the party or a personal quality of the party in the absence of which the contract had never been concluded. • **In SK,** according to CC section 49a., there are two different situations: 1. The error needs to be decisive in case a person acted in error arising from a circumstance decisive for its creation and the person to whom the legal act was addressed gave rise to the error or had to be aware of the error; 2. On the other hand the error need not to be decisive in case the error was caused by the other person intentionally.	

		-For some MS, decisive character is not expressly required by law, but it is a condition added by case law, but it cannot be derogated from by agreement: FR, IT (with some restrictions[552]), LV. -In one MS, the decisive character is not expressly required by law, but he decisiveness of the error is considered to be a fundamental prerequisite in the doctrine: FI[553] -In one MS, the decisive character is required only **for one sort of error:** SE for error as to a point of fact. **These provisions cannot be derogated from by agreement:** • except for one MS, after the error was discovered: CZ. • Only in a standard terms context: DE. • Only if it is to the detriment of a consumer: EE.	
Does domestic law require that the **error relates to the essence of the agreement**?	-**In AT, there is a differentiation between essential errors** (the party would not have concluded the contract), which may allow for avoidance, **and non-essential errors** (the party would have concluded the contract on different terms), which allow for	**For many MS there is a general mandatory rule which requires that the error relates to the essence of the agreement:** BG, CY, EL, FR, HR, HU, IT, LT, PL[554], RO, SI, SK. • **In BG,** an error will constitute grounds for invalidation of the contract only when such error	**-For some of the MS, the law requires that the error relates to the essence of the agreement, but it is not a mandatory rule**: BE, ES, LU, PT -**Some MS do not require that the error relates to the essence of the contract**: DE,

[552] *IT: A decisive error shall not necessarily be relevant in the sense that without the error, the party would not have concluded the contract or would have done so only on fundamentally different contract terms. Such a further element is required by the law only in cases concerning the quality of the good or the quality of the counterparty;*
[553] *FI: see T.M. Kivimäki & Matti Ylöstalo, Suomen siviilioikeuden oppikirja 1961 p. 418*
[554] *PL: only if essence of the agreement means the substance of the agreement (and not the essentialia negotii)*

	modification of the contract (§ 872 ABGB). This rule is a general rule. But, § 6 (1) no. 14 Austrian Consumer Protection Act (KSchG) provides that "*the consumer shall not be bound by contractual stipulations within the meaning of § 879 of the Civil Code, whereby:…14. the right to assert an error or the lack or frustration of contract is excluded or limited* ***in advance****, i.e.* ***by an agreement according to which the entrepreneur's promises do not concern the merits or essential nature of the agreement*** *(§ 871 (1) of the Civil Code)"*. So, a special text of protection consumer Act excludes that this rule about error can be derogated from by agreement, in advance, in B2C contracts.	concerns significant elements of the contract. Art. 28, Para. 1 and Para. 2 OCA. • **In CY**, the error must bear on a point of fact that is essential to the contract: section 21 of Cyprus Contract Law Cap. 149 • **In EL**, article 141 of the civil code states that "an error is substantial when it refers to a point of such importance in regard to the whole of the transaction that if the person in error were aware of the true situation he would not have entered into the transaction ». • **In ES**, the civil code distinguishes among different types of error. According to art. 1266, the error must be "*about the substance of the thing which constituted the subject matter of the contract or about the conditions thereof, which should have been the main reason to enter into it".* If the error concerns the person, it "*shall only invalidate the contract where consideration for such person should have been the main cause thereof*". A simple error in counting shall give rise only to its correction.	DK, EE, LV, MT, NL, SE **-In NL**, it suffices that the other party knows or should realise that the error pertains to something which was relevant to the party who suffering from error. -**For one MS**, the requirement of the essential character of the error is discussed in case law, but when it is admitted, it is not a mandatory rule: UK[555].

[555] *UK: There is no fully-developed doctrine of error, but the instances in which error has been recognised relate to circumstances where (i) parties are at cross-purposes (Raffles v Wichelhaus (1864) 2 H & C 906); (ii) one party is mistaken about the terms of the contract and the other party is aware of this (Smith v Hughes (1871) LR 6 QB 597; Hartog v Colin & Shields [1939] 3 All ER 566 (KBD)); (iii) one party is mistaken about the identity of the other party in non-face-to-face dealings (Shogun Finance Ltd v Hudson [2004] 1 All ER (Comm) 332). Also, there can be a mistake where both parties are mistaken about a particular state of affairs, the non-existence of which renders performance impossible: Great Peace Shipping Ltd v Tsavliris Salvage (International) [2002] EWCA Civ 1407.*
These have developed incrementally through decided cases. On the whole, these are background rules which set the parameters within which parties design their contracts.

		• **In FR**, article 1110 of the Civil code provides that "*Error is a cause of nullity of an agreement only when it bears on the very substance of the thing that is the object of the agreement*". • **In HR**, pursuant to Article 280 of the COA, one of the instances in which an error is considered decisive is when error relates to the object of a contract or an essential feature of the object. • **In IT**, Art. 1429 of the civil code requires that the error relates to the essence of the agreement. This means that the error must concern at least one of the elements listed at art. 1429, that is the object of the contract (the obligation undertaken; the identity of the object; the quality of the property), or the identity of the counterparty, or his/her qualities. • **In RO,** pursuant to article 1207 of the civil code, the error leads to contract avoidance only if it concerns an essential element of the agreement, such as (a) the nature or the object of the contract, (b) the identity of the object of the performance, a quality of the object or any other fact considered to be essential by the parties and in the absence of which the contract had never been concluded, (c) the identity of the party or a personal quality of the party in the absence	

		of which the contract had never been concluded (in the case of contracts concluded *intuitu personae);*(d) should the error concern the mere reasons for contracting, it shall not be considered essential, unless these reasons were decisive for the contract formation according to the parties' will. • **In SI**, first § of Art. 46 provides that an error shall be deemed significant if it relates to the essential characteristics of the subject, to a person with whom a contract is being concluded if it is being concluded in respect of such person, or to circumstances that according to the custom in the transaction or according to the intention of the parties are deemed to be decisive. **For one MS, decisive character is not expressly required by law but it is a condition added by case law and/or doctrine:** FI. **For one MS, derogations can be made but only after the error was discovered:** CZ • **CZ:** the essential character of the error is not expressly required by law but it could be inferred from the law.	

		In one MS, the derogation is also under condition: IE: "*they can derogated be from **as long as there is a valid agreement in the first place***". Then, the provision of the Irish law which provides that the error relates to the essence of the agreement, cannot be derogated from, when, because of the error, the agreement in the first place can be valid any more.	
Does domestic law require that the other party knows or can be expected to know that the misled party is mistaken?		-In some MS there is a mandatory rule which requires that **the other party knows or can be expected to know that the misled party is mistaken:** CZ (implicitly), HU, IT, LT, PL, SE, SK. -In one MS **the knowledge of the counterparty is not expressly required** by law but it is a condition added by case law and/or authors, and it cannot be derogated from by agreement: CY. -For one MS there is such rule which requires the knowledge of the other party expressly as a prerequisite to the avoidance of the contract by error, it cannot be derogated from only **when it is to the detriment of a consumer**: EE. -**A few MS do not require the knowledge of the counterparty but require a subjective condition to avoid the contract for error**: • **EL:** the law examines the erroneous declaration of the misled person, and it cannot be derogated from this.	**-Most MS do not require that the other party knows or can be expected to know that the misled party is mistaken:** BE, DE, ES, FR, HR, LU, LV, MT, PT, RO, SI **In the same way, but with a little distinction**: • **BG**: **this is not a requirement for the avoidance of the contract** but the knowledge of the other party is required for **damages**. Article 28 § 3 of Obligations and Contracts Act states that "*the party claiming invalidation must compensate the other party for the damage sustained in result of the conclusion of the invalidated contract, unless the former party proves that the error is through*

		• **FI:** According to Finnish law *bona fides* of the counterparty generally excludes the possibility of avoiding the contract[556]. • **NL:** The rule on error requires that the other party knows or should realise that the quality or other aspect of which the first party was mistaking was relevant to that party's decision whether or not to contract or under these terms. It is not required that the other party knew or should realise the first party was actually mistaking[557]. **-For AT**, there are three alternative requirements under § 871 (1) ABGB, that are essentially used to determine if the misled party is worthy of protection: (1) the other party caused the error; (2) ***the other party could be expected to realise the error;*** (3) the error ***was discovered before the other party has made any dispositions in reliance on the contract.*** Also, in case of a mutual error, it is still being discussed if this also leads to the same result. -A few MS require the **knowledge of the other party only when the error is not a common (ie shared) error**. By the way, the derogation from this provision is under condition: it cannot be derogated	*no fault of its own or that the other party has known about the error*" One MS requires that the other party knows or can be expected to know that the misled party is mistaken but it could be derogated from by agreement: DK.

[556] *See T.M. Kivimäki & Matti Ylöstalo, Suomen siviilioikeuden oppikirja 1961 p. 418-419. Mala fides is consequently one of the prerequisites for avoiding the contract. See Mika Hemmo, Sopimusoikeus I, 2003 p. 392*

[557] *Cf. C.C. van Dam, 'Wilsgebreken', in: Jac. Hijma et al., Rechtshandeling en overeenkomst, sixth edition 2010, no. 172.*

		from as long as there is no valid agreement in the first place: IE, UK.	
Does domestic law provide that **only excusable error could void the contract**?		-Several MS expressly **require the excusable character of the error to avoid the contract** and it is a mandatory rule: IT, LT, LV, RO, SI. -One MS does **not expressly require an excusable error, but it is admitted in constant case law** and it cannot be derogated from: FR.	-Most of the MS **do not require that only excusable error could void the contract:** AT, BG, CY, CZ, DE, DK, EE, EL, FI, HR, HU, IE, MT, NL, PL, PT, SE, SK, UK. -For a few MS, which do not expressly require an excusable error, it is admitted in **case law**, but it can be derogated from: BE, ES, LU.
Does domestic law require that the **error was caused by the other party**? Or is this point irrelevant to cancel the contract?		-In several MS, the fact that **the error is caused by the other party** is one of the conditions where the contract could be avoid by error, and it cannot be derogated from **(**AT, HU[558], PL[559], SI[560], SK), or it cannot be derogated from when it is to the detriment of the consumer (EE). **-**For one MS, derogations to the provision which provides that the error needs to be caused by the counterparty can be made but **only after the error was discovered**:	-Most MS **do not require that the error was caused by the other party to avoid the contract:** BE, BG, CY, DE, DK, EL, ES, FI, FR, HR, IE, IT, LT, LU, LV, MT, NL, PT, RO, SE, UK.

[558] *HU: And it also sufficient if the other party could have recognized such error.*
[559] *art.84§1 CC the declaration of intent is made to another person, its legal effects may be avoided only if the error was caused by that person, even if it was not his fault, or if that person was aware of the error or could easily have noticed it; this restriction does not apply to a free-of-charge legal act.*
[560] *This is relevant only in relation to deceit pursuant to Art. 49 of the CO.*

		CZ	
Does domestic law provide for avoidance of the contract **only if both parties make the same error,** or is it irrelevant?		-For one MS, the requirement that the contract could be void **only if the error is committed by both parties** is discussed both in case law and among authors: AT**.** **-**For one MS the fact that the situation where both parties make the same error is **one of the alternative** preconditions to avoid the contract based on error and it cannot be derogated from when it is to the detriment of the consumer: EE. -In a few MS, avoidance of the contract is admitted if both parties make the same error and it cannot be derogated from by agreement, but **it is not an exclusive condition**: SK, UK.	For most of the MS, the fact that the parties make the same error is irrelevant to the avoidance of the contract: BE, BG, CY, CZ, DE, DK, EL, ES, FI, FR, HR, IE, IT, LT, LU, LV, NL, PL, PT, RO, SE, SI.
Does domestic law exclude avoidance if the risk of the error was borne by the misled party?		-In several MS, the law does **not provide that avoidance of the contract is excluded if the risk of the error was borne by the misled party** (and it cannot be derogated from the provisions on error): BG, CY, CZ, FI, PL, SK. -A few MS provide **the avoidance exclusion if the risk of the error was borne by the misled party** and it cannot be derogated from by agreement: HU, RO, SI. -One MS admits **the option of the**	-In a few MS, **the law** provides that avoidance of the contract is excluded if the risk of the error was borne by the misled party (and it could be derogated from this rule): AT, ES, IE, NL, SE -In a few MS, **case law** or/and doctrine admit that avoidance of the contract is exclude if the risk of the error was borne by the misled party: BE, FR **-**In several MS, law does not

		avoidance exclusion in case of the error was borne by the misled party but it cannot be derogated from the rules of the avoidance based on error to the detriment of the consumer: EE. -For a few MS, **error is not essential if the risk of the error could be borne by misled party**: EL, LT.	provide that avoidance of the contract is excluded if the risk of the error was borne by the misled party, but **it can be derogated from the provisions** of the error, in consequence parties could exclude avoidance in this case by agreement: DE, DK, HR, IT, LU, LV, MT, PT, UK
Is an inaccuracy in the transmission of a statement treated as an error?		**-In many MS, an inaccuracy in the transmission of a statement could be treated as an error and it is a mandatory rule:** CZ, EE, EL, FI, IT**,** PL, RO, SE, SI, SK • **CZ:** Derogations are not possible before the option of the avoidance has become known • **EE:** it cannot be derogated from in detriment to consumers • **FI:** there is a difference between the way of transmission[561]. -In one MS, an inaccuracy in the transmission of a statement could be treated as an error specifically **on the electronic contracts** and it is a mandatory rule: BG**.**	-In several MS, an inaccuracy in the transmission of a statement **could be treated as an error**, **but it can be derogated from** by agreement: BE (in case of an error on essential objects), DE, DK, ES, LU (only if the condition of the error are respected), PT, UK. -In a few MS, there is **no specific rule** about the way to consider an inaccuracy in the transmission, it is question solved case by case: CY, FR, HR, LT. -In a few MS **an inaccuracy could not be treated as an error**: HU, IE, LV, MT, NL.

[561] *There is a separate rule governing inaccuracy in the transmission found in Contracts Act (228/1929) Chapter 3 Section 32 (2). According to the provision, avoidance is possible even if the counterparty was bona fides. Only if the party does not give notice without undue delay, the avoidance is not possible. The scope of application is, however, very narrow, as the provisions applies only to telegrams and messengers. Other forms of transmission errors will be treated as errors in declarations. See Mika Hemmo, Sopimusoikeus I, 2003 p. 402.*

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q17 Fraud			
Does domestic law distinguish between **principal fraud** (but for the fraud, the party would not have concluded the contract) and **incident fraud** (but for the fraud, the party would have concluded the contract on different contract terms)?		**Several MS recognize the distinction between principal and incident fraud and it is a mandatory rule:** AT, BE, EL, ES, IT, LT, LU, PT • **In AT**, the distinction exists; however, even in case of an incident fraud, the victim may choose between avoidance and modification and is not limited to the latter (ABGB-ON § 870 mn. 28). • **In EL**, Article 147, subparagraph a of the Greek Civil Code, states that "*a person who has been led by deception to make a declaration of will shall have the right to claim annulment of the transaction.*". But article 148 adds that: "*If the error caused by the deceit is not substantial and the other party has accepted the declaration of will as intended by the victim of the deception, the Court may decide not*	**Most MS do not recognize the distinction between principal and incident fraud:** CY, CZ, DE, DK, EE, FI, HR, HU, IE, LV, MT, NL, PL, RO, SE, SI, SK, UK. • **In CY,** Sections 17 and 19 of CAP.149 define fraud as "*including any of the following acts carried out by any of the contracting parties or with the consent thereof, or by their representative, with the purpose of another contracting party or their representative or extrusion thereof at the formation of the contract: (a) the presentation of untrue facts as true, by the person who does not believe that it is true; (b) the active non-disclosure of facts by a person who is aware of the fact or believes it; (c) a promise made without the intention of its fulfilment; (d) any*

		to annul the transaction". • **In ES**, civil code deals with principal fraud (*dolo causal*) in art. 1269 and 1270.1 and with incidental fraud (*dolo incidental*) in art. 1270.2. Yet, case law shows that the limits of these concepts are not clear. • **In IT**, principal fraud is disciplined at art. 1439, §. 1, It. civil code, while incidental fraud is disciplined at art. 1440 It. civil code. • **In LT**, Article 1.91 of the Civil Code provides only for principal fraud: "*5. In addition to the forms specified in the preceding paragraph of this Article, fraud may result from the silence of a party, i.e. from concealment of such circumstances being aware of which the other contracting party would not have concluded the transaction and which, within the principles of reasonableness, justice and good faith, had to be disclosed to the other party; fraud may also result from active actions by which it is desired to mislead the other contracting party concerning the effect of the transaction, essential terms thereof, civil legal capacity of the person who enters into the transaction, and any other essential circumstances*. " • **In LU**, according to Article 1116 of the Civil code, fraud is a cause of nullity of the agreement when the manoeuvres practiced by one party	*other act purposely towards deception any act or omission which is specifically defines in the law as fraud* ". • **In CZ**, Section 584 (2) of the civil code states that "*If a juridical act in error was made as a **result of trickery**, **the juridical act is invalid**, even where the error only concerns a secondary circumstance*". • **In DE,** According to § 123 (1) BGB, a person who has been induced to make a declaration of intent by fraud (deceit) may avoid his declaration; such fraud (deceit) must have caused an error by the declarant leading him to make the declaration of intent with that specific content; i.e. without the fraud (deceit) he would not have made the declaration of intent or he would have made a declaration with different content. • **In DK,** Section 30.1 of the Act on Contracts, which provides: "*A declaration of intention is not binding on the person making it if he was induced to make the declaration by the person to whom it was made by fraud or the latter realised or ought to have realised that it was induced by fraud on the part of a third party*." • **In EE**, fraud is an intentional leading or leaving a person in error by disclosing false circumstances to

		are such that it is clear that without those manoeuvres, the other party would not have contracted. Fraud is then considered a major fraud. Fraud may also be incident. There is incident fraud when manoeuvres have only had the effect of influencing the conditions in which the other party has contracted, without questioning the conclusion of the contract • **In PT,** pursuant to article 254, nr. 1 CC. Indeed, the latter allows the avoidance of the declaration only to declarants *whose will has been determined by fraud*. The essentiality of the error into which one party has been led is so highlighted. It means that only the fraud without which the victim would never have entered the contract at all allows the avoidance of the contract	the person in order to induce the person to enter into a transaction (Art. 94 para 1 of the GPCCA) and can be both situations: either the party would not have entered into the transaction in the same situation or would have entered into the transaction under materially different conditions. • **In IE**, there is no difference between principal fraud and incident fraud. However, the measure of damages awarded – if the victim elects to seek damages – might differ where the fraud is incident. • **In LV,** article 1459 of the Civil Law sets: "*Fraud is the illegal deception of another person for the purpose of inducing him or her to perform acts in contravention to his or her interests or to refrain from such acts*". • **In NL**, article 3:44(1) and (3) BW allow the other party to avoid the contract in both situations. • **In RO,** According to art. 1214 (2) of the Civil code, the party victim of the fraud may avoid a contract "*even if the error which he made was not decisive.*" **-In one MS, incident fraud is considered as an error:** BG -**In FR**, this distinction was admitted by

			case law in the past, but **now there is no actuality for it anymore**.
Does domestic law admit the avoidance of a contract as a result of a fraud by non-disclosure of any information? Does such a fraud suppose the existence of an obligation to provide pre-contractual information?		-Some MS admit the avoidance of the contract as a result of a fraud by no-disclosure of information**, only when there is a pre-contractual or general duty to disclose:** AT, BE, CY, CZ, DE, EE, FI, FR, IE, LT, LU, PL, PT, SK • **EE:** even when the duty to inform is not expressly required but based on good faith principle. • **FI:** even when the requirement of a pre-contractual duty is based on doctrine discussion. • **FR, PL, PT:** even when it is not expressly required but admit by case law (and reform project of contract law: PL). In Fr, the new article 1112-1 of civil code, applicable from 1er October 2016, mentions a general duty to inform. • **IE:** only in law relating to insurance contracts. • **SK:** particularly within the area of consumer law. **-Several MS admit the avoidance of the contract as a result of a fraud by non-disclosure of information**: DK, ES, HR, RO, SE, UK • **DK, HR, SE, UK**: independently of the existence of a duty to disclose.	A few MS do **not admit the avoidance of a contract as a result of a fraud by non-disclosure of any information**: BG, EL, HU, LV.

		• **RO:** independently of the existence of a duty to disclose, but based on good faith principle that is interpreted distinctively. • **ES, IT, SI**: without any precision about the requirement of a pre-contractual duty to disclose.	
Does domestic law admit that the contract may be void due to the fraud of a third party?		**Most MS admit the avoidance of the contract based on a fraud of a third party**: AT, BG, DK, DE, EE, EL, FI, FR, HR, IT, LU, LT, NL, PL, PT, RO, SE, SI • **EE, EL, FI, FR** (case law[562]), **HR, IT, LT, BG, DE, NL, PL, PT, RO, SE, SI:** only if the other party knows or ought to know the fraud of the third party • **EE:** if the third party acquired rights by the contracts conclude under fraud. • **AT, LU**: only when the third party is directly attributable because it is an abettor (e.g. tasked with leading negotiations). • **DK:** under condition that the other party realized or ought to have realized that the declaration made by the first party was induced by fraud on the part of a third party. • **UK:** without any supplementary condition: **In a few MS there is no specific rule about the origin of the fraud**: CZ, SK	Several MS do not admit that the contract may be void due to the fraud of a third party: BE, CY, ES, HU, IE, LV, MT. • **MT**: If the third party is not connected with the parties and the object of the contract the avoidance can't be based on the fraud of a third party.

[562] *FR: It is also in the reform of contract law applicable from 1er October 2016: art. 1138 of the civil code.*

		• **CZ:** but the provision which admits the error caused by a third party could applied by analogy • **SK:** but the definition of invalidity of the legal act based on usury can cover this situation.	

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q18 - Threats			
In what conditions may a contract be void for threats[563]?		**All MS have mandatory rules. These are general rules, which can apply to the consumer, but which are not made for him**. -Most MS require **an unlawful threat:** AT[564], CZ[565], DE[566], EE, EL, ES, FI[567], FR, IT[568], HR, LT, LV[569], NL[570], PT, RO	

[563] *It must be taken into consideration that some **unfair practices** (as aggressive commercial practices) can include an effective threat and be sanctioned as an unfair practice for example SK[563], but it must be the same for all the MS, because they have implemented the directive 2005/29/CE of 11 may 2005, on unfair commercial practices.*
[564] *AT: Threats do not make a contract void, but only voidable under § 870 ABGB. There are three conditions: (1) one party would not have concluded the contract, or would have concluded it on significantly different terms, but for the threats; (2) the threat was unlawful, ie either the aims or the means or the relation between aims and means were illegitimate; (3) it was understandable that the victim of threats would yield to the pressure (because of 'well-founded fear').*
[565] *CZ: Section 587 of civil code: "(1) A person forced to make a juridical act under a **threat of physical or mental violence** inducing justified concern given the relevance and likelihood of danger as well as the personal characteristics of the person being threatened has the right to invoke invalidity of the juridical act."*
[566] *DE: A contract can be void for threats (violence) if a person has been induced to make a declaration of intent unlawfully by violence. Threat (violence) is defined as presenting the prospect of a future evil, which the agent pretends to be able to influence.*
[567] *FI: Contracts Act (228/1929) Section 28 addresses situations of so-called grave violence. The conditions for avoidance in connection with grave violence are the following: 1. The party has been coerced into the conclusion of the contract. Not only the other party but also a third party can execute the coercion. (T.M. Kivimäki & Matti Ylöstalo, Suomen siviilioikeuden oppikirja 1973 p. 407).; 2. The coercion consists of physical violence or a unlawful threat involving imminent danger to life or health. The situation can be described similar to that of robbery. (Mika Hemmo, Sopimusoikeus I, 2003 p. 352).; 3. Avoidance is possible even if the other party was bona fides. If the coercing party is a third party, the coerced party is obliged to notify the other party, without undue delay after the coercion has ceased and at the risk of the transaction otherwise becoming binding.*
[568] *IT: Art. 1434 It. civil code admits that the contract may be avoided due to the threat of a third a party: the contract may be avoided even if the the party who profited of the third party's threat was not aware of the threat. Threat is considered a more important vice of consent than fraud: this is because the law protects in any case the innocent party, to the*

		-Several MS require **a <u>serious threat:</u>** BG[571], EE[572], FR, IE[573], IT, LT[574] (real) **-**Some MS define coercion as consisting in **<u>a threat involving imminent danger to life or health or property</u>:** EL[575], ES[576] FI, FR[577], HR[578], LU[579], MT[580],	

detriment of the counterparty's reliance on the validity of the contract. Reverential fear ('timore riverenziale') is not considered as a relevant threat in view of the avoidance of a contract (art. 1437 It. civil code).

[569] LV: Article 1467 of the Civil Law sets: "A lawful transaction concluded under violence is not invalid of itself, but the person under violence may contest it".

[570] In NL, the threat must be unlawful (i.e. constitute a tort) and must be such that a reasonable person in the same circumstances as the victim would be influenced by it. Cf. Article 3:44(1) and (2) BW.

[571] BG: Obligations and Contracts Act (OCA) Art. 30. "Threat shall constitute grounds for the contract's invalidation provided one of the parties has been forced either by the other party or by a third party to enter into the contract through provoking reasonable fear".

[572] EE: Under the Art. 96 para 1 of the GPCCA a person who entered into a transaction under the influence of an unlawful threat or violence may cancel the transaction if the threat or violence was under the circumstances so imminent and serious as to leave the person who entered into the transaction no reasonable alternative. Regard shall be had, in particular, to the personality of the person using threat or violence and of the other party to the transaction, and the situation in which threat or violence was used. Threat is unlawful if (Art. 96 para 2 of the GPCCA):1) the act or omission with which the person who entered into the transaction was threatened is unlawful; 2) the objective of the transaction entered into under the influence of the threat is unlawful; 3) use of the act or omission for threatening in order to induce the person to enter into the transaction is unlawful. Violence is always unlawful and gives the right to cancel the contract. Threats as ground for cancelling the contract should be proved to be unlawful.

[573] IE: The threat must be so great as to overbear the free contracting will of the party. It must relate to physical harm to self or others, or to serious threats against goods or economic interests, within reason.

[574] LT: Article 1.91(1) of the Civil Code provides that "1. A transaction may be declared voidable by a court on the action of the aggrieved party if it was entered into due to fraud, violence, economic pressure or <u>real threatening</u>, or if it was formed by a malicious agreement of the agent of one party with the other party, likewise if, by entering into the transaction by reason of abusive conditions, one party assumes obligations under unfair conditions. "Article 1.91(4) of the Civil Code adds that "4. For the purposes of this Article, the notion "<u>real threatening</u>" means unjustifiable or unlawful actions of the other party or a third person directed towards the person, property or reputation of the other contracting party, or that of his parents, children, spouse, grandparents, grandchildren or any other close relatives; the threatening actions must be of such nature as to impress a reasonable person and to cause him fear that the person, property or reputation of the persons concerned may be exposed to damage and there is no other reasonable alternative except to enter into the transaction…."

[575] EL: Article 151 of the civil code: « The threat must in the concrete circumstances instill fear in a reasonable person and expose to a grave and imminent danger the life, limb, freedom, honour or property of the person threatened or of persons very closely to him.".

[576] ES: According to art. 1267 SpCC, a contract may be void for threats where one of the parties inspires the other a <u>rational and founded fear</u> of suffering <u>an imminent and serious harm</u> inflicted to <u>him/her or his/her property or his/her family or their property</u>. In addition to these legal conditions, consolidated case law has required the <u>wrongfulness</u> of the act (see SSCJ 16.12.1915; 21.6.1943; 21.10.2005; 8.11.2007);

[577] FR: Article 1112 of the Civil code provides that "There is violence when it is of such a nature as to make an impression upon a reasonable person and when it can inspire in him a fear of exposing his person or his wealth to considerable and present harm. In such an instance, the age, the sex, and the condition of the persons shall be taken into consideration").

[578] HR: Pursuant to Article 279, paragraph 2 of the COA, fear is deemed justified if it is evident from the circumstances that life or limb or other important goods of the other party or a third person is gravely endangered.

[579] LU: The conditions for the contract to be void for threats are laid down in Articles 1111 to 1115 of the Civil code. There is violence when it is of such a nature as to make an impression upon a reasonable person and when it can inspire in him a fear of exposing his person or his wealth to considerable and present harm.

[580] MT: article 978 of civil code provides that « (1) Consent shall be deemed to be extorted by violence when the violence is such as to produce an impression on a reasonable person and to create in such person the fear of having his person or property unjustly exposed to serious injury. (2) In such cases, the age, the sex and the condition of the person shall be taken into account ».

		PL[581], RO[582], SE[583], SI[584] -**Or a threat that impresses an reasonable person**: BE, BG, EL, FR, IT, LT, LU, MT, NL -Several MS mention not only serious threats but **also the commission of violence:** CY[585] , DK[586], EE, FI, LU, PT[587], RO. **-**Some MS only mention threat (except SK[588]) but **not actual violence:** AT, BG, CZ, DE, EL, ES, IE, HU[589], IT, LT, SI, SK	

[581] *PL: According to article 87 of the Polish Civil Code any person who makes a declaration of intent under the influence of an unlawful threat made by the other party or a third party may avoid the legal effects of his declaration if it follows from the circumstances that he had reason to fear that he or another person was in serious danger with regard to person or property*

[582] *RO: According to the provisions of art. 1216 of the Civil Code, " (1) A party may avoid a contract if its consent was expressed in a state of justifiable fear that was unlawfully induced by the other party to the contract (i) or by a third party to the agreement (ii); (2) The fear is justifiable when the induced threat is such that the threatened party may consider, according to the circumstances, that without his consent, his life, person, honor or his property would be exposed to serious and imminent danger; (3)Threats can lead to cancellation of the contract when directed against a person close to the party, such as his spouse, ascendants or descendants; (4) In all cases , the existence of threats is assessed taking into account the age, social status, health and character of the party, as well as any other circumstances which could have influenced his state at the time of concluding the contract; (5) Threats may arise also from the fear induced by the threat of the exercise of a right made in order to gain an unfair advantage; (6) The mere fear derived from respect, and not from a violent manifestation, does not void the contract. »*

[583] *SE: Section 28 of Contracts Act (1915:218) provides that "A juridical act performed under violence, where such violence has been exerted through violence to the person or threats of imminent danger to the person, shall not be binding on the party subjected to such violence. …"*

[584] *SI: Art. 45 of the CO states that "(1) If via an impermissible threat a contracting party or a third person causes justifiable fear on the part of the other party such that the latter concluded the contract for this reason the other party may request the annulment of the contract.; (2) A fear shall be deemed justifiable if it appears from the circumstances that there is a serious threat of danger to the life or to the physical or other well-being of the contracting party or anyone else."*

[585] *CY: Section 15, CAP 149 recognises the concept of "coercion" or "violence" which is defined to be the commission or the threat to commit an act which is forbidden by the Penal Code, as amended, or the wrongful restraint or the threat to wrongfully restrain an asset, to damage any person, and the coercion is committed with the intention to coerce the other party to enter into a contract.*

[586] *DK: Section 28.1 of the Act on Contracts provides: "A declaration of intention that has been wrongfully obtained by actual or threatened imminent violence is not binding on the person coerced."*

[587] *PT: Article 246 CC envisages the threats from a physical perspective. It provides that the declaration shall produce no effect (the contract has consequently no existence) if the declarant **has been physically** coerced to make it. Article 255 CC envisages the threats from a moral perspective. It states that "**moral coercion**" exists when the declarant made a declaration of intent for fear of a harm of which he was unlawfully threatened to secure his or her declaration (nr. 1). The threat may target the person or the honour or the assets of the declarant, or of a third party, regardless of the nature of the relationship between the threatened and the third party (nr. 2).*

[588] *SK: CC section 37 (1):"A legal act has to be made freely and seriously, clearly and concisely, otherwise it is invalid"; .CC section 39a: "A legal act is invalid if it is made by a natural person who is not an entrepreneur and misuses the other party's distress, inexperience, mental condition, stress, trustfulness, improvidence, financial dependence or inability to fulfil the other party's obligations and accepts, either for himself or for another person, a promise or provision of performance, the proprietary value of which is grossly disproportionate to their mutual performance.*

[589] *HU: Section 6:91 of Act V of 2013 on the Civil Code provides that:"(2) A person who has been persuaded to conclude a contract by the other party's use of threat shall be entitled to contest the contract statement".*

		-A few MS provide that the age, the sex and the condition of the persons shall be taken into consideration: BE, FR, LU, RO, MT -Many MS consider a **threat by a third person.** • Some MS accept a threat by a third person as a reason to void the contract **even if the other party was in good faith:** EL, ES, FI, FR, IT, LU, PL, PT, RO, SE, SI • One MS accepts a threat by a third person as a reason to void the contract **if the other party was aware or should has been aware of those facts:** LT • A few MS provide an obligation for the coerced party to **inform the other party that there has been coercion by a third party:** DK, FI, SE.	
Are **economic threats** admitted as a cause of avoidance?		-Some MS have mandatory rules which **admit economic threats as a cause of avoidance.** These are general rules, which can apply to the consumer but which are not made for him. They cannot be derogated from by agreement**:** DE, EL, ES Catalan Law[590], FI, IT, LT, PL, SK (only in B2C relations), UK. -Some MS require an wrongful threat: FI, PL -One MS requires, non-threat, but a **state of necessity that the other party speculates upon** (RO: art. 1218 Civil code). But the result is almost the same[591]. - A few MS do not specify that economic threat is a cause of avoidance (BG, CZ, CY, LV, ES). But if the general criteria of threat are fulfilled, the contract can be voided (AT, BE, CZ, CY, HR, EE, IE[592], PT, LU[593], LV, NL, SE, SI). And when the	

[590] *ES Catalan Law: ES: SpCC does not specify that economic threat is a cause of avoidance. ES Catalan Law allows a seller of real estate to rescind the contract if the sale price is less than half of the value of the property (ultra dimidium). The basis for the rescission is purely objective: the inadequacy of price (which is less than half the just or true price) to the detriment of the seller, regardless if the disproportion between performance and counter performance has been brought about by the exploitation of seller's weaknesses or disadvantaged position.*

[591] *RO: the term "economic threat" does not appear in the Romanian Civil code. However, the provisions of law on threats in general are sufficiently broad as to include economic threats as a cause of avoidance.*

[592] *IE: The principle is not fully developed and there is uncertainty about its general scope.*

[593] *LU: In such cases, the remedy is rather to seek with the claim of the lesion, rather than in the concept of violence.*

		law does not provide economic threat, case law can do it (FR, especially where the victim is in a state of dependence[594]).	

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q19 - Unfair exploitation			
Is avoidance for abuse of weakness or unfair exploitation admitted?	In one MS (FR) a special rule, which is in the consumer code, protects consumers. It permits to **avoid a contract for abuse of weakness.** Under these texts, the practice is illegal, punishable by law[595] which has the effect of allowing to cancel the contract. The text provides moreover that "***When a contract is concluded as a result of abuse of weakness, it is null and void***."	**-Most MS have mandatory rules which admit avoidance for abuse of weakness or unfair exploitation. These are general rules, which can apply to consumers, but which are not made for them. They cannot be derogated from by agreement:** AT, BE, DK, EE, EL, FI[596], HR, HU, IT, LT, PL, PT, RO, SE, SI, SK, UK. • **In AT**, § 879 (2) no. 4 ABGB provides that "***In particular, the following***	In two MS, **there is no rule** at all about abuse of weakness or unfair exploitation: LV, MT (but in the same situation can apply the rules of threat; so the result can be also the voidness of the contract, but based on threat).

[594] FR: economic threat is recognised by case law. Moreover, the French reform of contract law, applicable from 1er October 2016, provides that there is violence when one party is abusing the state of dependence in which the other party is, in order to get a binding obligation that the latter would not have performed if it had not been in this state of weakness. It may be considered that such a text includes economic threat (art. 1143 of the civil code).

[595] FR : see Armand DADOUN, La nullité du contrat et le droit pénal, Bibliothèque de droit privé tome 529,LGDJ, Lextenso éditions, 2011

[596] The Finnish provision on unfair exploitation is found in Contracts Act (228/1929) Section 31. According to the doctrine, Section 31 of Contracts Act has four prerequisites (Mika Hemmo, Sopimusoikeus I, 2003 p. 364). These are: (1). The weak position of the party; (2). Abuse of the party's weak position; (3). That the other party will benefit of this abuse, and (4). That the benefit reaped by the other party is excessive compared to his performance.

	(Art L122-8 al. 4 civil code). The abuse of weakness is mentioned in the following texts: Article L. 122-8 of the Consumer code provides that " *Anyone who may have taken advantage of a person's weakness or ignorance in order to get them to subscribe, by means of home visits, to cash or credit obligations in whatever form these may take, shall be punished by three years imprisonment and a €375,000 fine or just one of these penalties, where circumstances indicate that this person was not in a position to assess the impact of the undertakings given or to detect the ruses or tricks employed to convince him/her to subscribe to them or show that said person has been subject to violence*". Article L122-9 of the Consumer code adds that "*The provisions of article L. 122-8 are applicable, under the same circumstances, to undertakings obtained: 1° either subsequent to canvassing by telephone or fax; 2° or subsequent to personalised soliciting, without said soliciting necessarily being by name, to visit a place of sale; taking place at home and accompanied by the offer of particular benefits; 3° or upon the occasion of meetings or excursions organised by the person committing the offence or to his advantage; 4° or when the*	***contracts are void:*** **4.***if someone exploits the carelessness, predicament, intellectual weakness, inexperience or agitation of another by letting himself or a third be promised or given a performance whose value is strikingly disproportionate to the value of what is performed in return*." • **In BE,** it is called lesion, but it is a general rule. It is sanctioned with article 1382, via 'culpa in contrahendo'. There are three cumulative conditions to conclude to qualified lesion: (1) A clear and serious imbalance between the mutually agreed performances. (2) This imbalance or disadvantage finds its origin in the manifest abuse that one party has taken from the concrete circumstances in which the aggrieved party found himself; (3) The contract would not have been concluded without the abuse, or would have been concluded against more favourable conditions. • **In DK**, Section 31.1 of the Act on Contracts provides that "*If a person has exploited another person's financial or personal distress, lack of knowledge, thoughtlessness or an existing dependency relationship to obtain or contract for a benefit that is substantially disproportionate to the consideration or for which no consideration is to be given, the person so exploited is not bound by his declaration of intention*." • **In EE,** GPCCA provides abuse of weakness or unfair exploitation as grounds *inter alia* for transaction to be against the good morals or public order	

	transaction was carried out in places not intended for the marketing of the goods or services proposed or within the scope of fairs or shows;5° or when the transaction was concluded in an emergency making it impossible for the victim of the offence to consult one or more qualified professionals, third parties or to the contract" . And Article L122-10 of the Consumer code states that "*the provisions of articles L. 122-8 and L. 122-9 apply to anyone who may have taken advantage of a person's weakness or ignorance to obtain, without giving anything in exchange, sums in cash or by bank transfer, bank or giro cheques, payment orders by payment or credit cards, or else securities, in the sense of article 529 of the civil code*". From 1er October 2016, abuse of dependance will be also explicitly stated in the ordinary law of contracts (Art. 1143 of the civil code).	and void (Art. 86 of the GPCCA), but since 2009, weakness or unfair exploitation are not any more a special ground for avoidance of the contract. • **In EL,** Article 179 of the Greek Civil Code states that: "*shall in particular be contrary to morality a transaction whereby the freedom of a person is hampered excessively or whereby through an exploitation of the need, the levity of character or the lack of experience of the other party are stipulated or received for one's own benefit or for the benefit of a third party and in consideration of something furnished pecuniary advantages which in the circumstances are obviously out of proportion to the consideration furnished*.". • **In HR**, pursuant to Article 329, paragraph 1 of the COA, if a person exploiting the state of need or difficult financial situation of another person, its lack of experience, levity or dependence, agrees a benefit for itself or for a third party that is manifestly disproportionate to whatever it has given to or performed for or undertaken to give to or perform to the other party, this contract shall be null. • **In HU**, section 6:97 of the Act V of 2013 on the Civil Code provides that "*if, by exploiting the other party's situation, a contracting party gains excessive benefit or unfair advantage when the contract is concluded, the contract shall be considered null and void*". • **In IT,** the civil code admits the termination of a contract for abuse of	

		weakness (art. 1447, § 1, It. civil code) and unfair exploitation (art. 1448, §§1-3, It. civil code). The rationale for both rules is that they represent an exception to the general principle of contract law, according to which no economic balance is required, but a free and spontaneous consent is sufficient. • **In LT,** Article 1.91(1) of the Civil Code states that "*1. A transaction may be declared voidable by a court on the action of the aggrieved party if it was entered into due to fraud, violence, economic pressure or real threatening, or if it was formed by a malicious agreement of the agent of one party with the other party, likewise if, by entering into the transaction by reason of abusive conditions, one party assumes obligations under unfair conditions*". Article 1.91(4) of the Civil Code adds that "*… Threatening shall also be deemed to be real where one party or a third person threatens to enforce measures of economic pressure against the other contracting party that is economically weaker or is in essence economically dependent in order to compel him to form a transaction under exceptionally economically disadvantageous conditions….*" • **In PL**, according to Article 388 of the Civil Code, if one of the parties, exploiting a forced situation or the inefficiency or inexperience of another party, in exchange for its own performance accepts or stipulates for itself or for a third party a performance with a the value at the time	

		the contract is executed that grossly exceeds the value of its own performance, the other party may demand that its performance be reduced, or that the performance due to it be increased, and if these are extremely difficult, it may demand that the contract be declared invalid. • **In PT,** Article 282 of civil code states that "*1.Legal transactions are annullable, on grounds of usury, when a person takes advantage of the need, inexperience, irresponsibility, dependence, mental condition or weakness of character of another person and obtains, for himself or herself or a third party, the promise or the concession of excessive or unjustified benefits*". • **In RO**, art. 1218 of the civil code mentions that **"***the contract entered into by a party affected by a* ***state of emergency*** *cannot be cancelled unless the other party has taken advantage of this fact*." Article 1221 adds that **"***(1) There is lesion when one party takes advantage of the state of necessity, inexperience or lack of knowledge of the other party and imposes in their or a third person's favour a benefit of considerably greater value than their own contractual contribution on the date the contract is concluded*." • **In SE,** section 31 of Contracts Act provides that *"where someone takes advantage of another person's distress, lack of mental capacity, irresponsibility or dependence, in order to attain benefits*	

		which are manifestly disproportionate to the consideration paid or promised, or in respect of which no consideration shall be paid, a resultant juridical act shall not be binding to the person exploited." • **In SI,** Art. 119 of the civil code provides that if anyone exploits another's distress, the severity of the assets situation thereof, or the inexperience, recklessness or dependence thereof, and reserves for the former or for a third person benefits that are in clear disproportion to what the former provided or did or undertook to provide or do, such a contract shall be null and void. • **In SK,** CC section 39a states that "*a legal act is invalid if it is made by a natural person who is not an entrepreneur and misuses the other party's distress, inexperience, mental condition, stress, trustfulness, improvidence, financial dependence or inability to fulfil the other party's obligations and accepts, either for himself or for another person, a promise or provision of performance, the proprietary value of which is grossly disproportionate to their mutual performance*". **-In several MS** (CY, IE, NL[597] and UK), **it is qualified as undue influence**.	

[597] *NL: Article 3:54 BW states that "1. The power to invoke undue influence to annul a multilateral juridical act shall lapse when the other party in good time proposes a modification to the consequences of the juridical act which conclusively removes the prejudice; 2. Furthermore, instead of pronouncing the annulment for undue influence, the court may, if one of the parties so moves, modify the consequences of the juridical act to remove this prejudice".*

		-In a few MS, there is no general rule which provides that a contract is void ? in case of unfair exploitation. However, the mandatory rules of these MS give relief for**:** • **an abuse of right or abuse of circumstances** when it gives rise to a **disproportionate transaction** under the doctrine of qualified **lesion or *lesio enormis:*** CZ, ES, LU (in some regions and sometimes limited to real estate transactions, and on purely quantitative criteria), **or usury** (CZ) ○ **In CZ**, the weakness of the party is not relevant. Is only relevant the grossly disproportionate of the performance. Section 1793 of the civil code states that *"(1) If the parties undertake to provide each other with a mutual performance and the performance provided by one of the parties is **grossly disproportionate** to the performance provided by the other party, the injured party may request that the contract be cancelled and the original state restored unless the other party reimburse the lesion, having regard to the usual price at the time and place at which the contract was concluded. This does not apply if the disproportion between the mutual performances is based on a fact which the other party neither knew nor was required to know*".	

		• **in case of violence or in very specific cases of quantitative disadvantage involving <u>minors and similarly situated persons:</u>** ES**.** • **<u>An abuse of extreme necessity:</u>** BG. The art. 33 of the Obligations and Contracts Act (OCA) provides that "*A contract entered into because of extreme necessity under obviously unfavourable terms shall be subject to invalidation. The court may invalidate such a contract fully or for the future only. The invalidation shall not be admissible if the other party proposes to repair the damage….*" **-**In a few MS, abuse of weakness and unfair exploitation are cases under the generic term of legal transaction that is **<u>contrary to public policy</u>**: DE, EE, or **<u>illegal:</u>** EL	
What exactly is the **<u>abuse of weakness or unfair exploitation</u>** ?	The French special text especially made for the consumers, states: "*Anyone who may have taken advantage of **<u>a person's weakness or ignorance</u>** in order to get them to subscribe, by means of home visits, to cash or credit obligations in whatever form these may take, shall be punished by three years imprisonment and a €375,000 fine or just one of these penalties, where circumstances*	-In many of the MS which admit avoidance for abuse of weakness or unfair exploitation, **<u>the formulations include all recognized cases of abuse or weakness or unfair exploitation such as dependency, or in a relationship of trust with the other party or economic distress or, improvidence ignorance or inexperience</u>**: CY, DK, EE, FR (even if it is only case law that admits avoidance for abuse of weakness) FI, HR, IE[598], LT, NL, SE, SI, SK **-<u>Concerning the weak party, some MS law</u>**	

[598] *IE: <u>Undue influence is an equitable doctrine which has not been defined by the courts</u>. The essence of the doctrine, however, is that the exertion of influence, falling short of violence, by one person over another which prevents that other from exercising their independent judgment, entitles them to avoid the contract. <u>In some relationships undue influence will be presumed</u> until the contrary is proved.*

	*indicate that **this person was not in a position to assess the impact of the undertakings given or to detect the ruses** or tricks employed to convince him/her to subscribe to them or show that said person has been subjected **to violence**." (Article L. 122-8 of the Consumer code)*	**have a special scope**: • only carelessness, intelligent weakness, , prodigality or inexperience, insufficiency of funds (the formulation does not include dependency, or relationship of trust): AT, CZ, DE, EL, IT, LU, PL[599], RO • only insufficiency of funds, i.e. economic weakness: BG • abuse of concrete circumstances: BE -In one MS **the law applies only where there is a relationship of trust and confidence**: UK	
To avoid a contract, **is it necessary to prove a minimum threshold of lesion (disparity) or the simple fact that the contract is unbalanced is sufficient**?		-Except for 3 MS (IE, NL[600], UK[601]), all of the MS which admit avoidance for abuse of weakness or unfair exploitation require **an excessive benefit for the party who exploits the weakness of the other:** AT, BE, BG, CY, CZ, DE, DK, EE, EL, FI, FR, HR, LT, LU, PT, SE, SI, SK • **In CY**, in order to prove undue influence, according to Section 16 CAP 149, one must establish that the relationship between the parties was of such a nature, so as to enable one party to dominate over the independent will of the other party in order to enter into an unfair transaction and thus obtain an unfair	

[599] *PL: According to Article 388 of the Polish Civil Code, if one of the parties, exploiting a forced situation or the inefficiency or inexperience of another party, in exchange for its own performance accepts or stipulates for itself or for a third party a performance with a the value at the time the contract is executed that grossly exceeds the value of its own performance, the other party may demand that its performance be reduced, or that the performance due to it be increased, and if these are extremely difficult, it may demand that the contract be declared invalid.*
It must be noted that this rule is very rarely used in practise, mainly because of rigid requirements and rather short period restricted for a weaker party – The rights expire two years after the contract execution date.
[600] *NL: An imbalance in the contractual obligations is not required. The imbalance will, however, be an important factor to consider when determining whether or not the other party abused the first party's circumstances.*
[601] *The crucial criterion is the former: the nature of the transaction is suspect. This need not be to the manifest disadvantage of the person complaining (although if it is not, the defendant might more easily rebut the presumption that undue influence was exercised). Cf. Turkey v Awadh [2005] EWCA Civ 382*

		advantage. Moreover, according to section 16 a rebuttable presumption of undue influence will be established when (a) one party has a real or obvious power over the other party or is in a relationship of trust and confidence with him/her; or (b) enters into a contract with a party whose mental capacity is permanently or temporarily impaired due to his/her age, illness or due to mental or physical decline -One MS quantifies the contractual imbalance. To be unfair, the economic imbalance must **overwhelm half of the market value of the obligation** due by the weak party, and it must persist at the time when the termination of the contract is acted upon by the weak party: IT. -One MS requires a minimum threshold of lesion (disparity) of 50 % between the other party's performance and the performance promised or completed by the party entitled to avoidance: RO	
If there is a minimum threshold of lesion (disparity), **does domestic law allow damages below this threshold?**		In the MS which require a minimum threshold of lesion, the law **does not allow damages, below the indicated threshold:** IT, RO (except in the case of a minor person, under the age of 18, assuming an excessive obligation)	
To avoid a contract for abuse of weakness or unfair exploitation, **is it necessary to prove**		-**Many MS require that the other party knew or could be expected to have known the situation of the other or consider that the knowledge of the weakness is inherent to**	

knowledge of this weakness by the other party?		**the concept of ab**use**:** CY, CZ, DE, DK, EE, EL, FR (case law[602]), HR, IE, IT, LT, LU, NL, PL, PT, SI, UK -**Some MS do not require that the other party knew or could be expected to have known the situation of the other**: AT, BG, FI, SE[603], SK	

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q20 – Damages for loss.			
Where a consumer is victim of an error, fraud, threats or unfair exploitation, entitled to **damages**? What are the conditions for such an action for damages? Specifically, does your law require that the other party knew or should have known of the cause of avoidance?	**-One MS** has mandatory rules designed to protect the consumers: ES[604]: (where the vice is also an unfair commercial practice, the consumer is entitled to damages[605]).	Most MS have mandatory rules, but these are general rules, which can apply to the consumer, but which are not specifically designed for him: **- In many MS the consumer is entitled to damages with no reference to the knowledge of the other party:** • **Without any other condition than the vitiating factor:** CY, EL, LV, SI ○ **CY**: (error and misrepresentation) ○ **EL**: for deception and threats, the victim who claims compensation needs to experience a	Some MS have such provisions in general law but they are not mandatory: **-In a few MS, the consumer is entitled to damages based on general rules of liability with no reference to the knowledge of the other party:** • **DE, FI**: (*culpa in contrahendo*) based on negligence or intentional

[602] *It is explicitly stated in the French reform of contract law (Article 1143 of the civil code, applicable from 1er October 2016): There is also violence when one party is abusing the state of dependence in which is the other party to get a binding obligation that the latter would not have performed if it had not been in this state of weakness.*
[603] *The knowledge is required if the abuse or exploitation was committed by a third party*
[604] *There is both special and general rule about damages. In case of fraud, case law admits that avoidance and damages may also be cumulative.*
[605] *ES: Art. 32 UCA*

		loss. The obligation to compensate shall be excluded if the victim ought to have known the error[606]. • Under **the condition of a fault**: AT, BE, BG, FR, HU, MT, NL, PL, SK, UK ○ **BG, FR, HU, MT, NL, PL, SK**: based on **general tort liability** in case of damage caused by the void contract. ○ **AT, UK**: **depending of the cause of avoidance** ▪ **AT**: For threats or fraud, Austrian law requires a classic fault, for other cases, error and unfair exploitation, it could be a case of *culpa in contrahendo* (at least a case of negligence[607]) ▪ **UK**: only for fraud, for duress and undue influence only rescission but if restitutions are not possible, damages could be awarded. ○ **BE**: it requires that the law does not provide for nullity in this case. **-Some MS require the knowledge of the other party to admit the action for damages**: CY, CZ, EE, IT, LT, PT, RO • **CY**: but only in case of fraud, duress and undue influence • **CZ**: based on general tort liability for breach of a statutory duty	fault **-In a few MS, the consumer is entitled to damages based on general rules of liability and the knowledge is required:** DK, SE • **DK:** based on the norm of culpa, requiring fault on the part of the perpetrator, causality between the act and the loss, and proportionality between the act and the loss. In case of acts by third parties, termination will apply only where the other party was or should have been aware of the cause of avoidance. • **SE:** liability is admitted based on general principles of contract law and subject to an economic loss suffered by the consumer caused by a negligent act of the other party. **-In several MS, the consumer is entitled to damages based on specific rules providing for the avoidance of contract:**

[606] *EL: art. 145 of the Greek Civil Code.*
[607] *Which means that the he has failed to comply his duty of care.*

		• **EE**: The purpose of compensation for damage is to place the person who cancelled the transaction in the same position in which the person would have been if the person had not entered into the transaction[608]. • **IT**: the damages are awarded to protect the reliance interest of the innocent party in the fairness of negotiations and the freedom of contract. Reliance damages for loss are therefore due as pre-contractual liability. • **LT**: based on fault and the knowledge of the opposite party. • **PT, RO**: Except for error, knowledge of the other party of the cause of avoidance is required. In all cases, the law requires a fault based on the requirement of good faith during the formation of the contract[609] or on specific contract law provisions[610].	HR, IE, LU • **HR**: without any fault for error, without any reference to the knowledge of the other party in case of fraud, with this requirement of knowledge for the abuse of weak position. • **IE:** in case of an expectation loss or a reliance loss. Knowledge is normally required but damages could be awarded in case of innocent representation. • **LU:** based on contractual liability if the "victim" proves that he was misled by fault or by wilful concealment or manoeuvres of the other party and the nullity of the contract is not enough to repair all of its damage (It could be also claimed on general tort law, where fault, loss and causation are required).
Does the action for damages		**- Most MS provides that the action for damages is**	**- In a few MS the action for**

[608] *EE: Art. 101 para 1 sentence 2 of the GPCCA.*
[609] *PT: Art. 227, n°1 of the Civil Code*
[610] *RO: Art. 1215 of the Civil Code.*

referred to in the previous paragraph **depend upon the avoidance or is it independent**?		**independent upon the avoidance**: AT, BE, BG, CZ, DE[611], DK, SP, FR, HU, IT, LV, NL, PL, PT, RO[612], SK, UK. • **AT**: but for the evaluation of the amount it takes into account the avoidance and the contributory negligence of the "victim"[613]. **-In several MS the action for damages depends on the avoidance** : CY, EE, EL, LT **- For one MS (SI) it depends on the cause of the action for damages:** • The action for damages depends on the avoidance, when the victim invokes error[614] and specific liability of the culpable of the avoidance[615]. • The action for damages does not depend on the avoidance when the victim invokes fraud[616].	**damages depends on avoidance causes**: FI, HR **- In a few MS the action for damages is independent of avoidance**: IE, LU, SE
Do damages cover the positive interest (to place the creditor in the situation where he would have been, had the debtor performed the contract) **and also the negative interest** (to place the creditor in the position		**- In several MS, only negative interest is covered by the action for damages**. Thus, such an action compensates the creditor and places him in the situation in which he would have been, had he never met the other party and contracted: BG, CZ, EE, EL, IT, NL **-In most MS, damages cover both interests, negative and positive.** Therefore, they compensate for	**- In a few MS, damages cover both negative and positive interests:** DK, SE • **DK:** but the burden of proving the loss will rest with the plaintiff **- In one MS, IE, damages**

[611] *DE: For this MS, there is some mandatory actions based on breach of public policy (§826 BGB) but for some of them it can be derogated from by agreement (cases based on culpa in contrahendo, §§. 281 (1), 311 (2), 241 (2) BGB.*
[612] *RO: Independence is expressly mentioned in art. 1215 and 1220 of the Civil Code.*
Art. 1215 Civil code: (1) « Fraud leads to contract avoidance also when it is performed by a third party, provided that the party whose consent was not vitiated knew or, where appropriate, should have known of the fraud committed by the third party ».
Civil Code, Art 1220: (1) « Threats lead to cancellation of the contract when they are performed by a third party, but only if the party whose consent was not vitiated knew or, where appropriate, should have known of the threats committed by the third party. »
[613] *AT: 1304 ABGB provides reduction of the damages for contributory negligence*
[614] *SL: Art. 46 (3) of the CO.*
[615] *SL: Art. 91 and 97 of the CO.*
[616] *SL: Art. 49 (2) of the CO.*

he would have been,had he never met the other party and contracted)?		the lack of performance of the contract by the debtor: AT, CY, DE, HU, LT, PL, PT, RO, SI, SK, UK. • **AT:** however, positive interest could be covered only if the cause of liability is not a breach of duty[617]. • **CY:** damages only compensate for the negative interest if the action is based on mutual error[618] or in the other cases if the victim asks to affirm the contract. Positive interest is covered only if the victim asks to rescind the contract based on all the other vitiating factors[619] unless there is a mutual error. • **DE:** Damages cover both of them when liability is based on *culpa in contrahendo*[620]. Damages cover only negative interest when liability is based on tort law[621]. • **PL:** Polish law admits both positive and negative interests, but there are specific rules on compensation of the negative interest in case of legal warranty[622]. • **PT:** The Civil Code states as a general principle that whoever is obligated to indemnify shall restore the situation that should have existed if the event that gave rise to the indemnity had not occurred (Article 562). An obligation to indemnify shall only exist with respect to a damage that the injured person would probably not have incurred if the injury had not been produced (Article 563). Nevertheless, case law has admitted positive contractual interests when all elements of the	**only conver the positive interest:** • **IE:** but where this coverage is impossible to calculate, the courts will award damages to cover the loss incurred as a result of reliance on the wrongful action. - In some MS, **there is no solution** : ES, FI, HR, LU, LV, MT • **ES:** because the law does not provide for any rule on this question, and case law offers no consolidated results. • **FI:** because traditionally, damages calculated according to the negative interest have been connected to situations where contracts are not binding, whereas the positive interest is a sign of a binding contract. According to modern legal authors, however, the strictness of the rule is rejected and the

[617] *AT: Pletzer in Kletečka/Schauer, ABGB-ON1.02 § 874 mn. 19.*
[618] *CY: Section 19 (1) and (2) of CAP 149.*
[619] *CY: Section 75 of CAP 149*
[620] *DE: §§. 281 (1), 311 (2), 241 (2) BGB.*
[621] *DE: §823 and 826 BGB.*
[622] *PL: Art. 566 CC.*

		contract are already agreed upon and only the *formalization* of the contract lacks. **- In a few MS, damages only cover the positive interest, i.e. they only compensate for the lack of performance of the contract by the debtor:** BE, FR	appropriate choice is more dependent on the situation • **HR,** because the law does not recognize this distinction between positive and negative interest (reliance and expectation interest). • **LU:** damages only cover the loss which can be proved and which is in a causal relationship with the fault.

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q22 – Merger clauses.			
In B2C contracts, **is there any effect to a merger clause** that is to say, a clause under which the contract contains all terms agreed? Does this clause bind the consumer? Does	-Some MS **prohibit indirectly mergers clauses**. They are **admitted in principle but they must not be in conflict with other provisions which are specifically made to protect the consumer**: BE, CZ, ES, FI, IE, PT, UK • **BE**: the prohibition could be on a double legal basis: o the unfair clause concerning the prohibition	-Few **MS prohibit indirectly merger clauses**. They are **admitted in principle but they must not be in conflict with others provisions**, which are **made to protect all contract parties generally**: DE, NL • **DE:** there is a kind of mandatory provision which deprives effect of the merger clause[632]. • **NL:** based on case law. Supreme Court[633] recognizes the validity of merger clauses but the judge could take in account all the circumstances to interpret the contract.	**-Some MS admit merger clause. Nevertheless it is not a mandatory rule**: AT, CY, DK, EE, HU, LU • **AT:** it's not possible to exclude, in B2C relationships, that a written contract may be modified or supplemented by oral agreement[637]. This

this clause bind the trader?	to limit the evidence of the consumer[623] ○ the unfair term concerning the obligation of the trader to respect the obligations performed by its powers[624]. • **CZ:** In Czech law there is no special regulation of merger clauses, so they can be stipulated in a B2C contract, but they must not be in conflict with the mandatory consumer's law specifics provisions[625]. • **ES:** In a B2C contract, a not individually negotiated merger clause could be invalid under the general test of unfairness of contract terms[626] if it limits the legal rights conferred to consumers[627]. However, the merger clause is not black-listed as such in specific provisions[628]. • **FI**: Merger clauses are considered as unfair terms	-Few MS **admit, expressly or not, merger clauses and they're binding both consumers and traders and it's a mandatory rule**: IT, LT, RO • **IT**: the admission of merger clauses is based on an interpretation of a general provision dedicated to the voluntary formalism[634]. • **LT:** there is no specific provision but they are implicitly admitted based on the principle of freedom. If they are accepted by consumers they bind the parties unless they infringe the imperative rule of law[635]. • **RO:** Only for the negotiations terms[636]. To bind parties, merger clauses need to be clearly, explicitly and unequivocally expressed.	implies **that a merger clause is not effective where it would be to the detriment of the consumer**. However, it is **binding to the trader where terms are concerned that are to the disadvantage of the consumer**. But even beyond that it is recognised that the parties are not bound by merger clauses; they are free to come off of them even tacitly. • **CY:** Based on general law[638]. • **DK:** Based on the Act on Contract. Merger Clauses are admitted but it will remain open to interpretation by the judge. So they don't bind the parties neither consumer nor trader.

[632] DE: § 305b of the BGB which provides that it is always possible to reverse the presumption by proving that a deviating individually negotiated term exists which prevails.
[633] NL: HR 5 April 2013, ECLI: NL:2013:BY8101 (Mexx/Lundiform).
[637] AT: According to § 10(3) KSchG.
[623] BE: article VI.83,21° CEL.
[624] BE: Article VI.29° CEL.
*[625] CZ: Especially they must not be in conflict with § 1822 of the Czech Civil Code which concerns **the consumer contract at a distance**. In case of the merger clause is admitted, Such clause is bilaterally binding only if it is in compliance with the mandatory provisions.*
[626] ES: art. 82 RCPA.
[627] ES: art. 86.7 RCPA.
[628] ES: See arts. 85-91 RCPA.

	when they are in a B2C contract[629]. • **IE**: it is not expressly recognized as unfair term but it is an interpretation of the Irish National Consumer Agency. The parties cannot derogate from this rule. • **PT**: they are admitted in principle, but: ○ they do not bind consumers. ○ Furthermore, a term of a standard form contract which has the object or effect of limiting the seller's or the supplier's obligation to respect commitments undertaken by a representative is strictly prohibited[630] ○ Merger clauses stated in B2C contracts bind the trader when they are more favourable to the consumer. • **UK**: such clause could be caught by the fairness controls[631].		• **EE:** Merger clauses are expressly admitted[639] based on general contract law. They bind either consumer or trader. But in B2C contracts the consumer can rebut the presumption. • **HU**: Merger clauses are admitted based on general contract law[640] in written contract and they bond both consumer and trader. • **LU:** they could be allowed if they are not considered as unfair. -**For many MS there is no provision about merger clause**, and their law does not give any effect to them: BG, EL, FR, HR, LV, MT, PL[641], SE, SI, SK

[634] *IT: art. 1352 of the Italian Civil Code.*
[635] *LT: art. 6.189 (1) of the Civil Code.*
[636] *RO: Art. 1185 of the Civil Code.*
[638] *CY: Cap 149*
[629] *FI: Chapter 3 section 1 of the CPA (38/1978).*
[630] *PT: Article 21, lit. a General Contract Terms Act.*
[631] *UK: Part. 2 of the Consumer Right Act 2015 (Office of Fair Trading v MB Designs (Scotland) (2005) SLT 691 (decided under the Unfair Terms in Consumer Contracts Regulations 1999).*

Does this merger clause prevent the parties' prior statements from being used to interpret the contract?	-For some MS, **merger clauses do not prevent the parties' prior statements from being used to interpret the contract, based on specific rule made to protect consumers**: AT, CZ, DK, ES, FI, PT[642] • **AT:** unless they have been contradicted by a valid, later statement. • **CZ**[643]**:** Merger clauses might prevent the parties' prior statements from being used to interpret a BTB contract, but not in B2C relations at a distance. • **DK**: if a merger clauses purports to exclude reference to prior statement it will be considered as an unfair term[644] • **FI:** Merger clauses are considered as unfair terms[645].	-For many MS, **merger clauses do not prevent the parties' prior statements from being used to interpret the contract, based on provisions which protect contract parties generally: BE,** EE, HR, HU, LT, NL • **BE:** since merger clauses are most of the time void, merger clauses don't prevent the parties' prior statements from being used to interpret the contract. • **EE**[646]**:** provisions provide that in the case of a merger clause, the prior declarations of intent of the parties may be used to interpret the contract. • **HR**: unless there is no black-letter rule on this issue, generally speaking merger clause should not prevent parties from using their prior statements in interpreting their contract. • **HU:** based on a specific provision under contract common law[647]. • **LT:** based on a specific provision under contract common law[648] • **NL:** based on case law about a commercial contract, but it may be applied the same for B2C contract[649].	-In several MS, **Merger clauses can prevent the parties' prior statement from being used to interpret contract**: CY, DE, IE, IT, RO, UK • **UK**[650]**:** Pre-contractual statements are generally inadmissible when interpreting a contract **-There is no regulation in the law of some MS**:BG, EL, FR, LU, LV, MT, PL[651], SI, SE, SK

[639] *EE: art. 31 of LOA*
[640] *HU: art. 6:87 of the Civil Code.*
[641] *PL: there is actually nothing in polish law related to merger clauses but in the draft of the new Polish civil code, there is a provision (Art. 92), which will be recognize the validity of merger clauses, and the fact that they'll be bind parties.*
[642] *PT: Nevertheless it is possible.*
[643] *CZ: Next to the specific provisions (section 1822), there is a similar rule under contracts common law, § 556 of the Czech Civil Code*
[644] *DK: Section 36.1 of the Act on Contract, through the reference in Section 38c.1, mandatory in relation to consumers.*
[645] *FI: CPA (38/1978) Chapter 3 section 1*
[646] *EE: Art. 31 of the LOA.*
[647] *HU: art. 6:87 of the Civil Code.*
[648] *LT: art. 6.193 (5) of the Civil Code.*
[649] *HR 5 April 2013, ECLI:NL:2013:BY8101 (Mexx/Lundiform).*

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q23 – Unilateral determination of the price or other contract term by a party.			
Are there **other** rules about **unilateral determination of the price of the contract by one party**, which can apply to the consumer, next to the one which eventually considers as unfair a not negotiated term that has the object or the effect to provide « *for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price*	-Few MS have **some other mandatory rules, made only to protect the consumer, which prohibit unilateral determination of the price of the contract**[652]: BE, RO, UK • **BE:** There is a provision which declares **as unfair the term** which provides the trader to raise the price unilaterally or to change the conditions to the disadvantage of the consumer[653]. • **RO:** It is forbidden, in B2C contracts, for the seller or	-Some MS have some other mandatory rules **which prohibit unilateral determination of the price of the contract but they are not specifics to the consumer**: AT, FR, HU, HR, LU, SI • **AT**[655]**:** Unilateral determination of price could be considered as a term grossly detrimental to the consumer cause of the avoidance of the contract based on a violation on a general moral duty[656]. • **HU:** If object or effect of a term is to **enable a business party to alter contract**	- One MS has some others rules about unilateral determination of price, but they are not mandatory: • **CY:** The price can be determinate only by traders, but it must be a reasonable price. - Several MS haven't any other rule about unilateral determination of the price of the contract: • **CZ**: price is always negotiated or determined by a third party but never

[650] *UK: Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38*
[651] *PL: In the draft of the new polish Civil code it will be possible to stipulate in a merger clause to prevent the parties' prior statements from being used to interpret the contract.*
[652] *Few MS have also some other mandatory rules, made only to protect the consumer, which provide the conditions regarding unilateral determination of the price of the contract may be allowed, but which concern other contracts than sale, especially consumer's credit: BG, SK*
[653] *BE: Article VI.83, 2°CEL.*
[655] *AT: Next to the general provision, which is a mandatory one, there are two other special rule which are not mandatory. The rules §6 (2)n°3 and n°4 of KSchG are made to protect the trust of consumers on what they can reasonably expect from the contract and also not to be treated arbitrarily. These rules do not forbid unilateral determination per se, but restrict it and also require corresponding terms to be individually negotiated. It is also possible for the consumer to accept an unlawful change of performance, though this acceptance is required to be very explicit*
[656] *AT: § 879 (3) ABGB.*

agreed when the contract was concluded;» (Annex I)?	supplier to unilaterally determine the price. • **UK**: Provision includes as an indicative unfair term one which "*has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound*", and a further term « *which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded* »[654]	**terms unilaterally without a valid reason** which is **specified in the contract**, in particular to increase the monetary consideration fixed in the contract, or to allow the business party to alter unilaterally the terms of a contract where there are serious grounds laid down in the contract for doing so, provided that in such cases the consumer is not free to withdraw from or to terminate the contract **is to be considered unfair**[657]**.** • **FR**[658], **LU**[659]**:** Unilateral determination of the price is prohibited on sale contract: • **HR**[660], **SI**[661]**:** Unilateral determination is forbidden and a clause that allows such determination shall be deemed inexistent[662]: -Many MS have some **other general mandatory rules which provide**	unilaterally stipulate. • **DK, FI, LV, MT, SE**

[654] *UK: Schedule 2 of the Consumer Rights Act 2015*
[657] *HU: Art. 6:104 (2) d) of the Civil Code. There is another general provision which admits in general contract that the price could be determined only by one party.*
[658] *FR: art. 1591 of the French Civil Code. Case law admits unilateral determination of the price on the frameworks contracts.*
[659] *LU: art. 1591 of the Civil Code.*
[660] *HR: art. 388 of the COA.*
[661] *SI: Art. 446 of the CO*
[662] *HR: art. 388 of the COA.*

		the conditions regarding unilateral determination of the price of the contract may be allowed: DE, EE, EL, ES, IE, LT, IT, PT • **DE**: There are rules about unilateral determination of performance in B2C contracts. They are allowed but they need to be reasonable[663]. • **EE**: Unilateral determination is possible under some rules strictly determined and respecting principles of good faith and reasonableness[664]. • **EL:** Unilateral determination of a performance is possible but only based on equitable criteria[665]. The determination made under the absolute discretion of one party must to be void[666]. • **ES:** In a contract of sale, the determination of a performance cannot be left to the discretion of one of the contracting parties. But unilateral determination of the price by the seller is allowed if it was impossible to fix it *a priori* and when it based on reasonable criteria[667].	

[663] *DE: §315-319 BGB*
[664] *EE: art. 26 §1, 3, 7 and 9 of the LOA.*
[665] *EL: Art. 371 of the Greek Civil Code.*
[666] *EL: Art. 372 of the Greek Civil Code*
[667] *ES: Art. 1256 an 1449 SpCC.*

		• **IE**[668]**, LT**[669]**:** Unilateral determination is allowed but the price needs to be reasonable: • **IT:** Unilateral determination is possible but the criteria must be clear and well determined[670]. • **PT:** Unilateral determination of the price in B2C contracts is admitted when the final price is not too high or justified[671]. -Few MS **admit the unilateral determination of the price in all general contracts**: NL, PL • **NL**: Unilateral determination of the price is valid[672].	
If it is possible for the seller to determine unilaterally the price, in B2C contracts, are there rules which protect the consumer against unreasonable or abusive determination of the price, if he or she does not want to cancel the contract? In	-In one MS, the seller cannot be held liable for abusing the possibility to unilateraly determine the price, **but there are some indeterminate protective rules specially made for consumers**[673]: DK • **DK:** Unilateral determination	-In most MS, there is **no liability for abusive price unilaterally fixed, but there are some protective rules for parties including consumers**: • The **judge can determine the reasonable price:** AT,	-For many MS there is **no such rule to protect consumer against unilateral determination:** BE, CZ, HR, LV, MT, RO, SI - For some MS there is **no such rule to protect**

[668] *IE: Section 8 Sale of Goods Act 1893.*
[669] *LT: art. 6. 189 (2 and 4) of the Civil Code.*
[670] *IT: art. 1346 of the Civil Code.*
[671] *PT: Art ; 400 of the Civil Code.*
[672] *NL: Art. 6:227 BW.*
[673] *For instance, outside the scope of the sale, in BG, in case of consumer credit, the total cost of the credit, which can be determined unilaterally, mustn't be unreasonable or abusive (art. 10. (4) CCA)*

particular, is the party that determines the price liable for abusive price fixing? Or, may the judge substitute a reasonable price to the abusive price?	of the price is a violation of good faith principle[674]. - For one MS, there is no liability for abusive price unilaterally fixed, but in case of abuse, the judge can determine the reasonable price and it is a rule specially made to protect consumers: FI[675]	CY, DE, EE, EL, HU, LT, NL, SE[676] ○ **AT**: The judge can correct the grossly unfair, clearly abusive unilateral determination or where the party has gone beyond the margin of discretion afforded by agreement. ○ **CY:** Price must be reasonable. It's a fact question under authority of the court. ○ **EL:** If the unilateral determination was not based on equitable criteria, the contract won't be void, it shall be made by the court. ○ **DE:** An unreasonable determination of the price by the seller is not binding on the consumer[677]. Such determination is not automatically void but the consumer has to claim unreasonableness in court. Where court procedure is concerned, the court will evaluate whether the threshold of discretion in regard to reasonableness has	**consumer in case of unilateral determination which is allowed** (there is no precision on the way to obtain a reasonable price that the consumer could paid): ES, IE, IT, PL, SK, UK.

[674] *Section 36.1 of the Act on contracts.*
[675] *FI: Chapter 5 section 23 CPA, Chapter 4 section 1. According to the said provision, price of the commodity or service can be adjusted if it is unreasonable in relation to the quality of a service or commodity, or to the general level of prices*
[676] *SE: Section 36 of the Contracts Act.*
[677] *DE: Art. § 315 (3) BGB,*

		been exceeded and will – if necessary - determine performance itself. ○ **EE:** There is no requirement of liability for abusive price fixing, the way of the fixing or the price shall be against good faith and unreasonable. If the parties agree that seller may unilaterally determine the price, provisions may protect consumer against unreasonable or abusive determination of the price without cancelling the contract[678]. The rule itself does apply to all contract terms determined by party unilaterally, however it can be applied to the determination of the price also. A party may also require that a court determine a term left open if the term determined by the other party or a third party does not conform to the principles of good faith and reasonableness. ○ **NL:** judge may provide an alternative decision to the avoidance of the contract if the price is unreasonable[679].	

[678] *EE: Art. 26 para 11 of the LOA*
[679] *NL: Art. 7:904 BW*

		- **For two MS, when unilateral determination is abusive, the judge can only pronounce liability of the party which has determined the price or the avoidance of contrac**t: FR, LU - For **one MS in case of unreasonable or abusive determination of price, the liability of the party could be engaged**[680] **and the judge could determine the price**[681]: PT	

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q24 – Determination of the price or other contract term by a third party			
Can a third party determine the price, in B2C contracts? In this case, what is provided by the law, if the third party designated by the parties cannot determine the price (death) or does not want to do so? May the judge (state judge or arbitrator) appoint another third party, even if the parties have not expressly agreed?		-For several MS, **a third party can determine the price; in case of failure the contract shall be deemed as inexistent or void and the judge cannot appoint another third party**: AT, ES, FR, LU[682] • **AT**: but the judge can correct the determination where it has obviously been erroneous (Art. §1056 f. ABGB)	-For several MS, a third party can determine the price, in case of failure the contract shall be deemed as inexistent or void and **the judge can appoint another third party, but its not a mandatory rule**: BE, CY (Section 10 of the Sale of Goods Act 10(1)/1994), CZ (Art. §1749 and 1750 generally, and §1792 and

[680] *PL: Art. 334 of the Civil Code.*
[681] *art. 400, n°2 of the Civil Code.*
[682] *LU: Art. 1592 of the Civil Code.*

		• **ES:** unless the parties have agreed to designate a substitute (Art. 1447 of SpCC) • **FR:** unless the parties have expressly agreed that the judge can appoint another third party. -In a few MS, a third party **can determine the price; in case of failure the contract shall be deemed as inexistent or void and the judge can appoint another third party**: DE (Art. 317 and 319 of the BGB), IT, RO (Art. 1662 of the Civil Code) • **IT:** the judge can determine the price in case of failure by the third party (Art. 1349 of the Civil Code) -For **some MS, a third party can determine the price; in case of failure a party may require that court replaces the third party**: EE, EL, HR, NL, LT, PT, SI • **EE**: and the judge cannot appoint another third party (Art. 26 of the LOA) • **EL**[683]**, HR**[684]**:** The contract shall be deemed that the parties	2085/2 for purchase contracts), IE (: Sale of Goods Act 1893, s9). -**In a few MS, a third party cannot determine the price in B2C contracts**: BG[685], DK, MT ○ **DK**: it could be considered as an unfair term the clause which provides a third party's determination of the price. **For some MS, there is no specific rule which regulate the determination by a third party:** FI, HU, LV, PL, SE, SK, UK • **HU**: unless in case where the third party is the judge. • **PL, SE, SK:** But, a third party could be allowed by the parties to determine the price based on freedom of contract principle

[683] *EL: Art. 371 of the Greek Civil Code*
[684] *HR: Art. 387 and 384 §3 of the COA.*

		have agreed on a reasonable price, which can be determined in this case by judge • **NL:** the judge can also appoint another third party to determine the price (Art. 6:227 BW). • **LT:** but there is no provision to allowed the judge to appoint another third party (Art. 6.198 §3° of the Civil Code) • **PT:** and the judge can also appoint another third party (art. 400, n°1 of the Civil Code). • **SI:** there is no precision in Slovenian law about the possibility to the judge to appoint another third party (Art. 445 of the CO).	
Can the consumer contest the price determined by a third party? When is it possible to contest the price? In case of unreasonable price? In case of the third party's gross fault when determining the price? Other?	**- For one MS, the consumer can always contest the price determined by a third party** • **FI:** An unreasonable price can always be contested according special provision made to protect consumers **(**CPA (38/1978) Chapter 4 section 1)	**- For some MS, the consumer can contest the price determined by a third party when it is an unreasonable price:** DK, EE, LT, NL, PT[686], SI, SK • **DK:** If the price is not reasonable or if it is unfair. This rule is a mandatory one for consumer based on general provision (Section 36.1 of the Act of the contract and section 72 of the sale of Good Act.).	For some MS **there is no special rules to the consumer to contest an unreasonable price determined by a third party**: BG, CY, HU, LV, PL, SE, UK **For one MS, the consumer can contest the price determined by a third party:**

[685] *BG: but it is possible in general contract law and court can determine the price in case of failure.*
[686] *PT: Art. 400, N°2 of the Civil Code.*

		• **EE:** if the price determined by a third party is not conforming to principles of good faith and reasonableness (Art. 26 par. 11 of the LOA). • **LT:** when the determination is unreasonable under the fundamental principles of good faith, justice and reasonableness. • **SI:** Based on unfair contract terms[687] **For many MS, the consumer can contest the price determined by a third party based on different conditions:** • **AT:** when it is obviously unfair and unexpected[688] • **EL:** Without any precision about the base of the contestation. • **ES:** the contestation is possible in two sort of cases: ○ when the third party has not followed the instructions given by the parties or, if there are not instructions, when his or her conduct contravenes the principle of reciprocity (*arbitrium boni viri*) or the	• **CZ:** if he's not satisfied with the price determined as usual price[692] In a few MS, the judge can exercise a **marginal control but he cannot substitute his own opinion to the opinion of the third party**: BE, HR, IE • **HR:** Hence, generally speaking, neither consumer nor any other person is entitled to contest the price determined by a third party. If a price determined by a third party would be grossly unreasonable, thus creating significant imbalance between obligations of the contractual parties, one party could resort to the general rules of *laesio enormis* in order to avoid such contract. • **IE:** the judge is just competent to avoid the

[687] *SI: but there is no special rule about the possibility to contest the third party's determination of the price.*
[688] *AT: §1056 ABGB.*

		principle of good faith (*arbitrium merum*)[689]; ○ when the third party's conduct is vitiated by mistake, fraud, threats or violence[690]. • **FR, LU:** in case of a third party gross fault when determining the price. • **IT:** In case of unreasonable or incorrect determination and in case of the third party's fraud. • **RO:** In case of unreasonable determination or third party's gross fault/fraud[691]. • **MT:** If the third-party acted beyond the mandate given.	contract in case of fraud, misrepresentation, undue influence or mistake during the determination of the price by the third party.
When the price determined by the third party has been successfully contested, **may the judge or another party determine the price**?	In one MS, **the judge can determine the price in case of a successful contestation**: • **FI**[693]**:** the court adjusts the price.	For many MS, **the judge can determine the price in case of a successful contestation**: AT, BG, CZ, DE[694], DK, EE, EL, NL, PT **- In a few MS, the judge appoints another third-party to determine the price:** FR, LU **-For several MS, the judge can determine the price in case of a successful contestation or appoints another third-party to determine the price:** IT, RO, SK	-In most MS there is **no special rule** about determination of the price after a contestation against a third party's determination of the price: CY, ES, HU, IE, LT, LV, PL, SE, SI, UK • **ES:** case law on this matter is not relevant, sometimes, the contract is void, sometimes, the judge can designate another third-party and sometimes the judge

[692] *CZ: §2085/2 of the Civil Code.*
[689] *SP: Based on case law but it is an imperative rule to respect, for consumers, the right to contest the determination of the price.*
[690] *SP: art. 1301 SpCC*
[691] *RO: Art. 1232 of the Civil Code.*
[693] *FI: CPA (38/1978) Chapter 4 section 1.*
[694] *DE: §319 (1) BGB.*

		• **IT:** The price will be determined by the judge if the determination was unreasonable or incorrect. The judge will appoint a new expert if the consumers prove the third party's fraud.	determine alone the price. • **LT:** the new price will be determined under the general principles of the determination of the price without any precision about who is in charge to determine it[695]. • **SI:** normally in this case, the contract will be void. Eventually, the court could determine the daily price with regard to the circumstances of the case[696]. **In a few MS, the judge has no power to determine the price in spite of third party, only parties themselves:** BE, HR, MT • **MT**: the contract will be void in the case of a successful contestation.

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to	No mandatory rule, or no rule at all

[695] *LT: Art. 6.198 (3) of the Civil Code.*
[696] *SI: Art. 442 (3) of the CO.*

		protect consumers	
Q25 – Various			
Excluding the formal requirements of the directive 2011/83/UE, are there rules which provide that the sale to a consumer has to respect formal conditions and which cannot be derogated from by agreement?	-For some MS there **are formal requirements provided for consumers**: BE, CZ, EE, ES, FI, RO • **BE**: **there is an obligation to deliver a purchase order** whenever the sale of goods or services is deferred and if the consumer pays in advance[697]. • **EE**: formal requirements are provided for specific consumer contracts concluded by telephone[698] • **ES:** ○ In B2C contracts, receipts, copies or accrediting documents shall be provided, containing the essential terms of the operation, including the general contractual conditions accepted and signed by the consumer or user, when these are used in the contract[699].	**For some MS, there are some formal conditions require for sale but they're not specific for consumers:** BG, CY, EL, FR, IT, PT • **BG: Formal conditions can be required in two sorts of cases:** ○ written form and signature for every contract[701] ○ formal conditions are required too for specific contracts as sale of immovable, transfer of rights in rem, cars, etc. • **CY:** for contract of sale of good, it's required an offer for the sale or purchase of good for a specific price. This offer could be in writing or orally[702]. • **FR:** general rules provide when formal conditions are required for the validity of the contract	**-In most MS there is no such rule by principle:** AT, DE, DK, HR, HU, IE, LT, LU, LV, MT, NL, PL, SE, SI, UK • **AT**: unless contracts with blind people[704] which require notarial form. • • **UK:** No formalities unless than those mandated by the rules implementing the *acquis.* **Some MS have no more formal requirements than those demanding by the directive 2011/83/UE**: CZ, FI, PT[705], SK

[697] *BE: Art. VI.88 CEL*
[698] *EE: Art. 54 of the LOA. There are also formal requirements for other sorts of consumer contracts: Consumer surety, Consumer credit contract and a credit brokerage contract.*
[699] *ES: Art. 63 RCPA (as modified by Act 3/2014, implementing Dir. 2011/83).*
[701] *BG: Art. 147a CPA*
[702] *CY: Section 5 of the Sale of Goods law 10(I)/1994.*
[704] *AT: §1 (1) e, §1 (3) n°1 and 2 NotaktsG*
[705] *PT: Art. 25, 26 of the Decree law n°7/2004 on electronic commerce, Art. 4, 5 6, 7 and 9 of the Decree-Law n°24/2014 which implemented the directive 2011/83/EU on consumers right.*

	○ To electronics contracts, the obligation to receive paper invoice can be adapted and be made by an electronic form, but the electronic invoice requires the express consent of the consumer[700]. • **RO:** There is a general mandatory rule applicable in B2C contracts according to the circumstances and which imposes to the supplier to provide for adequate means of proof which may be used by the consumer where needed.	they can be adapted for electronics contracts[703]. • **IT:** Formal requirements are provided for different sorts of specifics contracts: sales of immovable, insurance products. •	
Are there rules which regulate cases where the buyer is an incapable person in certain circumstances? **Is it applicable in a B2C contract?**		-**In a few MS there are some rules which regulate cases where the buyer is an incapable person in certain circumstances**: IT, SK • **IT:** These circumstances are related: ○ to the status of public officers of the prospective buyers, with regards to goods submitted to their administration[706]	In most MS there are some specific rules ***when the buyer is an incapable person* and these rules are mandatory**: AT, BE, CZ, DE, HU, MT • **AT:** In custodianship[708]. • **BE:** an incapable is not able to conclude a consumer contract[709]. • classic rules of incapacity: BG, CY, DK,

[700] *ES: art. 23.3 Information Society Services and Electronic Commerce Act.*
[703] *FR: Art. 1108-1 and 1316-1 and 1316-4, 1317 §2 of the Civil Code.*
[706] *IT: Art. 1471, § 1, nn. 1)-3) It. civil code)*
[708] *AT: Art. 280 ABGB*
[709] *BE: Art. 1123 of the Civil Code, and married people are not able to sell the goods of each other.*

		○ to a possible conflict of interest in case of agents, as prospective buyers of the goods they are in charge to sell in the principal's interest[707]. • **SK:** there are some rules on specific regulations for different sort of goods (guns, drug, alcohol). If the buyer does not respect legal conditions, the sale is invalid for incapability to contract this sort of contract.	EE, EL[710], ES, FI, FR, HR, IE, LT, LU, LV, NL, PL, PT, RO, SE, SI, UK
Are there rules which provide that it is forbidden **to sell things which may not be owned or alienated**? Is it applicable in a B2C contract?		-In most MS there are some rules which provide that **it is forbidden to sell things which may not be owned or alienated but they're not specific for consumers**: AT, BE, CY, DE, DK, EE, ES, FR[711], HR, HU, IE, IT, LU, LT, PL, PT, RO, SI, SK • **ES, FR, HR, HU, IT, LU, PL, PT, SI:** Illegal contracts, Contracts conclude on impossible or illegal subjects and impossible performance are void • **AT:** there are some rules which	**- For some MS, there are rules about the sale of things which may not be owned or alienated, but they don't provide the avoidance of the contract:** • **the sale concluded by a person which is not the owner is a valid one**[719]: BG[720], CZ, EL, LV, NL, MT ○ **EL:** If the buyer is acting in good faith unless if the owner

[707] *IT: Art. 1471, § 1, n. 4) It. civil code).*
[710] *DK: Section 7.1 and 7.2 of the Act on Guardianship.*
[711] *FR: ART. 1128 of the Civil Code.*
[719] *BG: Art. 78 of the ownership Act.*
[720] *BG : but not a sale of a good which cannot be sold*

		forbid sales in different cases: • for Inheritance in advance • for organic materials or person • under restrictive conditions on the sale of real estate to foreigners which require permission. • **BE:** the consequence of the sale of goods that belong to another person then the seller, is nullity[712]. • **CY:** When the seller is not the owner of the goods sell and he has no authorization to sell them it could be interpret as an incapacity because, in this case, the buyer does not receive the tittle of the seller[713] • **DE**: Legal transactions that violate an absolute statutory or administrative so called "*Veräußerungsverbot*" (a prohibition to sell/transfer ownership) are void[714], unless more specific statutory provisions apply. • **DK**: The contract may not be enforced in these cases. • **EE**: A transaction contrary to a prohibition arising from law is void if the purpose of the	was dispossessed of the thing transferred by theft or loss[721]. ○ **LV:** except in the case when the contract concerns property acquired by means of a criminal offence, and the promise is aware of it[722]. ○ **NL**: the contract is valid as delivery is not possible, which means that the seller will be in breach of contract. **In a few MS there are no specific rules about the sale of things which may not be owned or alienated:** FI, SE, UK • **FI** • **SE:** there is no specific rule, but this sort of contract will be *contra legem*. • **UK**: Such contracts might well not be

[712] *BE: Art. 1599 of the Civil Code.*
[713] *CY: Section 27 of the Sale of Goods Act 10(I)/1994.*
[714] *DE: § 134 BGB*
[721] *EL: Art. 1036, 1037 and 1038 of the Civil Code.*
[722] *LV: Art. 1545 of the Civil Code.*

		prohibition is to render the transaction void upon violation of the prohibition especially if it is provided by law that a certain legal consequence must not arise[715] • **IE**: Provisions limit the transfer of title in sales by persons who are not owners or their agents[716]. • **LT**: the seller must give some warranties to the buyer[717]. • **RO:** Any goods may be alienated by sale, unless the sale of the particular goods is forbidden or restricted by law, contract or will[718]. Then it is forbidden to sell the goods which cannot be alienated. • **SK**: there are some restrictions for certain sort of goods on specifics provisions on the constitution (mineral resources, caves, underground waters, natural healing sources and streams are a property of the Slovak Republic).	upheld because they are effectively impossible to perform. There are no statutory rules on this.
Are there rules which provide **what happens when the thing which has been sold, is lost at the date of the sale**?Is it applicable in a B2C	-In a few MS there are some **specific mandatory rules for consumers** which provide that **when the thing which has been sold is lost at the date of the**	- For several MS there are some **general rules** which provide, **when the thing which has been sold is lost at the date of the sale,** that **the consumer is allowed to**	**For many MS, there is no special rule except the classical provisions which are not mandatory:** CZ, HU, IE, LT, LV, MT, PL, SE, SI[739]

[715] *EE: Art. 87 of the GPCCA.*
[716] *IE: sections 21 to 26 of the Sale of Goods Acts 1890.*
[717] *LT: Art. 6.48, 6.317 and 6.321(1)-(4) of the Civil Code.*
[718] *RO: Art. 1657 of the Civil Code.*
[739] *SI: Art. 689 of the CO*

contract?	**sale, the consumer is allowed to terminate the contract**: BE, DK • **BE:** ○ If the trader does not have the good anymore on the date of delivery, the consumer has the right to terminate the contract[723]. ○ There is also an exception of the traditional transfer of the risks realised by the transfer of property in a *lex specialis* applicable to B2C-contracts in which the good is sent to the consumer. The risk of loss or damage only passes to the consumer from the moment when he or a third person appointed by him has received physical property of the good[724]. • **DK**: the rule which provides the avoidance of the contract when the thing cannot be deliver, which is constitutes a delay, is a	**terminate the contract**: ○ **AT:** When the object was unique or limited so that the obligation cannot be fulfilled the consumer is allowed to withdraw from the contract. He's also allowed to claim damages if the debtor knew or had to have known about the impossibility to fulfil the contract. ○ **BG:** the contract is null or void[731]. ○ **CY:** a contract for the performance of an act, which following its conclusion is rendered impossible or illegal due to an event which the party could not have prevented, is rendered void once the said act becomes impossible or illegal. This is the concept of frustration of contract under domestic law[732]. ○ **ES:** Nevertheless, in case	• **CZ: except classical provisions about the passing risks,** the decisive moment is takeover. Till this moment the risk of lost is supported by the seller. • **HU:** the general contract law rules on breach of contract or impossibility of performance apply. • **LT:** It will be considered as a failure. • **LV:** the contract may be set aside[740]. • **MT:** The rules about responsibility apply. Responsibility is transferred at the point of sale. • **PL:** general rules of impossibility may apply. • **SE: except classical provisions about the**

[723] *BE: article VI.43 §2 CEL,*
[724] *BE: art. VI.44 CEL*
[731] *BG: Art.184 OCA*
[732] *CY: Section 56 of CAP 149.*
[740] *LV: Art. 2040 of the Civil Code.*

	mandatory in relation to consumers affairs[725] - For one MS, when the thing which has been sold, is lost at the date of the sale, **the contract is valid but the buyer can demand at his choice damages or reimbursement of the expenses.** This stipulation is optional so it is possible to agree for the termination of the contract, **except in case of consumers sales where termination or revocation by the seller is forbidden**: DE **- For one MS, there is no special rule except classical provisions about the passing risks which are mandatory for consumers:** • **FI:** It provides in Finnish law that the seller shall bear the risk of the goods being destroyed or lost, deteriorating or diminishing before delivery, owing to a reason not attributable to the buyer[726]. For one MS, there are some **special**	of partial loss, the buyer may withdraw from the contract or claim the existing part paying its proportional price[733]. ○ **FR[734], LU.** ○ **HR:** the contract has no legal effect[735]. ○ **UK:** the contract is avoided when the object of the contract is specific goods which have "perished"[736] -In a few MS there are some **general rules** which provide, when the thing which has been sold is lost, **that parties can claim to performance and, if it is impossible, ask others remedies (performance rules),** but the **validity of the contract is not affected by the loss of the thing**: EE[737], NL, SK • **NL:** the consumer may invoke the remedies for non-performance. **- For one MS, there is no special rule except classical provisions about the passing risks which are**	**passing risks.** - For one MS there are some **general rules** which provide, when the thing which has been sold is lost, that parties can claim a **reduction of the price,** but the **validity of the contract is not affected by the loss of the thing. Parties can derogated from by agreement**: EL

[725] *DK: Section 74.1 of the Sale of Goods Act.*
[726] *FI: CPA (38/1978) Chapter 5 Section 6*
[733] *ES: Art. 1460 of the SpCC.*
[734] *FR: Art. 1601 of the Civil Code.*
[735] *HR: Art. 381 of the COA.*
[736] *UK: The sale of Goods Act 1979, Section 7.*
[737] *EE: Art. 12 §1, 108, §2, 101 §1, 237 6 1 of the LOA*

	mandatory rule which organize the transfer of risks between the seller and the consumer: • **PT:** In **contracts where the supplier sends the goods to the consumer**, the risk of loss or damage to the goods passes to the consumer when he or a third party indicated by him other than the carrier acquires physical possession of the goods. If the consumer trusts a carrier different from the one proposed by the supplier to carry the goods, the risk passes to the consumer as soon as the goods are in possession of the carrier[727].**Concerning B2C sale's contract at distance**, when the loss of the thing is the reason why the trader has failed to fulfil his obligation to deliver the goods at the time agreed upon with the consumer the consequences are the following: ○ The consumer is entitled to terminate the contract and the trader is obligated to reimburse all	**mandatory:** • **IT:** Unless the contract for the sale of goods is subject to a condition or to an initial day, the risk of the goods being lost/damaged/destroyed by force majeure or fault rests on the buyer[738].	

[727] *PT: Article 9-C Consumer Protection Act*
[738] *IT: Art. 1376 It. civil code.*

	sums paid under the contract in 30 days from the date of knowledge of the loss[728]; if the trader fails to reimburse such sums within that 30 days, he must reimburse the double in 15 days, without prejudice to the consumer to seek for damages[729]. ○ The trader may, however, delivery another thing of equivalent quality and price, if the parties have expressly agreed to it before or on the time of conclusion of the contract and the consumer was informed that the right of withdrawal has no costs for him[730].		
Are there rules which provide that the sale of a thing which is not the property of the seller is forbidden? Is it applicable	-In a few MS, **the sale of a thing which is not the property of the seller is not expressly forbidden, <u>but rules are providing a sort of prohibition and these mandatory</u>**	-**<u>For several MS, the sale of a thing which is not the property of the seller is forbidden:</u>** BE, FI, FR[744], IE[745], LU[746], MT, PT, SK	**<u>-For several MS, the sale of a thing which is not the property of the seller is not forbidden:</u>** AT, CZ, DE, EL, LV

[728] *PT: Article 19, nr. 1 Decree-Law 24/2014 of 14 February which has implemented the directive 2011/83/EU on consumer rights*
[729] *PT: Article 19, nr. 1 Decree-Law 24/2014*
[730] *PT: Article 19 nr. 4 Decree-Law 24/2014*
[744] *FR: Art. 1599 of the Civil Code.*
[745] *IE: Sections 12, 21 to 26 of the Sale of Goods Act 1890.*
[746] *LU: Art. 1599 of the Civil Code.*

in a B2C contract?	**<u>rules are specific for consumers</u>:** DK, ES, UK • **<u>DK:</u>** The sale of a good which is not the property of the seller confers the right to claim damages from the seller[741]**.** • **<u>ES:</u>** For B2C contracts, provision imposes to the seller the obligation to transfer the property of the sold thing. Therefore, the legal guarantee known as "*saneamiento*" in the SpCC cannot apply. Instead, when the seller sells a thing that is not of his/her property, there is a non-performance, which should equate to a lack of conformity. Nonetheless, rules on conformity in the RCPA do not contemplate the so-called "juridical vices": the text only deals with material defects[742]. • **<u>UK:</u>** there is no formal prohibition, but implicitly it is the same, because the	• **<u>BE:</u>** it can lead to compensation, when the buyer didn't know the good was the property of someone else. • **<u>PT:</u>** the contract is null and void, but the seller may not enforce nullification to a good-faith buyer, nor may a fraudulent buyer enforce nullification to a good-faith seller[747]. **<u>-For many MS, there is no rule which provides a formal prohibition, but implicitly it is a sort of prohibition, because the transfer of property will not be effective. The provisions about the transfer of property are mandatory rules:</u>** BG, CY, HR, IT, LT, NL, PL, RO, SE, SI • **<u>BG:</u>** the contract could be a valid one because there is no explicit rule which forbid it, but may not, however, achieve to transfer the	• **<u>AT:</u>** this sort of contract is allowed. • **<u>CZ:</u>** the contract is not automatically invalid and parties can derogate from this rule by agreement[754]. • **<u>DE:</u>** the contract of sale of a good which is not own by the seller is valid, but a right of termination, revocation or invalidity of the contract can be agreed unless in the consumers contract, where this sort of agreement are forbidden[755]. • **<u>EL:</u>** the contract is valid unless if the buyer acted under bad faith and if the owner was dispossessed of the thing transferred by theft or loss[756]. • **<u>LV:</u>** the contract is valid and establishes a

[741] *DK: Section 59 of the Sale of Goods Act*
[742] *ES: New art. 59 bis 1 a RCPA (which results from transposition of Dir. 2011/83).*
[747] *PT: Art. 892 of the Civil Code.*
[754] *CZ: Section 1760 of the Civil Code*
[755] *DE: § 311a (1) BGB.*
[756] *EL: Art. 1036, 1037 and &1à38 of the Civil Code.*

	provisions require that the seller must be able to transfer ownership to the buyer[743]. -For one MS, there is a special rule which **provides that the validity of the contract cannot be derogated from when the contract is concluded by a consumer:** EE	property right to the other party. • **CY:** the sale is not expressly forbidden, but the buyer does not receive a better title to the goods than the title of the seller. • **HR[748], SI[749]:** the contract is valid and binding the parties. But the buyer who didn't know nor should have known that the object is not property of the seller may **rescind the contract and claim damages if the purpose of the contract cannot be achieved** • **IT:** the conclusion of the contract does not transfer the property of the goods, but it imposes an obligation on the seller to become the owner of the promised good[750]. • **LT:** the seller is bound by a warranty of the ownership and quality of the things exists[751]. If the seller is not the owner he'll be in breach of contract: • **PL:** the rules on implied warranty for legal defects will	valid right to claim[757]. - For some MS, **there is no rule** about the sale of a thing which is not the property of the seller: HU

[743] *UK: Section 12 of the Sale of Goods Act 1979 and Section 17 of the Consumer Rights Act 2015*
[748] *HR: Art. 382 of the COA.*
[749] *SI: Art. 440 of the CO.*
[750] *IT: art. 1478, 1479 and 1480 of the It. Civil Code.*
[751] *LT: Art. 6.317 of the Civil Code.*
[757] *LV: Art. 1545 of the Civil Code.*

		apply in this case[752]. • **RO:** the contract is a valid but subject to the condition that the seller obtains the property of the good from the owner and be able to transfers it. Unless the buyer is allowed to claim for termination, or proportionate reduction of the price along damages for any other loss[753].	
Are there rules which provide the rescission for lesion of the sale? Is it applicable in a B2C contract?	For one MS, there are some **specifics and mandatory rules which provide the rescission for lesion of the sale concluded by a consumer**[758]: HU	-For many MS there are some general and mandatory rules which provide **the rescission for lesion of the sale based on a general disproportion**: AT, CZ, HR, LU, MT[759], PT[760] , RO[761], SI[762] • **AT:** The rules about usury[763] and *laesio enormis*[764]are applicable on sale contracts as well. • **CZ:** rules provide a **general**	-In most MS, there is **no rule which provide rescission for lesion applicable for sale**: BG, CY, DE, DK, EE, ES[773], FI, IE, IT, LT, LV, NL, PL, SE, SK, UK • **DE:** there is no specific rule, but this case could be treated with provision which requires the avoidance for contract which are

[752] *PL: Art. 556 of the Civil Code.*
[753] *RO: Art. 1683 of the Civil Code.*
[758] *HU: Art. 6/98 of the Civil Code.*
[759] *MT: Art. 1440 of the Civil Code.*
[760] *PT: Art. 432 of the Civil Code*
[761] *RO: Art. 1221 of the Civil Code.*
[762] *SI: Art. 118 and 119 of the CO*
[763] *AT: § 879 (2) no. 4 of the ABGB*
[764] *AT: § 934 f ABGB*
[773] *ES: but rescission for lesion is admits under Catalan law.*

		lesion based on disproportion of the performance[765]. • **HR:** in case of *laesio enormis*, a contract may be voided. If in a particular case *laesio* cannot be considered "*enormis*", a party would be entitled to rescind the contract based on the general rules of rescission of a contract[766]. • **LU:** there are specific provisions (for immovable sales[767] and contract concluded by an incapable person[768]) and a general principle of disproportion which can vitiates the contract (general principle of lesion)[769]. -In a few MS there are some general and mandatory rules which provide **the rescission for lesion of the sale based on specific cases of disproportion**: BE, FR • **BE:** If the seller of an real property has been	contrary to public policy. • **DK:** there is no specific rule, but this case could be covered by the unfair term provision. • **EE:** there is no specific provision, unless if the lesion is against good morals[774].

[765] *CZ: section 1793, 1794, 1795 and 1796 of the Civil Code.*
[766] *HR: Article 375 of the COA.*
[767] *LU: Art. 1674 of the Civil Code.*
[768] *LU: Art. 1305 and 491-2of the Civil Code.*
[769] *LU: art. 1118 of the Civil Code.*
[774] *EE: Art. 86 of the GPCCA and in matter of consumer credit.*

		disadvantaged for more than 7/12 of the price, he can ask nullity of the contract[770] • **FR:** only for immovable sales[771] and contract concluded by an incapable person[772].	

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q26- Others mandatory rules			
Excluding the rules required by the directive 2011/83/UE, are there other rules concerning the period of formation of the contract based on the ordinary law that can concern B2C sale at a distance?		-For some MS there are some mandatory rules which provide **requirements concerning the formation of the contract that can concern a B2C sale at a distance**. They're not specifically aimed to protect consumers: BE, EE, FR, IT, NL, PT, RO • **BE**: **there is a general obligation to negotiate in good faith** based on the general duty not to cause harm and to act with care[775]. • **EE:** there are two kinds of	For one MS there are some rules which regulate the formation period specific to consumer which can concern B2C sale but **it's not a mandatory rule**: AT • **AT: this rule provide** a right to withdraw from a contract when conditions promised during the negotiation by the trader don't realize or in a substantially lesser

[770] *BE: art. 1674 of the Civil Code.*
[771] *FR: Art. 1674 of the Civil Code.*
[772] *FR: Art. 1305 and 1394 of the Civil Code.*
[775] *BE: Art ; 1382 of the Civil Code.*

		rules: ○ The one defining durable medium which is mandatory rule to all contracts[776]. ○ The one defining pre-contractual obligations and liability cannot be derogated from by agreement in the detriment to the consumer[777]. • **FR:** There are some different mandatory rules especially related[778], power to act in the name of another[779], unlawfulness of the object, absence of cause, unlawful cause in the convention[780], public policy. • **IT:** The formation of contract at a distance has an ordinary rule and some special situations: ○ The ordinary rule prescribes that a contract at	degree[788]. -For one MS **there are some rules which regulate the formation period based on general contract law** which can concern B2C sale but it's not a mandatory rule: SI • **SI**: Rules concern negotiations[789], offer[790] and pre-contract[791]. -In a few MS, there are further rules concerning the formation of the contract, but they are **not specially aim to protect the consumer and they're not mandatory**: DE[792], IT • **IE:** the provisions are relative to the manner

[776] *EE: Art. 11 of the LOA*
[777] *EE: Art ; 14 of the LOA*
[778] *FR: to pre-contractual negotiations (such rules are laid down by case-law and will be stated in the French reform of contract law applicable from 1er October 2016) but it can be derogated from by agreement.*
[779] *FR: such rules are laid down by case-law and will be stated in the French reform of contract law applicable from 1er October 2016.*
[780] *FR: such rules are stated in the Civil code. They will be modified by the French reform of contract law applicable from 1er October 2016, which provides rules about absence of counter performance.*
[788] *AT: §3 KSchG.*
[789] *SI: Art. 20 of the CO.*
[790] *SI: Art. 22 of the CO.*
[791] *SI: Art. 33 of the CO.*
[792] *DE: §§130 et seq, 143 et seq. BGB.*

		distance is formed when the acceptance has reached the offeror[781]. ○ A special situation concerning the period of formation of a contract at a distance is represented by an executed contract, where the acceptance consists of performing the offeree's obligation[782]. In such a situation the offeree has a duty to give notice the offeror about the beginning of his/her performance; otherwise the offeror is entitled to damages[783]. This provision applies the rule of objective good faith in pre-contractual relationship. • **NL:** there are only specific rules pertaining to the provision of standard terms through electronic means[784]. • **PT:** there is a provision regarding the value of the silence as consent[785] • **RO:** there are some provisions	of communication of acceptance by post. -In most MS there are **no other rule about the formation period** than the rules seen before: CZ, DK, EL, ES[793], FI, HR, HU, LT[794], LU, LV, PL, SE, UK -**Some MS have no other rules than those required by the directive 2011/83/UE**, which is not in the scope of this study: BG, CY, SK

[781] *IT: Art. 1326 §1 of the It. Civil Code*
[782] *IT: art. 1327, § 1, It. civil code.*
[783] *IT: art. 1327, § 2, It. civil code*
[784] *NL: Art. 6:234 (2) and (3) BW.*
[785] *PT: Art. 218 of the Civil Code.*
[793] *ES: There are some rules to organize the burden of proof, art. 217.4 CPrA.*
[794] *LT: Parties must act fairly (Art. 6.163 of the Civil Code).*

		which regulate late acceptance[786] and revocation of an offer[787]	
Are there other rules concerning the period of formation of the contract based on the special law on **electronic contract** that can concern B2C sale at a distance? (excluding directive 2011/83/UE).	-For several MS there are **some specific mandatory rules for consumers concerning the period of formation of the contract based on special law on electronic contract**, that can concern B2C sale at a distance: DE, ES, PT • **DE:** There are rules which provide special obligations to the trader vis-à-vis consumers in electronic commerce[795]. • **ES:** there are rules concerning the duties of the service provider prior to the conclusion of the contract[796] and the placing of the order[797]. They are only mandatory when consumers are involved.	-For some MS there are some mandatory rules concerning the **period of formation of the contract based on special law on electronic contract**, that can concern B2C sale at a distance: FI, IE, NL, SK • **FI:** There is a rule which stipulates order and acknowledgement of receipt[799]; other one concerns time of receipt[800] and the last one stipulates the meeting of the formal requirements on a contract electronically[801]. • **IE:** the e-commerce Act is generally applicable to electronic contract. • **NL:** there are only specific rules pertaining to the	**-In most MS there are no other rule concerning the period of formation of the contract based on the special law on electronic contract, that can concern B2C sale at a distance (and which are not those requiring by the directive 2011/83):** AT, BG, BE, CY, DK, EE, EL, FR[804], HR, HU[805], IT, LT, LU, LV, MT, RO, SE, SI, UK - For one MS there are some general rules concerning the period of formation of the contract based on the special law on electronic contract, that can concern B2C sale at a

[786] *RO: Art. 1995, 1996 1997, 1998 of the Civil Code.*
[787] *RO: Art 1991, 1993, 1999 of the Civil Code*
[795] *DE: §§312i and j BGB.*
[796] *ES: art. 27 of ISSECA*
[797] *ES: art. 28 of ISSECA*
[799] *FI: Act on provision of information society services (458/2002) Chapter 3 Section 10.*
[800] *FI: Act on provision of information society services (458/2002) Chapter 3 Section 11*
[801] *FI: Act on provision of information society services (458/2002) Chapter 3 Section 12*
[804] *FR: there are no other rules than the one seen on Q.15-2.*
[805] *HU: But there is a special law on electronic commerce Act. CVIII of 2001 on Electronic Commerce and on Information Society Services.*

	• **PT:** there is a provision which considers as prohibited however general contractual clauses that impose to consumer the conclusion on line of a contract[798].	provision of standard terms through electronic means[802]. • **SK:** there are some different rules concerning the special law on electronic contract that can concern B2C sale at a distance in multiple texts[803].	distance, but they're not mandatory: • **CZ:** They provide rules about electronic signature.

C/ Period of performance

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q27- Performance by a third party – Seller remains responsible for performance			
Is there a rule which provides that **when the seller entrusts performance to**	-For several MS there is a **specific to consumers mandatory rule** which provides that when **the seller**	-For some MS there is a **universal mandatory rule** which provides that when **the seller entrusts**	-In a few MS there is a **rule** which provides that when **the seller entrusts performance**

[798] *PT: Article 25, nr. 4 Decree-Law nr. 7/2004 of 7 January 2004*
[802] *NL: Art. 6:234 (2) and (3) BW.*
[803] *SK: AEC, Act. N° 171/2005 coll. on Gambling Games as amended.*

another person, he remains responsible for performance in B2C contracts?	**entrusts performance to another person, he remains responsible for performance in B2C contracts**: ES, FI[806], FR, PT, RO • **ES**: it provides the seller liable for the lack of conformity resulting to incorrect installation of the consumers goods by a person under his/her responsibility[807]. • **FR:** the professional seller remains always liable. Nevertheless, the trader conserves his right of recourse against the latter. He can prove, to gain exemption, that the non-performance or poor performance of the contract was attributable to the	**performance to another person, he remains responsible for performance in B2C contracts:** BG, CZ[812], EE, HU, NL, IT[813], LU[814], SE • **BG:** the seller is always responsible for the performance[815]. • **EE**: the liability of the seller even in cases where the contract was performed by a third party has been developed in doctrine and case law[816]. • **HU**: There is such provision. Derogation would be deems as unfair term in the contract[817]. • **NL**: There is such provision[818]. Derogation would be deems as unfair term in the contract[819]	**to another person, he remains responsible for performance in B2C contracts, but it is not a mandatory rule:** BE, LT[822], PL[823], UK • **BE:** it's a general rule, derogation is possible with the consent of the third person. • **UK:** The contractual responsibility of the seller for performance towards the consumer would not be affected by the seller's decision to ask a third party to perform on his behalf. There is no express rule

[806] *FI: CPA (38/1978) Chapter 5 Section 32.*
[807] *ES: Art. 116.2 of the RCPA.*
[812] *CZ: Section 1935.*
[813] *IT: Art. 1228 of the It. Civil Code.*
[814] *LU: Art. 1134 of the Civil Code*
[815] *BG: Art. 49 of the OCA*
[816] *EE: Art. § 78 of the LOA do not say a word about liability of the performance by a third party. It just provides that the except where an obligor must, pursuant to law or a contract or due to the nature of an obligation, perform an obligation in person, a third party may perform the obligation in part or in full.*
[817] *HU: Art. 6:148 of the Civil Code.*
[818] *NL: Art. 6:76 BW.*
[819] *NL: Art. 6:236 under e) and f) BW. It must be noted that the seller can transfer his obligation to a third party. But such consent cannot be given in advance in standard terms (ART ; 6:156(1) BW).*
[822] *LT: Art. 6.257 of the Civil Code.*
[823] *PL: Art. 474 of Polish Civil Code.*

	consumer, to an unforeseeable and insurmountable fact of a third party, or to an instance of force majeure[808]. • **PT:** Derogations of the general rule which provide the liability of the seller even he transfers the performance to a third-party are not possible for B2C contracts because they will be deems as a violation of the duties imposed by the rule of law and order[809]. • **RO:** there is such rule and a clause which derogate from it in a B2C contract is deemed as an unfair term[810]. -In a few MS a clause that transfers the liability of the performance of the contract to a third party in a B2C contract can be deemed to an unfair term: AT, DK, IE, • **AT:** The rule provides that a term that allows the trader to transfer his obligations or the contract as a whole with debt-	**In a few MS, there is no express and specific rule which provides that the seller remains liable for the performance by a third-party but there are some rules that indirectly conduce to maintains the liability of the seller**. • **HR**: there is no specific rule about the liability of the seller in case of performance by a third-party, but there are mandatory rule which provides the obligation of the parties to perform the contract and the liability for their performance[820]. It can deduced of these provisions that creditor and debtor, are and remain responsible for the performance regardless of whether they entrusted this performance to another person. • **SI:** provisions are governing solely the execution of the performance and not the responsibility for the performance, which	to that effect because it is inherent in general contract law principles. **- For two MS there is a rule which provide individual liability for the person who is in charge of the performance of the contract:** CY, EL[824] • **CY**[825]**:** there is a statutory duty where performance of an act is entrusted to another person such person shall be liable for the performance of such an act. **-In a few MS, there is no rule about responsibility for performance by a third-party for B2C contract:** LV, MT, SK • **LV:** the responsibility depends from the

[808] *FR: Art. L. 121-19-4 of the Consumer Code.*
[809] *PT: Art. 800 n°1 and 2 of the Civil Code.*
[810] *RO: Art. 1852 of the civil Code.*
[820] *HR: Art. 9 of the COA and 65 §1 of the COA.*
[824] *EL: Art. 334 of the Greek Civil Code.*
[825] *CY: Section 142 CAP 149/*

	discharging effect to a third party that has not been mentioned by name in the contract is considered as unfair unless individually negotiated[811]. • **IE:** A provision which entitles the provider to transfer his rights to another in a way which limits his exposure on guarantees may be considered an « unfair Term » under the Unfair Terms in Consumer Contracts Regulations.	consequently stays with the seller[821].	agreement[826].

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q28 - Time of delivery			

[811] *AT: Art. § 6 (2) no. 2 KSchG. There is also an universal rule which provides the seller remains responsible for the acts of anyone he appoints to fulfil his contractual obligations pursuant to § 1313a ABGB (on this, see also 15-1)). This can be derogated from, but only when individually negotiated.*
[821] *SI: Art. 271,, 273 and 629 of the CO*
[826] *LV: Art. 1516 and 1519 of the Civil Code.*

Excluding article 18 of the directive 2011/83/UE, is there a rule which provides a legal time of delivery that binds the trader? Can it be derogated from by agreement?			-**For many MS, there is no legal time of delivery that binds the trader, unless otherwise agreed, to deliver goods to a consumer**: AT, BE, CZ[827], DK[828], EE, FR, IE, LU, MT, PL, -**For many MS, there is a legal time of delivery that binds the trader to deliver goods to a consumer, but the rule may be disregarded, by fixing the time of delivery.** Then the parties can derogate from it: BG,CY, DE, EL, ES, IT, FI, HR, HU, LT, LV, NL, PT, RO, SE, SI, SK, UK • **BG:** there is no express time but the condition to fix the term to perform the obligation by the debtor[829]. The term must be in "*a sufficient period of time*" and the delivery must be made in "*a reasonable term*"[830]. • **CY:** It just provides that the delivery must be made in "*a reasonable term*", that is a question of fact, and parties can agreed the time of delivery[831]. • **DE:** where no time for performance has been specified, the obligee may only demand the

[827] *CZ: the rules provide conditions to the delivery, but there is no legal time of delivery.*
[828] *DK: but if parties don't respect the time they agreed to, it constitutes a delay that is a mandatory rule.*
[829] *BG: Art. 69 to 71 of the OCA (Obligations and contracts Act).*
[830] *BG: Art. 319 of the CA (Commercial Act).*
[831] *CY: Section 36 and 64 of the Sales of Goods Law 10(I)/1994.*

			rendering of performance (in particular the delivery of goods), without undue delay[832]. • **EL:** If the time of the performance cannot be deduced from the transaction or from the circumstances and especially from the nature of the contractual relationship a creditor shall have the right to claim and the debtor shall have the right to furnish an immediate performance. Parties can derogate from by agreement[833]. • **ES:** unless the parties have agreed otherwise on the time of delivery, the trader shall deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay[834] • **IT:** a general principle of contract law states that the contract must be performed in good faith[835]. Such a general rule of conduct implicitly imposes to seller a reasonable time of delivery. • **FI:** unless it has been agreed that the goods are to be delivered at a fixed time or upon demand or without delay, the goods shall be

[832] *DE: § 474 (3) BGB,*
[833] *EL: article 323 [Time of performance] of the Greek Civil Code.*
[834] *ES: art. 66 bis RCPA (recently modified by Act 3/2014 in order to implement art. 18 Dir. 2011/83),*
[835] *IT: art. 1375 It. civil code*

			delivered without undue delay[836]. • **HR:** Save as otherwise agreed, a trader is obliged to perform a sales contract without delay[837]. • **HU**: In consumer contracts unless otherwise agreed by the parties the seller must place the good at the consumer's disposal without delay upon the conclusion of the contract[838]. • **LT:** Provisions states time-limit for performance must be **reasonable** and enable the debtor to perform the obligation properly and in any case **it should not be lesser than 7 days**[839]**.** • **LV:** If a term has not been set for performance, then the creditor may request it at any time, but the debtor may perform it at any reasonable time[840]. • **NL:** In case of a consumer sales contract, consumers' specific provision[841], contrary contractual provision, provides the consumer cannot demand performance before 30 days have elapsed. This provision therefore derogates from general contract law to the detriment of the consumer. Moreover, the parties may

[836] *FI: CPA (38/1978) Chapter 5 Section 4*
[837] *HR: Art. 44 of the CPA*
[838] *HU: Art. 6:220 (1) of the Civil Code*
[839] *LT: Article 6.53(2) of the Civil Code.*
[840] *LV: Art. 1829 of the Civil Law.*
[841] *NL: Article 7:9(4) BW (implementing the corresponding provision of the Consumer Rights Directive)*

			derogate from this provision also to the detriment of the consumer since Article 7:9(4) BW explicitly provides that the parties may agree to a different date for delivery. • **PT:** the supplier must deliver goods within a justified delay[842]. It is a non-mandatory rule. • **RO**: Unless a time of delivery has been provided for in the contract, the buyer is authorised to request that the delivery take place immediately after the price has been paid[843]. • **SE:** that, if it does not follow from contract when the goods are to be delivered, they shall be delivered without undue delay[844]. • **SI:** The trader must fulfil its obligations under the contract **immediately** and not later than 30 days from the conclusion of the contract, unless the parties have agreed otherwise[845]. • **SK:** Unless the parties agree otherwise, the seller shall deliver the item to the buyer without undue delay[846]. • **UK:** A trader must deliver goods without undue delay, unless

[842] *PT: Art. 9-B of the Consumer Protection Act.*
[843] *RO: art. 1693 of the Civil code.*
[844] *SE: Section 5 of the Consumer Sales Act.*
[845] *SI: Art. 25a(1) of the ZVPot.*
[846] *SK: Section 614 (2-3) of the Civil Code.*

			agreed otherwise[847].
Excluding article 18 of the directive 2011/83/UE, is there a rule which provides a **maximum time of delivery of the goods** by the professional to a consumer?		**For several MS there is a buyer's specific mandatory rule which provides a maximum time of delivery of the goods by the professional to a buyer (consumer or professional). The agreement between parties cannot provide a superior time of delivery than this maximum:** BG, DE, SK • **BG:** The parties to a commercial transaction (that means a transaction where at least one party is a merchant) may negotiate a term for performance of a monetary obligation which shall **not exceed 60 days**. A longer term may be negotiated as an exception where this is necessary due to the nature of goods or services or another important reason, if this does not represent an evident malfeasance with the creditor's interest or infringement upon good morals[848]. This text applies also to B2C contracts, as far as it doesn't contradict a mandatory rule which provides higher protection to the consumer. • **DE, SK:** The trader must deliver the goods at the latest thirty days after the contract: o **DE:** It cannot be derogated from by agreement to the detriment of the	For many MS, there are **no other rules** than those required by the directive 2011/83/UE (maximum of 30 days, and possibility of derogation): AT, BE, ES, FI, HR, LT, PL, PT, SE, UK. **In most MS, there is no specific rule about a maximum time of delivery:** CY, CZ, DK, EE, EL, FR, IE, IT, LV, MT, RO, SI

[847] *UK: Section 28 CRA.*
[848] *BG: Art. 303a. (1) of the Commercial Act.*

		consumer[849]. ○ **SK:** the seller shall deliver the item to the buyer no later than within 30 days from the date of entering into the contract[850].	

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q 29– Additional payments in contracts between a trader and a consumer			
Outside the scope of the directive 2011/83, in domestic law, is there a rule that prohibits contract terms not expressly agreed by the consumer which oblige him to make any payment in addition to the remuneration stated for the trader's main contractual obligation, before the consumer is bound by the contract? Are such rules specifically aimed to protect	**Some MS have other rules than those implementing the directive 2011/83.** -Some MS have no such special rule, but such an agreement could fall under the legislation on **unfair terms** (DK, HU, IT[851], LT), or could **violate the duty of good faith** (RO). -One MS (that has also a special rule) considers that such a term can be a **surprising condition,**	-In one MS, the consumer is protected by the **ordinary law** of contracts. In EL, Article 196 of the civil code states that: "*If the parties consider the contract as having been concluded although they did not agree on a certain provision in the contract, **what has been agreed enters into force** when it can be deduced that the contract would have been concluded even if the*	**-**Most MS have **no other rules** than those implementing the directive 2011/83: AT[852], BE (art. VI.37 CEL), BG, CZ[853], DE, EE, ES, FI, FR, HR, IE, LT, LU, NL, PT, SE, SI, SK -In a few MS, there is **no such provision**: CY, LV, MT

[849] *DE: Art. 474, 475 (1) BGB.*
[850] *SK: Section 614 (2-3) of the Civil Code.*
[851] *IT: As for terms with which one party had no real opportunity of becoming acquainted before the conclusion of the contract, such a term can be struck down if they are included in the list of unfair terms provided by art. 1341, § 2, It. civil code*
[852] *AT: § 6c KSchG: "(1) An agreement, by what the consumer is obliged to an additional payment besides the payment for the main contractual obligation – for example as payment for an additional performance of the entrepreneur – is only valid, if the consumer expressly approves. Such an approval in particular cannot be seen in the consumer having to refuse and not refusing a pre-setting put up by the entrepreneur.*
(2) If the approval specified under Abs. 1 is not given, the entrepreneur has to reimburse any additional payments that have been made.
(3) By approving as specified under Abs. 1, the consumer can make the agreement valid retroactively.
(4) Abs. 1 to 3 are not applicable in contracts listet under § 5a Abs. 2 Z 3 to 8, 10 to 12, 14 and 15".
[853] *CZ: Section 1817 "An entrepreneur **may not require** the consumer to provide a payment other than what the consumer is required to pay under the main contractual obligation, **unless the consumer has given his express consent to such an additional payment**."*

consumers or do they protect contract parties generally? Can they be derogated from by agreement?	which needs to be accepted expressly. In LT, Article 6.186(1) of the Civil Code: provides that "*1. No surprising condition contained in a standard condition contract, i.e. such condition that the other party could not reasonably expect to be included in the contract, shall be effective. Standard condition shall not be considered surprising if they were expressly accepted by the party when they were duly disclosed thereto…*"	*parties had not reached a decision concerning the said provision*." Then, if they have not agreed to an additional payment, the contract enters into force, when it can be deduced that the contract would have been concluded even if the parties have not agreed to an additional payment.	

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q 30- Payment of interests when the debtor is a consumer			
In domestic law, is there a rule which provides that the **consumer does not have to pay interest for delay in payment when non-performance is excused**? Are such rules specifically aimed to protect consumers or do they protect contracting parties in		**- In some MS, the consumer has to pay interest for late payment only when the non-performance is not excused** and the rule is general, and cannot be derogated from: BG, CZ, DK, EE, FI, FR, LT, LU, PT, RO, SK (partial	- In some MS, there is **no such rule** (BE, ES, EL, IE, IT, LV[854], MT, UK), **or** there is a rule which provides that **interest must be paid even if non-performance is excused, and this rule can be derogated from** (AT, HR, HU, PL, SI). • **In AT**, pursuant to § 1333 (1)

[854] *LV: Article 1753 of the Civil Law sets: "Interest shall mean the compensation to be given for granting use of, or for lateness relating to a sum of money or other fungible property (Section 844), proportionate to the amount and the duration of use thereof". The text does not distinguish.*

general? Can they be derogated from by agreement?		solution) • **In BG,** in case of an excusable non-performance the **debtor is not liable**, so **interest would not be due**. These are the general rules. The rules are mandatory (Art. 81 OCA). • **In CZ**, Section 1968 of civil code states that "*A debtor who fails to perform his debt properly and in due time is in default. A debtor is not liable for the default if he cannot perform due to the creditor's default.*" And Section 1970 of the civil code states that "*A creditor who has properly fulfilled his contractual and statutory duties may require that a debtor who is in default of payments of a pecuniary debt pay default interest, unless*	ABGB interest for delay can be claimed regardless of an excuse. This rule is universal, it can be derogated from. • **In EL**[855], the law states that a debtor in delay must pay interests, but the text does not mention the case where the non-performance is excused. • **In HR**, pursuant to Article 183 of the COA, Croatian law recognises the so-called objective *mora debitoris*, i.e. objective debtor's default, which implies that a debtor will be in default if it fails to perform the contract in due time, regardless of the reason for default. • **In HU**, according to the Civil Code, the obligation to pay interest on late payments is effective even if the obligor justifies his default. This is a general contract law rule (Civil Code art 6:48(4)). • **In IT,** there is no specific rule providing that the consumer does not have to pay interests for delay in payment when non-performance is excused.'Interessi corrispettivi' shall accrue in any event, unless they have been

[855] *EL: Article 345 [Delay with reference to a monetary debt] of the Greek Civil Code: In the matter of a monetary debt a creditor shall have the right in the event of delay to claim interest for the delay as determined by the law or provided for in the transaction without being obligated to prove prejudice. Unless otherwise provided in the law by proving further positive prejudice the creditor shall also have the right to claim compensation in respect thereof.*

		the debtor is not liable for the default" • **In DK**, it follows from general principles of law that interest cannot be claimed if non-performance is excused. • **In EE,** § 113. Penalty for late payment, states that "(*1) Upon a delay in the performance of a monetary obligation, the obligee may require the obligor to pay interest on the delay for the period as of the time the obligation falls due until conforming performance is rendered…. (4) An obligor is not required to pay a penalty for late payment for the time the obligor is unable to perform the obligation thereof due to a delay in acceptance by the obligee or for the time the obligor legitimately withholds performance of the obligation*." • **In FI**, CPA (38/1978) Chapter 5 Section 28	expressly excluded by agreement: art. 1282, § 1, It. civil code • **In PL**, both parties are obliged to pay them in case of delay, even excused. Art. 359 §1 states that " Interest on a sum of money is due only if it follows from a legal act or the law, a court decision or a decision of another competent authority." - In some MS, there is a rule which provides that **the debtor does not have to pay interest when non performance is excused, but this rule can be derogated from**: DE, NL • **In DE**, according to § 286 (4) BGB, there is no delay of the consumer in this case so that he does not have to pay interest. § 286 BGB protects contract parties generally and can principally be derogated from by agreement, with restrictions if it is in standard terms. • **In NL**, for damages, the non-performance must be attributable to the debtor. Article 6:74(1) BW states that "Where non-performance is excused, no damages are due. The parties may derogate from these rules to the detriment of the consumer".

		(4) provides that the seller is not be entitled to compensation if the buyer's delay in payment is due to the provisions of an Act, the interruption of general transport or payment communications or another similar hindrance which the buyer cannot reasonably avoid or overcome. Such situations can be referred to as *force majeure*. The rule stems from ordinary law of contracts. It cannot be derogated from by agreement to the detriment of a consumer. • **In FR**, according to French law (article 1147 of the Civil code), a debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that	

		the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part. • **In LT**, Article 6.248(1) of the Civil Code states that « 1. Civil liability shall arise only upon the existence of the fault of the obligated person, except in the cases established by laws or a contract when civil liability arises without fault." So in case non-performance is excused there is no fault on the consumer and thus consumer is not obliged to pay interest. • **In PT**, Article 792, nr. 1 CC states that if the impossibility - not attributable to the debtor - is *temporary*, the debtor is not liable for the delay in the fulfilment of the obligation. Thus, in the case where temporary impossibility corresponds to an	

		excused non-performance, the consumer does not have to pay interest for delay, since he is not considered in delay. • **In RO**, According to art. 1525 Civil code, "The debtor may be held liable for all damage caused by the non-performance from the date on which he has been put on a notice, unless the non-performance is excused by the supervening of a unforeseen excusable event". • **In SK**, it is only if delay of the creditor caused the delay of the debtor (consumer), the debtor will not be obliged to pay interest. -In one MS (SE), interest must be paid even the debtor is excused, but there is a possibly of adjusting the level of interest, **if this is to be considered unconscionable** according to the first paragraph of Section 8 of the	

		Interest Act (SFS 1975:635). According to paragraph 2 of Section 8, a contractual term derogating from the rule in the first paragraph is void against the debtor.	
In domestic law, is there a rule which provides **what is the starting point of interest for delay in payment, in B2C contracts?** Are such rules specifically aimed to protect consumers or do they protect contracting parties in general? Can they be derogated from by agreement?	-**One MS has a special rule for consumers**: LU • **In LU**[856], Article 12 of the Law of 18 April 2004 on payment periods and late payment interest states: "*Claims arising **from contracts concluded between a supplier and a consume**r are entitled to full interest at the legal rate **from the moment of the expiration of the third month following the receipt of goods, completion of works or the provision of services."** And article 13 adds: "(1) The interest shall only be payable if the professional has,*	-In some MS, there is a mandatory rule which fixes the **starting point of the interests:** • **at the day of the default or, the first day after the default**: AT, BG, CY[857], CZ, DE[858], EE, HR, HU[859], RO[860], SI, SK ○ **In AT**, § 903 ABGB provides that interest can be claimed after the end of the last day on which the other party could have performed. The parties can determine that day, by agreement. This	-In some MS**, there is no rule about the starting point of the interest for delay**: DK, IE, IT, MT, UK • **In IE**, in principle a consumer might be fixed with interest at the court's discretion under the Courts Acts, or where interest is proved as a consequential loss. -**In LV**, article 1768 of the Civil Law sets: "*The term with respect to payment of interest shall depend on the mutual agreement of the contracting parties who may also stipulate payment in advance*". It can be derogated from by agreement. -**In NL**, article 6:83(b) BW provides that the interest is due from the moment when the non-performance occurs and the requirements for damages are fulfilled. The parties may derogate from

[856] *LU: there is also a general rule. Pursuant to article 1153 al. 3 of the Civil code, late interest are due only from the day of the formal demand to pay or of another equivalent act such as a personal letter clearly stating a demand, except in those instances where the law causes them to accrue as a matter of right.*

[857] *CY: This cannot be derogated from, in B2C contract, except if it is more favourable for the consumer (sections 34(2) and 3(5) of the Consumer Rights Law (133(I)/ 2013)*
[858] *DE: According to § 286 BGB, the debtor is in delay if he does not perform after a reminder by the creditor and after the due date of performance has passed*
[859] *HU: Act V of 2013 on the Civil Code Section 6:48 [Interest on late payments]: "…the debtor shall pay interest on late payment from the time of default…"*
[860] *RO: Art. 1535 Civil code*

	within one month of the receipt of goods, of the completion of works or the provision of services, sent to the consumer the invoice for it. The invoice must contain a statement that the professional intends to benefit from Article 12, (2). The proof of the execution of this duty will be in accordance with common law. "	rule is universal. ○ **In EE**, the general rule is that the starting point is the time when the creditor is entitled to require performance of the obligation (Art. 82 para 7 of the LOA). If the due date or period of time for performance is agreed upon, the buyer is in delay from that date or the end of the agreed time period (Art. 82 para 2 of the LOA). If the date was not agreed upon, the buyer is in delay after the reasonable time has passed from the conclusion of the contract taking into particular account the place, manner and nature of the performance of the obligation (Art. 82 para 3 of the LOA). These rules can be derogated from by	these rules to the detriment of the consumer.

		an agreement, except in B2C contracts. ○ **In RO**, Art. 1535 Civil code: "The default damages for breach of the obligations of money (1) Where money is not paid when due, the creditor is entitled to damages and default interest from the due date until payment at the rate agreed by the parties, or failing, at the legal rate, without having to prove any prejudice. (...) • or when the debtor is put under **notice,** or when the creditor **request for the performance**, or **send an invoice to the debtor:** EL, ES, FI, FR, PT ○ **In EL**, it is when the debtor is put under notice by means of judicial or extrajudicial	

		notification (article 340 of the Greek Civil Code) or after the passing of a fixed date (article 341 of the same code) ○ **In ES**, specifically for sales, art. 1501.3º SpCC states that interests are due upon request of performance, in accordance with article 1.100 SpCC. It is disputed if this is a case of automatic delay or if request of performance is still necessary. ○ **In FI**, Interest Act (633/1982) Section 5 provides that interest for late payments must be paid from the due date onwards, if the due date of a debt has been fixed in advance in a manner binding on the debtor. If the due date has not been fixed in	

		advance in a manner binding on the debtor, interest for late payment must be paid when 30 days have passed from the date on which the creditor sent an invoice to the debtor or otherwise requested payment of a fixed amount of money. ○ **In FR**, according to article 1153 al. 3 of the Civil code, late interests are due only from the day of the formal demand to pay or of another equivalent act such as a personal letter clearly stating a demand, except in those instances where the law causes them to accrue as a matter of right. ○ **In PT**, according to Article 806, nr. 1 CC in pecuniary obligations, interests are due	

		as of the date on which default is established. Concerning the period when default is established, Article 805 CC states that: (1) The debtor is only deemed to be officially in default after being judicially or extra-judicially notified to fulfil the obligations. (2) Independent of notification, default by the debtor exists: (a) If the obligation has a specific deadline; (b) If the obligation arises from an illicit act or fact; (c) If the debtor himself or herself blocks the notification, in which case notification is considered to have occurred on the date when the notification would normally have	

		taken place… ». • at the **fixed date** if it is provided: FI , LT • or the **date of delivery or the very first day after delivery:** BE, LT ○ **In BE**, if parties did not agree a date of payment, the date of payment is considered to be the date of delivery. The buyer is allowed to refuse any payment until the date the delivery has taken place	
In domestic law, is there a rule which provides that **interest for delay in payment cannot be capitalized in B2C contracts**? Or which provides restrictions for capitalization of interests in this case? Are such rules specifically aimed to protect consumers or do they protect contracting parties in general? Can they be derogated from by agreement?		-Some MS **do not allow capitalization** and this cannot be derogated from, but it is a general rule: DE, EE, FI, SE, SI (in principle), SK (case law) • **DE:** According to § 289 BGB, default interest is not to be paid on interest. • **EE**: In Estonian law, interest for late	-Some MS **allow capitalization with conditions, and it can be derogated from**: AT, BE, CZ, EL, ES, FR, HR, IT, PT • **In AT**, § 1000 (2) ABGB provides, that compound interest can only be claimed if the parties expressly agreed upon it. This rule is universal • **In BE**, capitalization of interests is normally allowed on the base of article 1154 C.C. (except in in

		payment shall not be required for a delay in the payment of interest. Agreements which derogate from such requirement to the detriment of the obligor are void (Art. 113 para 6 of the LOA). • **In FI**, The prohibition of capitalising interest for delay is considered by the doctrinal literature to be part of Interest Act (633/1982) Section 4 (1). • **In SI**, Article 375 of the CO provides that no interest shall run on interest that has fallen due for payment but has not been paid, unless stipulated otherwise by law - One MS **does not allow capitalization in B2C contracts**: In BG, Art 294 of Commercial Act (CA) states that "(*2) Interest on interest shall be due only if so agreed.*" Capitalization is allowed under certain conditions, but **only in B2B contracts. Per argumentum a contrario,**	Consumer Credit Agreements it is forbidden). They are only due after a judicial notice or a special agreement and the notice or agreement must concern interests due for at least an entire year. • **In CZ**, in Section 1806 of civil code, Compound interest may be claimed if so stipulated. Where the claim arose from an unlawful act, compound interest may be claimed from the date on which the claim was asserted in court. • **In EL**, article 296 [Compound interest] par. 1 of the Greek Civil Code, states that: "Interest is due on accrued interest however arising if this had been agreed or if has been claimed in a legal action. In both cases interest may only be claimed on interest that has accrued in respect of at least a whole year or of one financial year in so far as public bodies are concerned.". This rule is not mandatory. • **In ES**, according to art. 1109 SpCC, interest for delay can only be capitalized if it is judicially claimed, even if the contract is silent on this point. Therefore, this is a default rule • **In FR**, It allows the seller to claim interest over the accrued interest. However, it is only possible after one whole year

		this text, because it excludes the consumers, is protecting them. Then, this text is not a special text made for consumers (it is not in the consumer code but in the commercial Act), but it protects them by excluding them of the scope of a dangerous rule for them. -One MS **allows capitalization subject to conditions, but it cannot be derogated from the conditions**: In LU, this possibility is provided for by article 1154 of the Civil code which provides that interest due on assets may produce interest either as a result of a judicial claim or on the ground of a special agreement, provided that either in the claim or in the agreement the interest concerned is owed at least for one whole year. The provisions relating to the capitalization of interest are public policy[861]. As a result, it is not possible to provide in a convention for capitalization of interest for a shorter period than one year. - **In PL**, there is no rule about	has passed since interest became due. (Article 1154 of the Civil code.) • **In HR**, pursuant to Article 31 of the COA, capitalisation of the accrued interest is only be permissible as of the date the request for the payment of the accrued interest has been submitted to the court. • **In IT**, According to art. 1283 It. civil code interests for delay in payment can be capitalized, provided that: they are accrued interests; they are interests accrued during the past six months; and they have been claimed by the creditor or there is an agreement subsequent to the expiring date of the interests. These rules cannot be derogated from by agreement, but only if different uses exist in a specific area. • **In PT**, there is a general rule on this issue in the Civil Code (Article 560) according to which accrued interest bears interest a new agreement has to apply after the interest has fallen due; compound interest may also be possible, from the day notice is given to the debtor, by means of a judicial demand claiming for accumulation of interest fallen

[861] *LU: Cass. Civ. June 21, 1920, DP 1924.1.102; Cass. Civ. June 1960, Bull civ I, No. 305*

		capitalization, but there are rules about "**maximum interest**". Art. 359 §2 of the civil code states that: " (1) The maximum level of interest resulting from a legal act cannot be more in one year than four times the pawn loan rate of the National Bank of Poland (maximum interest). (2) If the interest resulting from a legal act exceeds the maximum interest, the maximum interest is due. (3) Contractual provisions cannot exclude or limit provisions on maximum interest even if foreign law jurisdiction is chosen. In such case, the provisions of the law apply.	due or for its payment at risk of accumulation. Only interest due for a period not longer than one year may be accumulated - **In two MS, in principle, capitalization is not allowed, but it can be derogated from**: LT, RO • **In LT**, Article 6.37(4) of the Civil Code states that « 4. It shall be prohibited to calculate interest on the interest calculated previously (double interest), except in the cases established by laws or agreement of the parties if such agreement is not contrary to the requirements of good faith, reasonableness and justice". • **In RO**, Art. 1489 Civil code states that "(2) The interest for delay in prepayment cannot be capitalized unless the provisions of the law or the contract provide so, between the legal limits or, should there be no legal limits fixed, when the judge decides it. In the latter case, the capitalization becomes effective only from the date of the introduction of the judicial action." **-In some MS, there is no special provision about capitalization:** CY, DK (but in B2C contracts, a term

			providing capitalization could be unfair), HU, IE, LV, MT, NL, UK.
Would a contractual term that would provide for contractual interests (above the legal interest) or a starting point prior to the one that would prevail under the ordinary law, be unfair in a B2C contract? Are such rules specifically aimed to protect consumers or do they protect contracting parties in general?	**- Some MS consider that a contractual term that would provide a contractual interest (above the legal interest) or a starting point prior to the one that would prevail under the ordinary law, is unfair**: AT[862], BE[863], CY[864], DK, CZ[865], ES[866], FR[867], HR[868], HU[869], LT[870], LU[871], PL, PT[872], RO[873], SK[874], UK[875].	Some MS have mandatory rules, but these are general rules: BG, DE, EL, IT, MT, SE ○ **In BG**, the legal interest is provided by law and cannot exceed the legally provided limits. Art. 10, Para. 2 OCA. Then , such a term	-**In some MS, such agreements are valid**: EE, LV (except when "where the law requires calculation of lawful interest, that is, at six per cent per year": Article 1765 of the Civil Law) • **In EE**, Contractual interest can be agreed between the parties also in B2C contract and does not have any limits. But there is a possibility to claim the reduction

[862] ***In AT***, *§ 6 (1) no. 13 KSchG considers as unfair a term that would require the consumer to pay default interest which is more than 5% annually above the interest rate agreed upon in case the customers pays in due time. This rule protects consumers only and cannot be derogated from.*

[863] ***In BE***, *it is considered to be unfair if it is only the consumer who needs to pay damages in case of non-performance of the contract. If the trader also has to pay damages in the case of non-delivery, the clause is balanced and is not forbidden (article VI.83, 24° WER). Moreover, if a penalty clause has the effect of 'punishing' a party, rather than compensate for damages, it is forbidden in Belgian law (implicitly in art. 1229 CC). The judge has a general competence to mitigate penalty clauses to what the creditor could legally obtain in damages (art. 1231 CC).*

[864] ***In CY***, *a contractual term that provides a contractual interest (above the legal interest) or a starting point prior to the one that would prevail under the ordinary law is likely to be deemed as an unfair contract term. Further pursuant to section 74 of the Contract Law, Cap 149 it is provided that: " A clause in an agreement to pay increased interest by default, can be regarded as a penalty"*

[865] ***In CZ***, *this question is not regulated explicitly for B2C contracts but might definitely fall under the general clause § 1813 of unfair terms. This rule protects the consumer only and cannot be derogated from.*

[866] ***In ES***, *a term that would provide a contractual interest would be unfair if it was disproportionate (art. 85.6 RCPA). Art. 85.6 RCPA describes this unfair term using an indeterminate concept ("disproportionate"), so that it can be classified as a grey-listed term*

[867] ***In FR***, *Such clauses are not included in the black list nor the grey list of unfair terms of article R. 132-1 and R. 132-2 of the Consumer Code. But, such provisions could, however, be qualified as unfair term under the general definition of unfair terms (Article L. 132-1 of the Consumer Code), if they have the effect of creating an imbalance between the rights and obligations to the detriment of the consumer (doctrinal opinion). In any case, according to French Consumer Code the interest perceived according to a conventional interest rate which is higher than the average rate over the previous quarter perceived by credit institutions with the same risk must be returned. Article L313-4 of the Consumer code provides that "Where a contractual loan is usurious, the excessive levies in respect of articles L. 313-1 to L. 313-3 are automatically charged on normal interest payable and secondarily on the loan capital. If the loan capital and interest is paid off, the sums levied unreasonably must be repaid with legal interest from the day on which they are paid."*
But this text, even if it is in the consumer code, is a general text, also applicable in a B2B contract.

[868] ***In HR***, *pursuant to Article 26, paragraph 1 of the COA, contractually agreed interest cannot exceed the level of the default interest in B2C contracts. Hence, a contractual term providing for a contractual interest which exceeds default interest would be null.*

[869] ***In HU***, *Section 6:104 [Other unfair terms in consumer contracts] of Act V of 2013 on the Civil Code, states that "2) In contracts which involve a consumer and a business party the contract term shall, in particular, be considered unfair, until proven otherwise, if its object or effect is to: j) order the consumer to pay a disproportionately high amount if he fails to perform obligations or fails to perform as stipulated by the contract."*

Can they be derogated from by agreement?	-**Other rules than unfair terms** • **In FI**, there is a special text for the consumer: Interest Act (633/1982), Section 2—Freedom of contract (340/2002) provides that ": (2) If the debtor's obligation is related to a contract concerning consumer credit or another consumer good or service between a business and a consumer or to a contract according to	would not have effect. It is a general rule. ○ **In DE**, a not individually negotiated standard term within the meaning of §§ 305 et seq. BGB according to which a reminder is not necessary for delay, thus preponing the starting point for interests, is invalid according to § 309 No. 4 BGB. This rule is not specifically	of contractual penalty (Art. 162 of the LOA). And, the standard term providing an unreasonably high contractual penalty to the party supplying the term or an unreasonably high pre-determined amount of compensation for damage or other compensation, is unfair in B2C contracts -**In NL,** unless the specific circumstances of the case would provide otherwise, in particular where the contractual interest would amount to an unfair penalty, **such a term is not unfair.**

[870] ***In LT***, *such contractual term should be considered as being unfair. This rule is specifically aimed to protect consumers. Article 6.228[4] (1, 2 and 3) of the Civil Code states that: "2. The terms of a contracts shall be presumed unfair where they; (5) establish for any consumer a disproportionately heavy liability for non-performance or inadequate performance of the contract."*

[871] ***In LU***, *such clauses are not included on the black list of unfair terms of Article L. 211-3 of the Consumer Code. Such provisions could, however, be qualified as unfair terms under the general definition of unfair terms (Article L. 211-1 of the Consumer Code), if they have the effect of creating an imbalance between the rights and obligations to the detriment of the consumer. LU: extract of a decision declaring a clause unfair having departed from the legal provisions concerning interest: "The clause providing that the legal rate is increased by four percent, that any started months is deemed due and the interest due as of right and without notice in case of default of payment on the due date of the invoice and not at the expiry of a period of three months following completion, creates an imbalance of rights and obligations for the benefit of the professional. It is, therefore, unfair "(Ordonnance en matière de protection juridique du consommateur II No. 199/11 of 18 February 2011, Union Luxembourgeoise des Consommateurs Nouvelle a.s.b.l. c. Vérandas Grand-Ducales S.A)*

[872] ***In PT***, *there are no specific provisions regarding unfair terms relating to interest. Thus, Articles 15 and 16 of the General Contract Terms Act may apply so as to make standard business terms ineffective, if, contrary to the requirement of good faith, they create on the other contracting party an unreasonable disadvantage*

[873] ***In RO***, *the following contractual terms on interest are considered unfair terms in B2C contracts (the legal provisions not being specifically aimed to protect consumers): (a) contractual terms that would provide a contractual interest which overcome the legal interest by more than 50 %; (b) contractual terms on interest not agreed in writing (for instance, the agreement on the phone, on a specific interest rate will not be binding on the consumer); (c) should the seller or supplier violate the rule on formal agreement, the creditor shall be also deprived of its right to request for the payment of the legal interest (in the case of verbal agreement on the interest rate, the consumer is excused from all obligations of payment concerning the interest)[873]. But, on the other hand, contractual terms that would provide a contractual interest above the legal interest in a B2C contract are valid subject to the condition that the fixed interest rate did not overcome the legal interest by more than 50 %.*

[874] ***In SK***, *the restriction of consideration is settled down by law to protect consumer and it cannot be derogated from by agreement – CC section 53 (6), otherwise it would considerate to be an unfair term. Consideration consists of contractual interest, fees and all other consideration, and it shall not exceed twice the annual percentage rate of charge applicable to the common financial product.*

[875] ***In UK***, *this would depend on a case-by-case assessment under Part 2 of the Consumer Rights Act 2015.*

	which the debtor acquires, by purchasing or renting, accommodation for himself or herself or the members of his or her family, the obligation is invalid in so far as the debtor would be liable to pay higher interest for late payment than laid down in sections 4—11. In such cases, if the debtor has undertaken to pay a commission, fee or other comparable recurrent payment in lieu of or in addition to the interest for late payment, the obligation is invalid in so far as the combined amount of the interest for late payment and the said payment exceeds the interest calculated under sections 4—11." • **In SI**, Article 27a of the ZVPot provides that in the event of late payment by the consumer the parties may not agree on higher interest as is the default interest defined by the CO.	aimed to protect consumers. ○ **In EL,** article 294 of the Greek Civil Code states that: "Any transaction relating to interest which exceeds the upper lawful limit shall be null as regards the excess. "The above rule of the Greek Civil Code protect contract parties generally and they cannot be derogated from by agreement ○ **In IT**, the law of 7 March 1996 prohibits contractual interests above the legal interests which are considered as usurious. The interests are qualified as usurious by government decree every year. Once the interests have been qualified as usurious, terms providing such interests shall be deemed as void (art. 1815, § 2, It.	

		civil code) and the professional may be subject to criminal sanctions (art. 644 It. criminal code). ○ **In MT**, These are prohibited by the general rules. Such a clause cannot be allowed in a contract and if there is such a clause both parties may be guilty of an offence. ○ **In SE,** generally, the parties are free to derogate from the non-mandatory rules of the Interest Act, pursuant to Section 1 paragraph 2 of the Interest Act. However, a level of interest which is considered unconscionable can be adjusted according to Section 8 of the Interest Act. Also, a contractual term considered unconscionable, for any reason whatsoever, with regard to all the circumstances of	

		the case, may be adjusted or set aside pursuant to Section 36 of the Contracts Act. These rules protect contract parties generally, though the fact that a contract concerns a B2C-relation can influence the assessment of unconscionability. None of the rules can be derogated from.	

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q 31 - Third party rights or claims in relation to the sold good			
Does domestic law require **that the goods be sold free of any rights?** In other words, do they require **the trader to guarantee against eviction (peaceful**	**-In UK**, there is a special rule to give consumer **quiet possession of the goods**, and which cannot be derogated from by agreement: art. 17 (2) of	**-Most MS specify that the goods must be free of any rights, when they are sold**: BG, CZ[878], DK[879], EL, IE, HU, MT, PL, PT.	-In some MS, this right exists, but **it can be excluded by the contract**, even in B2C contracts: BE, CY[888], IT (but not for the act of the seller), LU[889] , HR, SE[890].

[878] *CZ provides that "2. If the right of a third party which is encumbering the goods is based on (intangible) industrial property or other intellectual property, the goods are considered to have legal defects:*
(a) if the right in question enjoys legal protection under the law of the country where the seller has his seat or place of business or residential address; or
(b) if, at the time when the contract was concluded, the seller knew, or ought to have known, that the right in question enjoyed protection under the law of the country where the buyer has his seat, place of business or residential address, or that the right enjoyed protection under the law of the country where the goods were to be further sold or used and the seller was aware of such resale or place of use when the contract was concluded."

possession guarantee, guarantee against legal defect) in B2C contracts? Are such rules specifically aimed to protect consumers or do they protect contracting parties in general? Can it be derogated from by agreement? In a B2C contract, are there cases where eviction guarantee does not apply?	CRA (2015) states that every contract to supply goods, except a contract for the hire of goods or a contract within subsection (4), is to be treated as including a term that: • (a) the goods are free from any charge or encumbrance not disclosed or known to the consumer before entering into the contract, • (b) the goods will remain free from any such charge or encumbrance until ownership of them is to be transferred, and • (c) the consumer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or	• This warranty is called: ○ a **warranty against eviction**: LU, ○ a **warranty of ownership**: LT ○ also called **warranty as to peaceful possession**[880]: IE, MT (but the text also mentions a lack of conformity). ○ In HU, it is a "***warranty of title due to any impediment of a right***". • Sometimes, it is a **guarantee of compliance or non conformity**: CZ, EL[881],	-**In one MS, no provisions exist, be it about warranty against eviction, or about legal defects:** LV

The CESL provides that it is "(a) under the law of the state where the goods or digital content will be used according to the contract or, in the absence of such an agreement, under the law of the state of the buyer's place of business or in contracts between a trader and a consumer the consumer's place of residence indicated by the consumer at the time of the conclusion of the contract." The criteria do not seem to be the same. They are almost reversed.

[879] *Section 59 of the Sale of Goods Act provides: "If it is reported that the sales object at the conclusion of the purchase belonged to someone other than the seller, the buyer may, even if the seller had made an excusable misunderstanding about his title, claim damages from the seller".*

[888] *CY: The right to peacefully possess the goods is not an absolute right under the law. The law states that there is an implicit guarantee that the consumer will peacefully enjoy the goods, unless the circumstances of the contract are such which show a different intention (Section 14, Sale of Goods Act 10(1)/1994)*

[889] *With the limit that the seller is still required to guarantee what is caused by his personal action.*

[890] *In SE, Consumer Sales Act (1990:932) Section 21 a mentions: "The goods contain a legal defect where a third party has title to the goods or a lien or other similar right over the goods **and the agreement does not prescribe that the buyer shall take over the goods subject to the limitation resulting from a third party right".** (SFS 2003:162). If the agreement prescribes that, the buyer will know the rights of the third person.*

[880] *See also CY in the right column*

[881] *EL: Article 5 par. 6 of Law 2251/1994 mentions that "In any case the responsibility of the vendor for real defects or absence of the agreed qualities is subject to the application of the stipulations of the Civil Code. Any waiver of consumer protections as per those stipulations, before the disclosure of the defect or absence of the agreed quality, is not valid.".*

	encumbrance so disclosed or known. -In some MS, there are no specific rules designed for the consumer about guarantee against eviction. Yet indirectly, some rules of consumer law can apply to protect the consumer against legal defects, or against a term that excludes the guarantee. - **Protection against the legal defects:** • **First, the seller can be liable for non-conformity, because the right of the third party is a legal defect:** EE, ES ○ **In EE**[876], Art. 218 para 1 sentence 2 and para 2 of the LOA provides that "**In the**	FI, SK, HR[882], PL, PT[883], SE, SK. In these MS, **the principle** is that goods must be sold free of rights, and if they are not free of rights, the goods are considered to have **legal defects**. • In many of these MS the (general) condition of this guarantee is that **the buyer should not be aware of the rights of the third parties** before concluding the contract (BG, EL[884], HU, PL) or has not expressly agreed to such encumbrance (CZ, NL, LT, SI, RO[885]). However, if the buyer does not know the right of the third party before the conclusion of the contract, **he cannot**	

[876] *EE: Under Estonian law, a thing does not conform to a contract if third parties have claims or other rights which they may submit with respect to the thing. If third parties have claims or other rights to the thing the buyer may claim performance of the obligations and delivery of a thing which is free from third party rights (Art. 217 para 2 subparagraph 4). These rules cannot be derogated from by an agreement in the detriment to the consumer (Art. 237 para 1 of the LOA).*

[882] *HR: Pursuant to Article 430 of the COA, the seller is liable only for these rights of third persons in the sold thing* ***which the buyer was not aware nor should have been aware of.***

[883] *In PT, it is a legal defect, but also, according to Article 905 CC, if the right transferred is subject to any encumbrances or limitations that exceed the normal limits inherent to rights in the same category, the contract can be void due to error or fraud, provided the legal requirements for annullability are met.*

[884] *Article 515 of the Greek Civil Code: "…However a seller shall be responsible for existing mortgages or pre-notices of mortgage or attachments or pledges even if the purchaser had knowledge of their existence".*

[885] *In RO, The parties may agree on contractual terms derogating from these rules, except from the following terms which are void: terms exonerating the seller for eviction caused by his malicious conduct or fraud and terms exonerating the seller from his duty to refund the price when the buyer have not expressly taken the risks of eviction.*

	event of consumer sale, the seller is liable for any lack of conformity of a thing which becomes apparent within two years as of the date of delivery of the thing to the purchaser." There are rules applicable only to consumers. But there are no special rules on guarantee against eviction. ○ **<u>In ES</u>**, in ordinary contract law, the parties can only exclude the guarantee against eviction if the seller acts in good faith (art. 1475.3, 1476 SpCC). However, since new art. 59bis RCPA (which implements art. 2.5 Dir. 2011/83) has applied, the legal guarantee of the SpCC cannot apply in a B2C contract. Accordingly, when	**<u>derogate from the protection of the law against the legal defect.</u>** • Indeed, if the buyer is unaware of the right of the third party, this rule is mandatory in these MS: BG, CZ, DK[886], EL, IE, MT[887], HU, NL, PL, PT, LT, SI, RO.	

[886] *Cf study about CESL*
[887] *MT: The peaceful possession guarantee is not mandatory in the civil code (cf art. 1410), but it cannot be derogated from only to the detriment of the consumer.*

	the seller sells to a consumer a thing that is not part of his/her assets there will be a non-performance that shall equate to a lack of conformity. In addition, the rules on conformity cannot be excluded to the detriment of the consumer (art. 10; art. 86.1 RCPA). Nonetheless, rules on conformity in the RCPA do not contemplate the so-called "juridical vices": the text only deals with material defects. **- Protection against terms that exclude the guarantee against eviction, or legal defects** • **In these MS, it is possible in principle to derogate from the protection against eviction or legal defects, but not in B2C contracts:** AT, DE, NL, HU, FR, PL		

	○ **In NL**, article 7:15(1) BW requires the seller to transfer the ownership of the goods free of all special charges and encumbrances that the buyer has not specifically accepted. Article 7:16 BW adds that when an action for eviction is brought against the buyer or an action for the recognition of a right which should not have encumbered the thing, the seller must be joined in the action in order to defend the interests of the buyer. These rules apply to all sales contracts. But there is a special rule, which forbids to derogate from this rules only to the detriment of the consumer (Article 7:6(1) BW) ○ **In HU**: Section 6:157 [Lack of conformity] of the Act V of 2013 on the Civil Code provides that "(2) Any clause of a contract that involves a		

	consumer and a business party that derogates from the provisions of this Chapter on warranties and commercial guarantees to the detriment of the consumer shall be null and void". ○ **In FR**, even if it is possible to derogate from the guarantee against eviction in B2B contracts (except for the guarantee against the personal act of the seller), it cannot be derogated from in B2C contracts because it would be an unfair term. ○ **In AT**, goods do not necessarily have to be sold free of any rights. It is only required that they conform to what has been agreed in the contract. Thus, if it has been assured to the consumer that the good is free of any defect, the consumer's guarantee remedies (§922 to §933 ABGB) cannot		

	be waived or curtailed before the consumer has knowledge of the defect pursuant to §9 KSchG. ○ **In DE**, according to § 435 BGB, the good is free of legal defects if third parties, in relation to the good, can assert either no rights, or only the rights taken over in the purchase agreement, against the buyer[877]. The above rules protect contracting parties in general. The parties can only derogate from these rules in favour of the consumer (§ 475 (1) BGB).		

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q32 – Passing of risks			
Excluding article 20 of the directive 2011/83/UE, is there	-**In some MS, the risk passes to the consumer when the**		In most MS, there is no other rules than those provided but article 20 of the

[877] *DE: But if the good sold is not the seller's property it does not inhibit the validity of the sales contract. The rights of third parties can be agreed on in the sales contract. If such a tolerance is agreed, the buyer cannot take action against the seller even if the seller makes unexpected use of said right.*

rule about passing of risks to the consumer, when in sales online or at a distance, the goods have to be dispatched to the consumer? **Are such rules specifically aimed to protect consumers or do they protect contracting parties in general? Can they be derogated from by agreement?**	**<u>good is delivered to the consumer, whether the carriage is organised by the seller or the buyer</u>**: FI, SE, SK • **<u>In SE</u>**, According to the second paragraph of Section 8 of the Consumer Sales Act (1990:932) the risk passes to the buyer when the goods are delivered, regardless of whether the carriage was supplied or not. This rule is specifically aimed at consumer protection, it is consumer friendly, in comparison with the rules of the Sale of Goods Act (applicable to non-B2C-relations). The rule cannot be derogated from to the detriment of the consumer. • **<u>In SK</u>**, the fact that the carriage was not provided by the seller does not modify the moment when the risk is transferred (CC section 594). Other agreements		directive 2011/83/UE: AT, BE, BG, CY, CZ, DE, DK, EE[891], EL, ES, FR, HR, HU, LT, NL, PL, PT, RO[892], SI, RU -In some MS the fact that the carriage was not provided by the seller **<u>does not modify the moment when the risk is transferred</u>**: IE, IT, LU, LV, MT

[891] *In EE, the risk of accidental loss of or damage to a thing sold in transit passes to the buyer retroactively as of the thing being handed over to the first carrier. This does not apply when a seller, at the time of entry into a contract of sale, is aware or ought to be aware that the thing is lost or has been damaged and does not notify the buyer thereof (Art. 214 para 3 of the LOA).*

[892] *RO: cf Study about CESL*

	less favourable to the consumer are forbidden.		
To compare: « In domestic law, is there a rule governing B2C contracts (not online or at a distance) and which, in cases when the goods do not have to be dispatched to the consumer, defines the moment when the risk is transferred? Are such rules specifically aimed to protect consumers or do they protect contracting parties in general? Can they be derogated from by agreement?	-**In some MS, there are rules especially made for the consumer, and that cannot be derogated from by agreement**: BE, CZ, FI, SE • **In BE,** article VI.44 Economic Code states that the risk of the goods passes to the consumer when the consumer (or a third party, not the transporter) receives the goods into possession. It is specifically aimed to protect the consumer. Additionally, no derogation is allowed. • **In CZ**, there is a rule especially made for the consumer, which cannot be derogated from by an agreement**. In the case of a self-service sale,** a consumer acquires the right of ownership in a **thing upon the payment of the**		In many MS, in ordinary law, it is possible to derogate from the rules about the passing of risk. They stipulate that the statutory provisions on the passing of risk apply **unless the parties agree otherwise:** AT, BG, CY, DE, DK, EL, FR, IE, LT, LU, SK. Some of them provide that the passing of risk occurs at the **time of delivery** (AT[893], BG, DE, DK, EL, ES (in ordinary law), LT, NL, RO[894], SI, SK), or **performance**: HU -Several MS provide that **the risk passes with ownership:** CY, FR, IE, IT, LU[895] -A few MS provide that the risk passes when new **physical possession occurs:** HR, PL -or at the time of the conclusion of the contract: LV -or they refer to the **moment when the goods fall within the control of the consumer**: MT[896].

[893] *AT: But when the goods are*
[894] *RO: on the one hand, the rules on the risks taken by the seller can be derogated from by agreement including in B2C contracts, in case individualized goods are sold, when the payment of the price by **instalments** has been agreed upon by the parties; on the other hand, all contractual terms having as an object or effect to oblige the consumer to fulfil his obligation of payment where the seller or supplier is not able to perform the delivery of the goods, **are void** under the provisions of Law 193/2000 on unfair terms (Annex c) and j).*
[895] *In LU, in principle ownership is transferred at the time of the agreement.*

	purchase price. Until such time, the consumer may put the thing back to its original place. **If damage is caused to a thing before the payment of the purchase price, it is compensated in accordance with the general provisions**. • **In FI**, the risk is transferred to the consumer upon delivery: CPA (38/1978) Chapter 5 Section 3 (2) and (3) and Section 6. The above-mentioned provisions are specifically aimed to protect consumers. They cannot be derogated from by agreement to the detriment of a consumer • **In SE**, According to the second paragraph of Section 8 of the Consumer Sales Act (1990:932) the risk passes to the buyer when the goods are delivered. The Consumer Sales Act is aimed at consumer protection. The rule may not be derogated from by		-**In CY**, the risk passes at the time of transfer of ownership, and ownership of the goods is transferred to the buyer at the time intended by the parties. Thus the will of the parties also has a significant role. .

[896] *Study about CESL*

	agreement to the detriment of the consumer? -**Protection of the consumer only against the terms excluding the rule which is not specifically aimed to protect the consumer**: EE • **In EE**, the risk passes at the time of delivery of the goods to the buyer. This rule can be derogated from by agreement, but not to the detriment of the consumer Art 237 §1 of the LOA).		
In domestic law, does the fact that the consumer does not perform his obligation to take delivery modify the moment when the risk is transferred? Are such rules specifically aimed to protect consumers or do they protect contracting parties in general? Can they be derogated from by agreement?	In several MS, there are specific rules on this matter. They are designed for the consumer and they cannot be derogated from by agreement: FI, SE • **In FI**, such a situation is regulated in CPA (38/1978) Chapter 5 Section 6 (1). If the consumer fails in time to fetch or take delivery of goods held available to him/her, the consumer bears the risk of the goods deteriorating owing to their inherent characteristics after the	**-In many MS the fact that the consumer does not perform the obligation to take delivery modifies the moment when the risk is transferred, and the rule, which scope is general, cannot be derogated from by agreement in B2C contracts**: DE, LT, SI. • **In DE,** According to § 300 (2) BGB, if a good designated only by class is owed, the risk passes to the obligee at the time when he is in default by not accepting	In most MS, if the consumer does not perform the obligation to take delivery, the risk passes at the time when the consumer takes physical possession of the goods, or takes the goods which have been delivered to him, or received notice from the seller. Then, the fact that the consumer does not take delivery, modifies the moment when the risk is transferred, because the risk will pass to the consumer before the delivery when he is in delay: AT, BG, CY, CZ, DK, EE, ES, FR, HR, IE, LU, NL, RO, SI, SK. But these rules can be derogated from by agreement (BG, CZ (in all other cases than self-service sales), DK, IE (the risks weigh on the party at fault, buyer or seller).

	seller has completed its obligations relating to the delivery. However, the risk passing over to the consumer is only partial, as the consumer will only bear the risk of the goods deteriorating owing to their inherent characteristics. If the goods are e.g. destroyed in a fire, the trader will bear the risk. • **In SE**, it is stipulated in the second paragraph of Section 20 of the Consumer Sales Act that, where the buyer fails, within due time, to collect or receive goods which are being held available on his behalf, the seller shall not be liable for the deterioration of the goods which occurs thereafter and which is due solely to the nature of the goods.	the good offered. The parties can only derogate from these rules in favour of the consumer -**In UK,** under s.20(2) of the Sale of Goods Act 1979, "where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault", but this provision does not apply to B2C contracts, and no corresponding provision exists on this matter for B2C contracts.	• **In AT**, the creditor does not have an obligation to take delivery (unless otherwise agreed upon). But if he does not accept a performance that conforms to the contract, he has to bear the negative consequences of the delay. Therefore, according to a number of authors, the risk is transferred to him[897]. • **In BG,** Art. 96 OCA states that where the creditor is in delay, the risk shall be taken by him. The rule may be derogated from. • **In CY**, pursuant to section 26 of the Sale of Goods Act No. 10(1)/1994 in the event of a failure by the consumer to take delivery of the goods the risk passes to the consumer. • **In CZ**, in all other cases than sales of the self-service, Czech law refers to the time of acquisition of ownership, and ownership is transferred at the time of delivery. Additionally, this rule can be derogated from by agreement. But it is also stated that a debtor bears the risk of damage to the thing incurred for

[897] *AT: in study about CESL: "If the consumer is in default of acceptance, the risk is transferred to him pursuant to § 1419 ABGB (Klicka/Reidinger in Schwimann/Kodek, ABGB Praxiskommentar[4], ABGB § 429 [1]).*"

			whatever reason for the duration of his default[898]. This rule can be derogated from. • **In EE,** § 214 (3) of the LOA states that "The risk of accidental loss of or damage to a thing also passes to the purchaser at the time when the purchaser is in delay with the performance of an act by which he or she is to facilitate the delivery of the thing, in particular if the purchaser fails to take delivery of the thing. If things with specific characteristics are sold and in the case where the purchaser is in delay, the risk of accidental loss of or damage to the things does not pass to the purchaser until the things which are the object of the contract are separated and the **purchaser is notified thereof.** " • **In ES,** as art. 66 ter RCPA (which implements art. 20 Dir. 2011/83 into Spanish consumer law) does not foresee the effects of a consumer's non-performance of his obligation to take delivery. Should Spanish general rules on obligations apply, the buyer would incur in *mora creditoris*

[898] *CZ: There are also other remedies: If the buyer is at fault by not taking delivery of the good, the seller may deposit the good at the buyer's expense in a public warehouse or with another custodian or may sell it on the buyer's account after notification. Notification is not necessary in the case of perishable items if there is no time for the notification. Furthermore, unless the buyer takes over the good within the period mentioned above, the seller is entitled to demand a storage charge, the amount of which must be laid down by a special regulation or determined by the agreement between the parties (Study about CESL).*

			and the risk pass to him/her (art. 1096.3 and 1182 SpCC). • **In FR, and LU,** the principle is that the obligation of delivering a thing is complete by the sole consent of the contracting parties. It makes the creditor the owner and places the thing at his risks from the time when it should have been delivered, although the handing over has not been made, **unless the debtor has been given notice to deliver; in which case, the thing remains at the risk of the latter.** • • **In RO**, if the consumer fails to collect or take delivery of goods made available to him/her in time, the consumer does not automatically bear the risk of the goods. In that case, the seller has to notify the consumer that he has to take the goods, and the risk passes at the time of the notice. • **In SI,** Article 437 of the CO provides that if goods were not delivered because the buyer was in delay the risk shall be transferred to the buyer when the buyer became delayed. When the subject of the contract are goods of a specific type the risk shall be transferred to a buyer in delay if the seller separated goods that

			were clearly intended for delivery and sent the buyer notification. When the nature of goods of a specific type is such that the seller cannot separate a part thereof it shall suffice if the seller does everything necessary for the buyer to be able to take them and sends the buyer notification about it. **<u>No modification</u>**: In some MS the fact that the consumer does not perform the obligation to take delivery does not modify the moment when the risk is transferred: IT, HU, PT, PL Some MS have no such provision, what is finally the same: BE, EL, LV, MT

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
<u>Q33- Other mandatory rules</u>			
Are there other rules concerning the period of performance of the contract that can concern B2C sales at a distance? Are such rules specifically aimed to protect consumers or do they protect contracting parties in general? Can they be derogated from by agreement?	There are a few others rules which are made for the consumers and which cannot be derogated from, but they are special rules which concern one MS or another. Therefore, no trends can be detected. • **<u>obligation to pay for a quote</u>**	There is a few others rules which are not made for the consumers and which cannot be derogated from, but they are rules which concern one MS or another. Then, there are no guidelines. • **<u>promise which can</u>**	A few MS have other rules but they can be derogated from by agreement: IE, LT • **<u>In IE:</u>** at common law a contract for which no time for performance has been agreed must be **<u>performed with a "reasonable time".</u>** Where a time has been specified, it is a matter of construction as to whether time is

	○ **In AT**, the consumer may have to pay for a quote only if the consumer is notified beforehand of the obligation to do so. • **protection against promises of a prize** ○ **In AT:** article § 5c KSchG provides that any entrepreneurs who send promises of a prize or similar notifications to certain consumers and by the design of such notifications cause an impression with the consumer that he has won a certain prize **shall deliver such prize to the consumer**; such prize may also be claimed through court action. ○ **In FR**, it has been decided by case law, that if a trader promises that the consumer has won at a prize draw, and that is not true, the trader can be sentenced to deliver the thing that the consumer thinks he	**be fulfilled in multiple ways** ○ **In AT**: § 906 ABGB provides that if the promise can be fulfilled in multiple ways, the choice is with the debtor. However, he cannot change by himself the choice once made; § 907 ABGB adds that if a contract is concluded with the express reservation of a choice, and the choice is frustrated by the accidental destruction of one or several items of property from which the choice was to have been made, the party who has the choice is no longer bound by the contract. A term which exclude these rules could be considered as unfair in B2C contracts • **Place of performance**	"of the essence". If it is, then a failure to perform on time allows the other party to rescind the contract. Otherwise, he is entitled only to damages for delay. • **In LT,** article 6.201 of the Civil Code states that the parties shall be bound to perform the contract simultaneously unless otherwise provided for by laws or the contract, or determined by its nature or circumstances.

	has won, on the basis of a quasi-contract • **Early settlement of a monetary debt in the case of consumer contracts** ○ **In HU**, Act V of 2013 on the Civil Code Section 6:131 provides that in B2C contracts any term excluding the early settlement of a monetary debt, and any term imposing extra charges on the consumer apart from the costs directly related to early settlement shall be null and void. • **Complaint of the consumer** ○ **In SK:** ActPC section 18 provides some rules to protect the consumer who wants to fill a complaint. For example, he trader is obliged to duly **inform the consumer** about the conditions for, and method of, filing	**of an obligation to pay money** ○ **In AT**, § 907a ABGB provides that a money debt is to be performed at the residence or office of the creditor by handing over the sum there or transferring it to a bank account made known to the creditor A term which exclude this rule could be considered as unfair in B2C contracts • **time of performance** ○ **In LT,** article 6.319 of the Civil Code provides that the seller is bound to deliver the things at the time provided in the contract of purchase-sale. Where the time of delivery is not specified in the contract, the things are bound to be delivered	

	a complaint, including the information on where a complaint can be submitted and on the performance of warranty repairs. The rules of complaint procedure must be displayed on a visible place accessible to the consumer. **The trader is obliged to accept a complaint in any establishment** where the complaint can be accepted with regard to the products sold or services provided, or at a designated place; this does not apply if a different person is designated to perform the repair. **The trader, or an employee designated by him or another person is obliged to inform the consumer on his rights.** Upon the submission of a	within a reasonable time after the conclusion of the contract of purchase-sale. • **termination of the contract when it is divisible** ○ **In AT**, § 918 ABGB states that if a contract for consideration is not performed by one of the parties in due time, at the proper place or in the agreed manner, the other party may accept performance of the contract and damages for the delay, or he may, after fixing a period of grace for the performance, rescind the contract. If the performance is divisible for both parties, rescission may be declared with respect to both the performed and the unperformed parts	

	complaint, the trader is obliged to provide the consumer with **a receipt**. The right to damages shall not be affected by complaint handling.	of the contract. A term which exclude this rule could be considered as unfair in B2C contracts • **consequences of wilful misconduct:** ○ **In ES,** art. 1102 SpCC prohibits waiving the action to enforce liability for wilful misconduct. • **duty of diligence** ○ **In ES,** SpCC states that when non-performance is caused by negligence, damages can be moderated –but not excluded - by courts According to prevailing doctrinal views, parties cannot completely exclude the duty of diligence in the performance of their obligations, since it would mean to deny the very concept of obligation.	

		• **Obligor's claim of enrichment** ○ **In HU**, Section 6:167 of civil code, provides that where the replacement of a thing is effected after the majority of the warranty period is consumed on account of suspension of the period of limitation, and this results in considerable increase in value for the benefit of the obligee, the obligor shall have the right **to demand compensation for such enrichment**. This provision shall not apply in contracts that involve a consumer and a business party. In the event of replacement or withdrawal, the obligee shall not be liable to	

		compensate for the loss in value if it has occurred in consequence of proper use. • **obligation to use the most economical means in the performance of the contract** o It is provided in **LT**, as a general rule. • **the *exceptio non adimpleti contractus*** o Especially **in PT**, article 428 of the civil code states that if bilateral contracts do not establish different deadlines governing compliance with considerations, each party have the ability to refuse his or her consideration until the other party comply with theirs, or propose to comply with it simultaneously. o It is the same **in BG.** • **Obligations to use**	

		<u>best efforts and obligations to achieve a particular result</u> ○ It is provided **<u>in RO</u>** as a general rule. • **<u>Determination of the quality of performance</u>** ○ **<u>In RO</u>**, art. 1486 Civil code, states that "if the object of the obligation is represented by movable goods determined by their species, the debtor may individualize the goods which are subject to the delivery. The quality of the goods delivered must be at least equal to the average performance taken into consideration the type of the operation."	
Are there other rules concerning the period of performance in electronic	For most MS, there are no other rules than those which have implemented the directive		**<u>-Time-limit of the performance</u>** • **<u>In FR</u>**, article 138-1 of the

contracts that can concern B2C sales at a distance? (excluding directive 2011/83/UE) Are such rules specifically aimed to protect consumers or do they protect contracting parties in general? Can they be derogated from by agreement?	2011/83/UE. For a few MS, there are some other rules: • **Obligation to give information of the time within the trader will perform his obligation:** ○ **In BE**, the trader has the obligation to give certain information to the consumer, including **the time limit within which he (the trader) will perform** its contractual obligations. This is provided in article VI.45 §1 7° CEL and is mandatory law. However it is almost the same as in directive 2011/83/UE. In this directive, article 5 (Information requirements for contracts other than distance or off-premises contracts) states that "Before the consumer is bound		consumer code states that "The professional performs on the date or within the period specified to the consumer, in accordance with Article 3 of L. 111-1, **unless the parties have agreed otherwise**. In the absence of indication or agreement as to the date of delivery or performance, the professional performs without undue delay and not later than thirty days after the conclusion of the contract." French law does not mention "where applicable" (see column below). • **In LT,** the seller must deliver the goods by transferring them to the buyer and by transferring the title to them no later than within **thirty days** after the conclusion of the contract, except if parties agree otherwise.

		by a contract other than a distance or an off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner, if that information is not already apparent from the context:… d) **where applicable**, the arrangements for … the time by which the trader undertakes to deliver the goods or to perform the service, …". What does "**where applicable**" mean? Art. 18 (Delivery) states "1. Unless the parties have agreed otherwise on the time of delivery, the trader shall deliver the goods by transferring the physical possession		

	or control of the goods to the consumer without undue delay, but not later than 30 days from the conclusion of the contract". Belgian law does not mention "where applicable". • **Contracted goods or services unavailable** ○ **In ES,** if the contracted goods or services are unavailable, when the consumer has been expressly informed of such an eventuality, the entrepreneur shall be able to supply goods or services with similar characteristics and equal or superior quality, at the same price. In this case, consumers shall be able to exercise their rights of withdrawal and termination under the same terms as would apply to the goods or services		

	originally requested, without the direct costs of returning these goods or services being enforceable on them. The consumer can accept the other goods, but it cannot be derogated from this text in advance.		

D/ Termination and after termination

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q 34- Mandatory rules about termination			
Are there rules concerning the period of termination of the contract based on ordinary law that can concern B2C sales at a distance? Are such rules specifically aimed to protect consumers or do they protect contract parties generally? Can they be derogated from by agreement?	A few MS have such rules concerning only the consumers: • **Rules about the right to terminate in sales concluded for an unlimited period (for example energy):** ○ **In AT**, contracts whereby the trader undertakes recurring delivery of movable tangible	A few MS have such rules concerning all the parties: • **Rules about fundamental non performance** ○ **In ES,** in order to terminate the contract non-performance must be essential. ○ **In IT,** the innocent party cannot claim	In some MS, there are a lot of rules about termination, but they can be derogated from by agreement: CZ, DE, IE, LT • **In CZ** for example, if a contract has been concluded for a definite period without a serious reason in a way that it **obliges an individual for his entire life**, or obliges anyone for more than ten years, extinction of the obligation may be claimed after ten years

	assets, including energy, or the recurring provision of services, and the consumer undertakes to make recurring money payments, and which are concluded for an unlimited period or a period exceeding one year, **may be terminated by the consumer on giving a two-month notice**, expiring at the end of the first year and subsequently at the end of any half-year. ○ **In NL**, termination of contracts for an undetermined period of time may be possible outside non-performance cases. Whereas the consumer may terminate at will, **the seller may then only invoke**	the termination unless the counterparty's breach is serious. • **Rules about termination by notice or unilaterally** ○ **In FR**, the law[901] does not allow the consumer to terminate the contract by notice. But case law has admitted such a termination, at the risk of the one who terminates the contract ○ It is the same **in LU**. ○ **In RO**, unilateral termination of a contract occurs by the giving of notice, in the cases in which the right to unilateral termination has been provided for by a resolution clause, or when the debtor is considered by a statutory	from its creation. A court shall also extinguish an obligation if the circumstances on which the parties apparently relied when the obligation was created have changed to such an extent that the obligor cannot be reasonably required to be further bound by the contract. If a party waives its right to claim extinction of an obligation in advance, it is disregarded. This does not apply if a legal person is the debtor. • **In DE**, if a period of time has not been agreed for the exercise of the contractual right of termination (revocation), then the other party may specify a **reasonable period** of time within which the person entitled to terminate (revoke) the contract must exercise that right • **In IE,** the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to

[901] *FR: The French project of contract law allows the party to terminate the contract by notice. Beforehand, the party must put the debtor in default to perform to perform within a reasonable time (Article 1226 of the French project of contract law). Such rule could apply in B2C sales at a distance.*

	termination in certain conditions, notice periods must be taken into account, and in some cases even court approval must be obtained. Apart from serious reasons justifying the immediate termination of the contract, the seller must give the other party a reasonable notice period[899]. These rules can be applied in a long-term consumer sales contract, such as a contract for the supply of energy. In addition, some terms which deprive the consumer of his or her rights to terminate are unfair[900]:	provision to be automatically in delay for performance, or when the debtor did not perform within the additional time for performance fixed in the notice. The notice of unilateral termination shall be given during the period fixed by law for the prescription of the action in the judicial termination of the contract." • **Rules about time for payment** ○ **In BG**, in a sale of movable property the seller may cancel the contract if the buyer does not pay the price within the time limit, where according to the contract the	the seller that he has rejected them. • **In LT**, in case of a delay in the performance, the aggrieved party may dissolve the contract if the other party fails to perform the contract within the additional period fixed. In addition, the aggrieved party may dissolve the contract unilaterally without bringing an action. The party shall be bound to give the other party notice of dissolution in advance within the time-limit established by the contract; if the contract does not indicate such time-limit, the notice of dissolution must be given within thirty days. And if the seller has refused to deliver the goods or if delivery within the term indicated in the contract has an essential significance taking into account all circumstances of conclusion of the contract or if before conclusion of the contract the buyer notified the seller that the delivery of goods within the term indicated in the contract has an essential significance to him. In these cases if the seller fails to

[899] *NL: See for instance HR 21 June 1991, NJ 1991, 742 (Mattel/Borka), where the Supreme Court accepted this (in a commercial case).*

[900] *NL: Where the contract pertains to the regular delivery of goods (electricity included) or the regular supply of services, a term leading to the tacit prolongation of the contract is deemed to be unfair unless the consumer has the possibility to terminate the contract at will while respecting a notice period of one or three months, depending of the nature of the contract;*

-A standard term that requires the notice of termination of a contract for the regular supply of goods or services to be received at a specific moment is deemed to be unfair (blacklist, Article 6:236 under r BW).

-A standard term leading to the prolongation of an introduction subscription for a limited period for the regular delivery of newspapers, magazines and reviews is deemed to be unfair

	• **<u>Fundamental breach of contract of sale by seller</u>** ○ **<u>In EE</u>**, the seller is deemed to be in fundamental breach of a contract of sale if, inter alia, the repair or substitution of a thing is not possible or fails, or if the seller refuses to repair or substitute a thing without good reason or fails to repair or substitute a thing within a reasonable period of time after the seller is notified of the lack of conformity. **In a consumer sale**, **any unreasonable inconvenience caused to the purchaser by the repair or substitution of a thing is also deemed to be a fundamental breach of contract**	transfer of ownership must be effected at the time of payment or after the payment of the price; or if the buyer towards whom the term of payment of the price has not expired yet, does not appear or does not accept within the time limit the property offered to him according to the contract. In both cases he must notify the buyer about the cancellation of the contract within 7 days as of the day of expiration of the term. • **<u>Rule about partial performance</u>** ○ **<u>In IT,</u>** unless the creditor has a serious interest in the total performance of the	deliver the goods within the term indicated in the contract or within the term indicated in Part 2 of this Article, the buyer shall be entitled to unilaterally terminate the contract with immediate effect.

(blacklist, Article 6:236 under s BW).
-A standard term that fixes an original contract period of more than one year for a contract for the regular supply of goods or services is presumed to be unfair unless the consumer has the right to give notice of termination of the contract after one year (grey list, Article 6:237 under k BW).

	by the seller. This is a specific rule applicable only to consumer contracts and which cannot be derogated from by an agreement in the detriment to the consumer (Art. 237 para 1 of the LOA). • **Notice period** ○ **In LU**, both the professional and the consumer must respect a reasonable period of notice. But the parties to a contract are free to stipulate in their agreement a specific notice period. But in a contract concluded between a supplier and a consumer, Luxembourg case law considers void for violation of public order, the termination notice clause which has the effect of seriously affecting the normal right of a party to unilaterally terminate a permanent contract • **Additional period** ○ **In PT**, if the supplier	obligations, he/she is required to accept partial performance. • **Rules on impossibility to perform** ○ **In PT**, the obligation is extinguished when consideration becomes impossible through no fault of the debtor (objective impossibility or subjective impossibility (intuitus personae). These rules are aimed to protect contract parties generally and cannot be derogated by agreement. • **Additional time to perform** ○ **In RO,** the non-performing debtor may be given notice, fixing an additional time for performance, according to the nature of the obligation and the	

	does not deliver the goods within the additional delivery date given by the consumer, the consumer has the right to terminate the contract.	particular circumstances. Should the notice not stipulate an additional time for performance, the debtor may complete performance within a reasonable time, from the date on which he had been put on notice. • **Insignificant non performance** ○ **In SI**, art. 110 of the CO provides that it shall not be possible to withdraw from a contract owing to the non-performance of an insignificant part of an obligation.	
Especially, is there in your law, a mandatory rule which provides that the termination of the contract has to be done in good faith?		**- In most MS, it is not explicitly mentioned for the termination of the contract but such a rule follows from general provision:** BG, CZ , EE[902], ES, FR[903] , HR, HU, IT, LT, LV, NL, PT, RO, SI, SK.	

[902] *-In EE, General rule of good faith principle applies to all contracts and contractual relations, including termination (Art. 6 of the LOA). Estonian court practice has accepted the principle of prohibition of abuse of rights derived from the good faith principle which is applied in cases where the termination of the contract is against good faith*

[903] *-In FR, according to article 1134, paragraph 3 of the Civil code, contracts must be performed in good faith. This can apply for termination, but moreover, the Courts mention the abuse of the right to terminate, which is almost the same.*

		-**In some MS, there is no reference to good faith for termination of the contract:** BE, CY, EL, FI, IE, MT, PL, SE, UK -**But in DE**, according to § 323 (5) BGB termination (revocation) is excluded if the creditor is solely or very predominantly responsible for the circumstance that would entitle him to terminate (revoke) the contract or if the circumstance for which the obligor is not responsible occurs at a time when the creditor is in default of acceptance – which is almost good faith.	
Are there rules concerning the period of termination of electronic contracts that can concern B2C sales at a distance? (excluding directive 2011/83/UE) Are such rules specifically aimed to protect consumers or do they protect contracting parties in general? Can they be derogated from by agreement?		**In EE** there are general rules about sales at a distance: they provide that the declaration of termination shall be done within a reasonable period of time (concept of reasonableness is defined in the Art. 7 of the LOA) after: 1) the party becomes or should have become aware of a fundamental breach of the contract; 2) the additional term for performance granted expire (Art. 118 para 1 of the LOA).	

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q 35 -Periods of prescription			
In the domestic laws**,** what is the period of prescription applicable to the obligation of the consumer? Do any of the above rules specifically aim to protect consumers or do they protect contract parties generally? Can they be derogated from?	-**Specific limitation period to protect the consumer** • In some MS, there is a **special period of prescription for the claim against the consumer**. To protect him or her, the period is not too long. ○ **In FR,** under **article L. 137-2 of the Consumer code,** the claim which are initiated by business for the goods or services they provide to consumers are prescribed by **two years**. In addition, in a contract between a supplier and a consumer, the period of prescription cannot be shortened by agreement nor be lengthened by agreement, and an agreement cannot add to causes of suspension or interruption thereof. ○ **In NL**, **Article 7:28 BW** provides that the seller's right to	- For some MS, the general rules apply to the limitation period of the claim against the consumer. • **For some of them the** period of prescription **cannot be** extended**, but can be shortened, because it is favourable to the weak party:** ○ **In AT**, it will be **three years,** especially in sales contracts where the claim of the trader results from a delivery of objects (§ 1486 no. 1 ABGB). But the parties may only shorten prescription periods and waive their exception (because of prescription) not in advance. **So they cannot lengthen the period of prescription of prescription and they cannot derogate from by agreement to these rules in advance.** ○ **In BE,** the remedy of the consumer prescribes after a period of **one year** after the day	- In some MS, the rules about prescription can be derogated from by agreement. ○ **In ES**, According to SpCC the prescription period is 15 years (art. 1964 SpCC). By contrast, **Catalan law does provide a specific prescription period for consumer sales, which amounts to 3 years** (art. 121-21 c CatCC[905]). But the

[905] *ES:* ***Art. 121-21 of Catalan Civil Code [= CatCC]*** *"The following prescribe after three years:[…]c) Claims for payment of price in consumer sales."*

	claim the sales price prescribes by the lapse of **two years** after payment of the price has become due. The parties may not derogate from these rules to the detriment of the consumer, cf. Article 7:6(1) BW. So the parties can only shorten the period of prescription of the sales price. ○ **In RO**, the period of prescription applicable to the obligation of the consumer is **one year** for the date on which the payment of the price was due. Agreements may modify prescription periods, if they are concluded before the prescription period has started to run. But all agreements which shorten or lengthen in advance prescription periods are void. In B2C contracts, contractual terms which modify the period of prescription or the starting point for the period of prescription are prohibited in B2C contracts. ○ **In SE,** the limitation period for claim against the consumer is **three years.** In general, prescription periods may be modified by agreements. However, pursuant to Section 12 of the Act on Prescription it cannot be agreed that the	the consumer has discovered the default (article 1649quater, §3 CC). In Belgian law, it is **only possible to shorten the prescription period by agreement.** Since the prescription protects to legal certainty, it is not possible to lengthen the prescription period. ○ **In DK**, the limitation period is **three years**. But the law may **not by prior agreement be derogated from to the detriment of the debtor.** ○ **In CZ**, the length of a limitation period is **three years**. A right may be asserted for the first time once **the entitled person became aware of the circumstances decisive for the start** of the limitation period or when he should and could have learnt thereof. It cannot be derogated from by agreement, against the weak party. If a shorter or longer limitation period is stipulated **to the detriment of the weaker party, such a stipulation is disregarded**. ○ **In LU,** the limitation period is 30 years. Luxembourg law excludes the possibility for the parties to extend in advance contractually the limitation period or waive prescription contractually. **A**	agreements shortening or lengthening in advance prescription periods shall be permitted. ○ **In HU**, it is 5 years. Parties can deviate in any direction the only limit is that they cannot contract out prescription entirely. ○ **In IE,** it is 6 years from the date of breach resulting in loss. In principle, agreements can shorten or lengthen in advance prescription periods[906].

[906] *IE: Shorter periods may be construed contra proferentem by the courts. But here, shorten period will be favourable to the consumer.*

	prescription period shall be longer than three years where consumer obligations are concerned. • **Protection of the consumer only against the terms which exclude the rule which is not specifically aimed to protect the consumer**: In one MS, the prescription period is not special for the claim against the consumer. But the protection of the consumer exists only against the terms which exclude the general rule. ○ **In EE**, the limitation period for a claim arising from a transaction shall be three years (Art. 146 para 1 of the GPCCA). The general limitation period of a claim **begins when the claim falls due** unless otherwise provided by law. **A claim falls due** at the moment when the entitled person obtains the right to claim performance of the obligation corresponding to the claim (Art. 147 para 2 of the GPCCA). **These rules cannot be derogated from by an agreement in the detriment to the consumer** (Art. 237	**shortening of the period by agreement is in principle accepted by case law.** A term which shorten the limitation period for the trader 's claim will be favourable for the consumer. • For other MS, the rule cannot be derogated from at all. The period can be: ○ two years: PT ○ three years: FI, SK ○ five years: BG[904], EL, SI ○ six years: CY, UK ○ ten years: IT, PL ○ In MT, it depends. It can be 12,18 or 24 months. But it cannot be derogated from by agreement. • For one MS, the possibility of derogation is only restricted: ○ **In DE**, it is **3 years** from the end of the year in which the claim arose and the debtor obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence. Generally, agreements may modify prescription periods, **but in sales contracts by standard terms, it is restricted** by § 309 No. 8 b)	

[904] *A shorter prescription period – 3 years (Art. 111 OCA) can apply in sale contract, to claims for compensation and penalty from non-performed contracts. The starting point is the moment when the obligation has become due.*

	para 1 of the LOA).	ff) BGB. This text provides that **a term is ineffective especially if the prescription period of less than one year reckoned from the beginning of the statutory prescription period is attained**.	
In the domestic laws, **what is the period of prescription applicable to the obligation of the trader?**	**Claim for warranty: see Q10**		
	Other claims		
	- **Protection of the consumer only against the terms excluding the general rule** : • **In CY**, Section 34(2) of The Consumers Rights Law No. 133(1)/2013 provides that any contractual terms which abolish or restrict, directly or indirectly the rights of the consumer are not binding on the consumer. So, **any agreement which modifies the prescription period by agreement and the shortening or lengthening in advance of prescription periods will not bind the consumer**. It is the same rule than in ordinary law, but it is provided by a special text of consumer law. • **In DK**, the limitation period is three years. Section 26.2 provides "The law **may not by prior**	- In some MS, the rules about prescription of the claim against the trader are the general rules, but they cannot be derogated from by agreement in all the contracts: • For some of them, the limitation period is: o Three years: CZ, PL, SK o five years: BG, EL, SI o six years: UK o ten years: IT o twenty years: PT	- In some MS, the parties can in principle derogate from by agreement to the rules about prescription: • **In IE**, it is 6 years from the date of breach resulting in loss. In principle, agreements can shorten or lengthen in advance prescription periods. (But shorter periods may be construed *contra proferentem* by the courts). • **In HU,** when it is another claim than a claim about

	<u>agreement be derogated from to the detriment of the creditor (consumer)</u> when the creditor acts primarily outside his profession and the debtor is a trader who is acting in his profession." Finally, section 26.3 provides: "The trader has the burden of proving that an agreement is not covered by paragraph 2". • **<u>In EE,</u>** the limitation period for a claim arising from a transaction shall be three years (Art. 146 para 1 of the GPCCA). This general rule **<u>cannot be derogated from by an agreement in the detriment to the consumer</u>** (Art. 237 para 1 of the LOA). • **<u>In FR</u>**, the period of prescription applicable to the obligation of the trader is 5 years. But, in a contract between a supplier and a consumer, the period of prescription **<u>cannot be shortened by agreement nor be lengthened by agreement.</u>** And an agreement cannot add to causes of suspension or interruption thereof (Article L. 137-1 of the Consumer code). In addition, article L 211-17 of the Consumer Code provides that any agreement between the seller and the buyer which was entered into prior to the latter making a claim and which directly or indirectly nullifies or limits the rights ensuing		warranty, the general rules apply and the time period is five years, and parties can deviate in any direction the only limit is that they cannot contract out prescription entirely. • **<u>In SE,</u>** under general rules of prescription, the limitation period for a claim against the trader is ten years. This rule can be derogated from by agreement.

	from the present chapter is deemed not to exist. • **In LT**, the limitation period is ten years, from the day on which the right to bring an action may be enforced. In principle, general prescription periods cannot be changed; however it is possible to agree in a contract on different prescription terms for the filling of claims regarding the defects of the things sold and claims connected with defects in the results of the work. Anyway, in B2C contracts, **a term which excludes or hinders the consumer's right to bring action or exercise any other remedy, would be unfair**[907]. • **In LU,** the limitation period is 30 years. A conventional abbreviation of limitation is in principle accepted by case law. But in B2C contracts, the provisions requiring the consumer an unusually delay short to make claims to the professional are **always unfair**[908]. • **In RO**, for the buyer's action requesting specific performance or contract termination for non-performance, the prescription period is **3 years** from the date when the performance of the		

[907] *Cf Study about CESL*

[908] *LU: For instance, "(...) The clause providing that any action on hidden defects has to be started within twenty days of its finding or its revelation under penalty of foreclosure was sanctioned on the basis of this article": F. Coustance, Unfair terms in Luxembourg: inventory of the legislation and its implementation, ACE, Kluwer, 2012/5, page 8; about Trib Arr 18 February 2011, No. 199 /.. 11*

	obligation was due. **Agreements may modify prescription periods, if they are concluded <u>before</u>** the prescription period has started to run. **All agreements which shorten or lengthen <u>in advance</u> prescription periods are <u>void. In B2C contracts,</u>** contractual terms which <u>modify the period of prescription or the starting point</u> for the period of prescription **are prohibited <u>in B2C contracts.</u>**		

	Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
<u>Q 36 – Restitution</u>			
In the domestic laws, **can the consumer be required to <u>return the fruits</u> due to avoidance or termination?** Are such rules specifically aimed	**<u>- In one MS, the consumer is not obliged to return the fruits of the goods</u>**: EE • **<u>in EE</u>**: **<u>in case of withdrawal</u>** from consumer distance	**<u>- In many MS the obligation of return includes the fruits and this rule cannot be derogated from</u>**: BG, DE[909], HR, HU, LU, SI, SE. **<u>- In several MS, all the fruits have to be returned only if the person has not acted in good</u>**	- **<u>In some MS, the obligation of return includes the fruits, but it can be derogated from</u>**: AT[911], EL, FI, IE, LV **<u>- In one MS, the obligation of return includes the fruits only if the buyer is in bad faith, but it can be derogated from</u>**: PT **<u>- In several MS, the consumer cannot be required to return the fruits due to avoidance or termination</u>: MT, PL, UK**

[909] *DE: Such a duty does, however, not exist in the context of cure in consumer sales contracts, § 474 (5) BGB (see Q8)*

to protect consumers or do they protect contract parties generally? Can they be derogated from by agreement? (regardless the case of withdrawal of the consumer: see directive 2011/83/UE)	contracts, off-premises contracts and distance contracts concluded by electronic means there is no obligation to return fruits (Art.-s § 493, § 562). This is not expressly provided in the directive 2011/83, but the time for withdrawal is so short, that maybe it is a theoretical hypothesis - **In one MS, a special rule made for the consumers and which cannot be derogated from provides that the consumer has to return the fruits of**	**faith, and it cannot be derogated from**: BE, CZ[910], ES, FR, IT, LT, RO, SI, SK.	• **In PL**, the buyer acquires the ownership of the natural profits that were separated from the item during the time of his possession, and retains the accrued civil profits if they became due and payable during that time. • **In UK**, generally, when a contract is terminated and the consumer is able to return everything he received, then he is entitled to a full refund • **In DK**: **generally**, but it is a doctrinal opinion

[911] *AT:* ***within the limits of § 879 (3) ABGB.***

[910] *CZ: The restitution would be realized in the regime of* ***unjust enrichment****, exactly according to the articles 3000 or 3003 and 3004 of Civil code.: Section 3004 "(1) An enriched person who did not act in good faith shall make restitution of the entire enrichment which he acquired,* ***including the fruits and revenues****;…"*

	the good in this case: SE • **In SE**, pursuant to the first paragraph of Section 44 of the Consumer Sales Act (1990:932), the consumer shall, where the contract is terminated, deliver up any profit which he has received from the goods. **- The consumer can be protected against a term which exclude to his detriment the general rule about restitution**: NL • **In NL**, all the fruits have to be returned only if the person has not acted in good faith. The parties cannot derogate from these provisions to the detriment of the consumer in so far as they		

	pertain to the consumer's rights for non-performance by the seller (Article 7:6(1) BW).		
In the domestic laws, in B2C contracts, **what are the conditions for the return in monetary value? Is the return in monetary value allowed in cases where the return of what was received would cause unreasonable expense?** Are such rules specifically aimed to protect consumers or do they protect	- **The consumer can be protected against a term which exclude to his detriment the general rule about restitution:** EE, NL • **In EE,** the principle is the return in kind. The return in monetary value can be allowed only if **the return in kind is impossible, for different reasons (due to the nature of the good, the good has**	- In some MS, the principle is the return in kind. But, the return in monetary value is possible **only if the return in kind is impossible, but it cannot be derogated from:** CZ, ES, FR, LU, PT, RO - In some MS, the principle is the return in kind. The return in monetary value can be allowed **if the return in kind is impossible or would cause unreasonable expense, but this rule cannot be derogated from: HR** (doctrinal opinion for the return in value in case of unreasonable expense), LT, SI, SK • **In SI,** Article 190(1) provides that return in monetary value is allowed if the return of what was received is not possible.	-In some MS, the principle is the return in kind. But there is exceptions in the laws, but they can be derogated from: • The return in monetary value can be allowed **if the return in kind is impossible or would cause unreasonable expense, but this rule can be derogated from: AT** • The return in monetary value can be allowed only if **the return in kind is impossible:** BE, DE, FI (in case of deterioration), SE o **In FI,** termination presupposes restitution of the goods that are substantially unchanged and undiminished[913] o **In SE,** the rule is not mandatory. However a contract derogating from these principles might be considered unconscionable under Section 36 of the Contracts Act (SFS 1915:218). • The return in monetary value can be allowed **only with the consent of the other party**: **BG**[914]. **- In one MS, the principle is the return in kind, and there is no exception, unless the parties agree**

[913] *FI: In some situations, the buyer may terminate the contract even though he cannot restitute the goods substantially unchanged and undiminished. In these situations, the trader is not entitled to the monetary value. It is when (1) the goods have been deteriorated or diminished because of their inherent properties or some other reason not attributable to the buyer; (2) the goods have been deteriorated or diminished due to an act that was necessary in order to examine the conformity of the goods; (3) the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the defect because of which he wants to declare the contract avoided or require substitute delivery; or if (4) the contract is declared avoided due to a third-party claim and the buyer has, under the law, forfeited the goods or relinquished them.*

[914] *BG: None could be forced to accept something which is different from the thing due (Art. 65 OCA)*

contract parties generally? Can they be derogated from by agreement? (regardless the case of withdrawal of the consumer: see directive 2011/83)	**been** consumed or transferred, or destroyed). These rules cannot be derogated from by agreement in detriment to the consumer (Art. 237 para 1 of the LOA). • **In NL,** where the return of the original performance is not possible due to the nature of the performance, then instead the recipient of that performance is required to return the monetary value. The parties cannot derogate from these provisions to the detriment of the consumer	Moreover, demanding something that causes unreasonable expense could be contrary to the prohibition of abuse of rights found in Article 7 of the CO. **- In one MS, the principle is a return in monetary value, and it cannot be derogated from:** IT • **IT:** In Italian general contract law the return in monetary value represents the general rule. According to a provision mainly addressed to tort liability, the injured party may ask for specific performance, but the judge may refuse his/her claim if it may cause the debtor unreasonable expenses (art. 2058 It. civil code).	**otherwise:** DK - Some MS have **no specific provision on the return in monetary value**: CY, HU, IE, LV, MT, UK • **In CY**, Equity provides a remedy in cases of unjust enrichment, by using the doctrine of a constructive trust, whereby an individual who receives money or property is considered to be the trustee of it, for the plaintiff, so that all the trust remedies are available to the plaintiff as the beneficiary. • **In UK**, case-law generally has taken the view that paying a reasonable sum of money might be an alternative in such circumstances, although this would depend on the nature of the breach that gave rise to termination.

	(Article 7:6(1) BW)[912].		
In the domestic laws, **can the consumer be required <u>to pay for use of goods</u> received after avoidance or termination?** Or, is there a law which provides that it is forbidden? Are such rules specifically aimed to protect consumers or do they protect contract parties generally? Can they be derogated from by agreement? (regardless the	**<u>- Some MS prohibit that the consumer can be required to pay for use of goods received, after avoidance or termination:</u>** • **<u>In ES</u>**, in B2C contracts, the seller cannot retain part of the price to compensate the use the buyer has made of the goods; art. 21.1 RCPA (Revised Consumer Protection Act) prohibits it. • **<u>In SK,</u>** consumer	**<u>- In several MS the consumer may have to pay for the use of the goods</u>**: LT, NL, RO, SI • **<u>In LT</u>**, the consumer is required to pay for all actions which shall be determined as not necessary for the determination of the goods nature, characteristics and functioning. So if the seller can prove that **he used the good constantly or several times and such use cannot be considered as determination of the goods nature, characteristics and functioning then consumer will have to pay.** On the contrary, if the consumer has used the goods **only** to check the nature, characteristics	- **<u>In some MS the consumer may have to pay for the use of the goods, but it can be derogated from</u>**: • in any case: AT[917], FI • within the scope of unjust enrichment restitution: CZ[918]**,** EL, HR (in case of avoidance), LU • in the case of termination: DE, HR -Most MS **have no provision which <u>obliges the consumer to pay for the use of the good</u> or service received:** BG, DK, HU, IE, LV, MT, PL[919], PT (except in CRD).

[912] *NL: In the case of avoidance, Article 6:210(2) BW provides that where the return of the original performance is not possible due to the nature of the performance then instead the recipient of that performance is required to return the monetary value that this performance had at the moment of reception (a) in so far as this is reasonable, and if (b) either the recipient was enriched due to the performance, if it can be attributed to him that the performance was rendered, or if he had agreed to perform a counter obligation. In the case of contractual performance, condition (b) is almost always met. In NL, reasonable is taken into account, but not to search if the return in kind is reasonable, but to search if it is reasonable to require a return in monetary value.*

[917] *AT: except **in case of warranty where consumers do not need to pay for the use if the object is replaced, but it is European acquis***

[918] *CZ: Section 3002 2) "If a thing acquired under an onerous contract is used by a fair beneficiary and if the contract is invalid, **the fair beneficiary shall provide the other party with <u>compensation for the use</u>, but only up to the amount equal to the benefit the beneficiary gained**."*

[919] *PL: under Article 33 of the new legislation (basing on directive 2011/83/UE, the consumer is liable (in cases of withdrawal from distant and out-door contracts) for usage exceeding the normal examination of the goods*

case of withdrawal of the consumer: see directive 2011/83)	cannot be required to pay for use of goods received, after avoidance or termination. It is prohibited within the unfair terms in consumer contracts – CC section 53 (8). It cannot be derogated from by agreement. **-Some MS impose to the consumer that he or she pay for the use of the good or diminished value of the good, and it cannot be derogated from: CY, SE, UK** - • **In CY**, pursuant to section 13(3) of The Consumers Rights Law No. 133(1)/2013 it provides that	and functioning of goods then he will not have to pay (Article 6.363(8) and 6.228 (8) of the Civil Code). • **In NL**, if the consumer continues to use the goods after the moment he must seriously consider the possibility that the contract will be avoided or terminated for non-performance of either party, and as a consequence thereof the goods (further) deteriorate in quality, he may be liable for breach of the obligation to take proper care of the goods (Article 6:204 BW in the case of avoidance, and Articles 6:273 and 7:10(4) BW in the case of termination). • **In RO,** the consumer has to pay for the use of the goods, only when he or she is in bad faith[916]**.** **- Several MS do not oblige the consumer to pay for the use of the good or service received and it cannot be derogated from:** FR (case law), IT.	

[916] RO: ***Art. 1641(3) Civil code, Obligations of the debtor who acted in good-faith*** *„(3) The debtor of the restitution shall have no obligation to pay the equivalent of the use of the goods unless the use represented the main object of the contract or the goods were by their nature susceptible of rapid deterioration."* ***; Art. 1642(3) Civil code, Obligations of the debtor who acted maliciously:*** *„The debtor of the restitution shall have the obligation to pay also the equivalent of the use of the goods."*

	the consumer is liable for any diminished value of the goods only as a result of the management of the goods other than what is necessary to establish the nature of the characteristics and functioning of the goods, the consumer shall not be liable in any way for any diminished value of the goods when the trader has not provided notification of cancellation. • **SE:** pursuant to the first paragraph of Section 44 of the Consumer Sales Act, the consumer shall pay reasonable compensation if he has derived any benefit from	• **In IT,** the consumer is not required to pay for the use of goods received, **unless the other party can prove that the use of the goods has diminished their value**. In this case, the general action of unjust enrichment can be brought by the disadvantaged party (art. 2041 it. civil code).	

	the goods. The rules of the Act cannot be derogated from to the detriment of the consumer • **UK:** In the past, the buyer was entitled to a full refund even if he has had use of the goods[915]. But, the new section 24 of the UK CRA has changed this rule in certain situation: It states that "8) If the consumer exercises the final right to reject, any refund to the consumer may be reduced **by a deduction for use,** to take account of the use the consumer has had of the goods in the period since they were		

[915] *UK: the case-law concerns cars: Rowland v Divall [1923] 2 KB 500*

	delivered, but this is subject to subsections (9) and (10). (9) No deduction may be made to take account of use in any period when the consumer had the goods only because the trader failed to collect them at an agreed time. (10) No deduction may be made if the final right to reject is exercised in the first 6 months (see subsection (11)), unless— (a) the goods consist of a motor vehicle, or (b) the goods are of a description specified by order made by the Secretary of State by statutory		

	instrument….”. **<u>- Protection of the consumer only against the terms which excludes the general rule to the detriment of the consumer:</u>** • **<u>EE:</u>** There are no specific rules prohibiting the requirement to compensate the use of the thing in case of termination of the contract. And general rules cannot be derogated from by agreement in detriment to the consumer (Art. 237 para 1 of the LOA).		
In the domestic laws, in B2C contracts, **may the one that returns a sum of money pay interest? Under what**	- For one MS, **the seller has to pay interests if he returns a sum of money,** and this rule is a special rule made for the consumer, and it cannot be derogated	**- In some MS, the person who returns a sum of money has to pay interest, and it cannot be derogated from:** BE, ES, RO **- In some MS, the person who returns a sum of money has to pay interests <u>only if he or she is</u>**	- **In some MS, the person who returns money may pay interest:** • just like the person who returns goods has to return the fruits, but it can be derogated from: AT, IT, LU, LV • or within the compensation for use: DE • **<u>FI</u>**: He or she must pay interest on the amount to be refunded from the date on which he received the payment

conditions? Are such rules specifically aimed to protect consumers or do they protect contract parties generally? Can they be derogated from by agreement? (regardless the case of withdrawal of the consumer: see directive 2011/83/UE)	from: SE • **SE:** according to the second paragraph of Section 44 of the Consumer Sales Act, where the seller is to reimburse the purchase price, interest shall be paid from the day on which he received payment. The rules of the Act cannot be derogated from to the detriment of the consumer. - For some MS**, the consumer is protected only against the terms which excludes the general rule to the detriment of the consumer:** • **EE:** In cases of termination interest shall be paid on money refunded as of	**in bad faith:** FR (by analogy with the fruits: it is stated expressly on French project of contract law), SI -**In some MS, interests must be paid only if the time for return goods is exceeded, and it cannot be derogated from:** LT, SK	• HU, NL, PL - **In some MS, interests must be paid only if the time for return goods is exceeded, and it can be derogated from:** BG, CY, EL (interests for delay). -**Some MS do not provide that the person who returns money has to pay interests:** CZ, DK, IE (but The courts have a general power to award interest on monetary sums due), MT, UK (this would be to the discretion of the Court).

	the moment of receipt of the money (Art. 189 para 1 sentence 3 of the LOA). This rule **cannot be derogated from by agreement to the detriment of the consumer** (Art. 237 para 1 of the LOA). • **HR:** Pursuant to Article 368, paragraph 5 of the COA, in case of termination of a contract, the party reimbursing money is obliged to pay default interest from the date on which it received the payment. The same rule applies in case of nullity or avoidance of contract, pursuant to Article 1115 of		

	the COA. These rules are of mandatory nature and **cannot be excluded or limited to the detriment of consumer**. • **PT**: Interests are due only if delay. This rule can be derogated from agreement, be derogated by agreement, except in B2C contracts. In this case, a term of a standard form contract which excludes or limits, directly or indirectly, liability for non-compliance, delay or defective performance in the event of intentional fault or gross negligence is *strictly prohibited*		

	pursuant Article 18, lit. *c* General Contract Terms Act.		
In the domestic laws, **if the consumer who must return the goods has incurred expenditure on goods, is he entitled to seek for compensation?** Are such rules specifically aimed to protect consumers or do they protect contract parties generally? Can they be derogated from by agreement? (regardless the case of withdrawal of the consumer: see directive	**-** For some MS**, the consumer is protected by a special rule, only against the terms which excludes the general rule to the detriment of the consumer:** • **EE:** The buyer is entitled to claim compensation for necessary expenditure for their value, and other expenditure, on the basis on unjust enrichment. But for the consumer, there is a special rule, which provides that this rule	**In some MS, if the consumer who must return the goods has incurred expenditure on goods, he is entitled to claim compensation, and it cannot be derogated from.** • Necessary expenditure for their value: DE, FR[920], • Necessary expenditure on the basis of unjust enrichment: BG, CZ, • Useful expenditure on the basis of unjust enrichment: BG, DE, FR (capital gain) • Only on a claim for damages: CY, DK[921], HU, UK[922] • Expenses reasonably incurred: SK - Some MS **distinguish** between consumer acting in **good faith** and consumer acting in **bad faith**: • **Some of those admit compensation for**	-In some MS it is only stated that the person who returns the good (i.e. the consumer or the buyer) **can expect to be reimbursed for expenditures and it can be derogated from:** AT, EL, FI, LU • **AT:** He will be reimbursed for necessary expenditures, and for useful expenditures, he will have only capital gains • **EL**: The seller shall return the **disbursements incurred by the purchaser in respect of the thing.** • **FI:** for necessary expenditure - In many MS **it is not specifically regulated**: IE, LV, MT. - In one MS, **the consumer can seek compensation only if the expenditure** increases the value of the good at the time it is returned to the owner: SE. The general principles on restitution are not mandatory. However a contract derogating from these principles might be considered unconscionable under Section 36 of the Contracts Act (SFS 1915:218).

[920] *FR: French reform of contract law applicable from 1er October 2016:* ***Art. 1352-5 civil code: To fix the restitutions, account is taken of expenses incurred for the preservation of the thing and of those that increased the value of that thing***

[921] *DK: The claim for damages could also cover expenditure incurred on the goods to be returned.*

[922] *UK: In some instances, courts have awarded damages to cover costs incurred e.g., for insuring a vehicle and carrying out minor repairs.*

2011/83/UE)	cannot be derogated from by agreement in detriment to the consumer (Art. 237 para 1 of the LOA). • **NL: the reimbursement depends on the cause of avoidance or termination**. In the case of return of the goods after avoidance, both Articles 3:120 and art. 6:207 BW provide for such compensation, if the consumer was in good faith when he or she received the goods. In the case of the return the goods after termination, only, the consumer is entitled to	**necessary expenditure without conditions, but demand good faith of the buyer for compensation of useful expenditure**: ES, HR, IT, LT ○ **In ES**[923], it is uncertain. Legal scholars and case law do not agree as to the applicability to the case of rules on possession that deal with expenditures (arts. 453-456 SpCC). Should these rules be applicable, necessary expenses shall be paid to every possessor; useful expenses shall be paid (the increase in value of the thing) to the good faith possessor; luxury expenses shall not be payable whatsoever but the possessor is granted the ius tollendi. ○ **HR**: if the consumer who must return the goods has incurred expenditure on goods,	

[923] *ES: For B2C contracts, in art. 74.3 RCPA, concerning the effects of the exercise of the right to withdraw: consumers shall have the right to the refund of the necessary and useful expenses that may have been incurred in relation to the goods (but is it European acquis).*

	compensation under the rules of damages if it was the trader's non-performance which was. The parties cannot derogate from these provisions to the detriment of the consumer in so far as they pertain to the consumer's rights for non-performance by the seller (Article 7:6(1) BW).	he can have compensation for useful (this includes necessary) expenditures, if he acts in good faith and only necessary if he acts in bad faith: HR • Several MS demand **good faith for the compensation of all the expenditure**: PL[924], RO • Some MS limit the reimbursement when the buyer acts in bad faith: ○ **SI**: Article 194 provides that the acquirer shall have the right to the reimbursement of necessary and beneficial expenses; an acquirer that acted in bad faith shall only be entitled to beneficial expenses up to a sum entailing the	

[924] *PL: An owner-like possessor acting in good faith may demand that the necessary outlays be reimbursed insofar as they are not covered by the benefits which he gained from the thing. He may demand that other outlays be reimbursed insofar as they increase the value of the thing at the time it is handed over to the owner*

		increase in value upon return.	
In the domestic laws, are there provisions, applicable in B2C contracts, **which provide that a party who caused the ground for avoidance or termination cannot ask for restitution?** Are such rules specifically aimed to protect consumers or do they protect contract parties generally? Can they be derogated from by agreement? (regardless the case of withdrawal of the		- In some MS, **a party who caused the ground for avoidance or termination cannot ask for restitution, and this rule cannot be derogated from:** BE, CZ, ES, LT • **BE:** it is the case if it constitutes a breach of the party's obligations under the contract or not. • **CZ:** Section 579 of civil code: "(1) A person who has caused a juridical act to be invalid does not have the right to invoke its invalidity or claim for himself any benefit arising from the invalid juridical act." • **ES:** a party cannot invoke the incapacity of those with whom they contracted, nor the violence or intimidation, or fraudulent misrepresentation or error they have cause, in order to avoid the contract.	- In some MS, **a party who caused the ground for avoidance or termination cannot ask for restitution, but this rule can be derogated from:** • **DE:** revocation is excluded if the debtor is solely or very predominantly responsible for the circumstance that would entitle him to revoke the contract - Most MS **do not provide that a party who caused the ground for avoidance or termination cannot ask for restitution:** AT, BG, CY, DK, EE (for the termination[925]), EL, FI, FR, HR, HU, IE, IT, LU, LV, MT, NL, PT[926], RO, SE[927], SI, UK - But in this case, the **party who has caused the ground, a claim for damages by the other party is possible:** for example AT, CY, EL, FR, HR, LV, RO

[925] *EE: In case of avoidance, the right for restitution may depend from the cause of the avoidance. For example, party to the contract is not required to return what was received and any gains derived if the contract is void due to the restricted active legal capacity of the recipient or due to threats or violence on the part of the transferor (Art. 1034 para 1 of the LOA).*

[926] *PT: But any party who, due to circumstances not ascribable to the other party, cannot return what they have received shall not have the right to dissolve the contract (Article 432, nr. 2 CC).*

[927] *SE: But the general principles on restitution are unwritten and quite malleable. Swedish courts would not apply them in a way that gave grossly inequitable results. They are rather seen as an expression of equity, if anything. There is no reason not to take the ground for avoidance or restitution into consideration, as one factor among others.*

consumer: see directive 2011/83/UE)		• **LT** : Article 6.152(2) of the Civil Code: « 2. In the event where … the restitution is due to his fault, all costs of restitution shall be borne by that party alone".	
In the domestic laws, in B2C contracts, **does restitution depend on the fact that a party lacked knowledge of the ground for avoidance or termination?** Are such rules specifically aimed to protect consumers or do they protect contract parties generally? Can they be derogated from by agreement? (regardless the case of withdrawal of the consumer: see		- In some MS, **restitution depend on the fact that a party lacked knowledge of the ground for avoidance or termination:** • **AT:** As a general rule, a party that knows about the ground for avoidance or termination and still uses objects it knows it has to return, must pay more than a party who does not. Derogating from it would most likely be considered as unfair pursuant to § 879 (3) ABGB. • **CZ:** This question is closely related to the good/bad faith which presupposes the knowledge/ lack of knowledge. Restitution depends on the circumstance **whether the consumer was in good faith or not**. A fair beneficiary shall make restitution **of what he**	**- For most MS, knowledge of the ground for avoidance or termination is in general irrelevant**: BE, BG, CY, DE, DK, EL, ES, FI, FR, HR[928], HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, UK.

[928] *HR: As is evident from Articles 323, 332 and 368 of the COA, knowledge or lack of knowledge about the grounds for nullity or avoidability of a contract shall be decisive when determining the right to be compensated for the damage sustained, and not when determining the right to be restituted for what has been given on the basis of invalid contract or terminated contract.*

directive 2011/83/UE)		**acquired to the maximum extent of the scope of enrichment still existing <u>when the right is asserted</u>**. A beneficiary in bad faith shall make restitution of **what he gained at the time <u>when he acquired the enrichment</u>** • **<u>EE:</u>** The receiver of the goods has an obligation to return everything received under the contract despite the enrichment if, at the time of the transfer, **<u>the recipient is or ought to be aware of circumstances which constitute a basis for the reclamation of that which is received. But</u>** In case of termination the restitution does not depend from such a knowledge. • **<u>SK</u>: there is a distinction between good and bath faith possessor, and it** presupposes the knowledge/lack of knowledge.	
In the domestic laws, in B2C contracts, **what**		**- Many MS take into account good or bad faith to determine the amount that is due**: AT, CZ,	**- For many MS, there is no specific role of good faith in restitution due to avoidance or termination**: BG, CY[930], DK, FI, IE, LU (except for keeping the fruits), MT, SE, UK.

is the role of good faith in restitution due to avoidance or termination? Are such rules specifically aimed to protect consumers or do they protect contract parties generally? Can they be derogated from by agreement? (regardless the case of withdrawal of the consumer: see directive 2011/83/UE)		DE, EE, EL (doctrinal opinion), ES, HR, HU, IT, LT[929], NL, PL, PT, RO, SI, SK • For instance, **in RO**, good faith has a key role in restitution. The consumer who acted in good faith: (1) is entitled to compensation for the expenditure on goods (2) cannot be required to pay for use of goods received after avoidance or termination (3) cannot be required to return the fruits due to avoidance or termination. (4) is entitled to full recovery of damages caused by the other party's malicious conduct (effective loss and missed gain), (5) cannot be obliged to the payment of a penalizing interest - **Some MS take into account good or bad faith to apply the rule "nemo auditur…"** (no one can	

[930] *CY: Equity also provides a remedy in cases of unjust enrichment using two methods: the doctrine of a constructive trust whereby an individual who receives money or property is considered to be the trustee of it for the plaintiff so that all the trust remedies are available to the plaintiff as the beneficiary; and a tracing order, so that the property can be traced by the true owner if changes have occurred or the property has been mixed with other property*

[929] *LT:* ***Article 6.222(1) of the Civil Code:*** *1. Upon dissolution of the contract, each of the parties shall have the right to claim the return of whatever he has supplied the other party under the contract if this party concurrently makes the return of whatever he has received from the latter. If restitution in kind is not possible or appropriate to the parties due to modification of the subject-matter of the contract, a compensation of value of what has been received must be made in money, provided that such compensation does not contradict the criteria of reasonableness, good faith and justice*

		argue his own wrongdoing) or "In pari causa…" (if turpitude equal, restitution cease): BE, FR	

	- Mandatory rules made to protect consumers	Mandatory rules which apply to the consumer, but which are not made to protect consumers	No mandatory rule, or no rule at all
Q 37- Time during which the consumer will have spare parts or consumables			
In domestic laws, are there rules concerning **the period during which the consumer can find spare parts or consumables that are necessary to use the good he has bought? Are there rules providing that the trader cannot sell a good if it is not sure that the consumer will find spare parts or consumables, that are necessary to use the good he has bought, during a reasonable time?** Are such rules specifically aimed to protect consumers or do they protect contract parties generally? Can they be derogated from by agreement?	**- For some MS, there are special rules to protect the consumers in the matter of spare parts or consumables, and it cannot be derogated from:** ES, FR, PT, RO, SE (ES and FR mention spare parts, PT, RO and SE spare parts and consumables). • **ES:** According to arts. 127 RCPA and 12.3 ART, as regards long-lasting products (= only those listed in the annex II of RD 1507/2000, of 1 September), consumers shall have the **right to the existence of spare parts** for a minimum period of **five years** following the date on	- For some MS, **it must be sure that the consumer will find spare parts:** • **CY**: there is only a general provision containing that the durability of a good means the reasonable endurance in time and of the use, and includes, where necessary, for the insurance of the durability, the availability of spare parts, and of specialist technicians. But no period is mentioned. • **DE:** In the case a **warranty** was provided, spare parts generally have to be available during this time as duties arising could otherwise not be	- In some MS, there is **no obligation to provide spare parts or consumables if this was not part of the contract:** AT, BE, BG, CZ, DK, EE, EL, FI, IT, LT, LU, LV, MT, PL, SK, UK[932] - In one MS, it is not specified. But such an obligation may follow from the contract itself or from the principle of good faith and fair dealing, even if the parties can exclude the existence or emergence of such obligations: **NL**

[932] *UK: It may be possible in a particular case to argue that the lack of available consumables or spare parts could mean that the goods are not of satisfactory quality/fit for purpose, but that would depend on the circumstances of the particular case.*

	which the product ceases to be manufactured. It is consumer law. • **FR**: As manufacturer or importer of tangible goods must inform the business seller (who inform the consumer) of the period during which parts that are essential for use of the goods are likely to be on the market, **the manufacturer or importer must provide, within two months, professional sellers or repairers, who request parts essential to the use of goods sold** (Article L111-3 of the Consumer code). • **PT**: Article 9, nr. 5 Consumer Protection Act provides that the consumer has **the right to receive after-sales assistance related to the supply of parts and accessories for the normal average duration period** of the products supplied. This is limited to the "lifetime" of each existing product, and cannot be longer in any case to 10 years (Article 6 Sale of Consumer Goods Act) . It concerns also consumables (doctrinal opinion). • **RO:** Art. 10, Govern-mental Ordinance 21/1992 on	met, at least not in form of repair. In addition, a post-contractual duty arises from the principle of **good faith, which requires spare parts to be available for a certain period of time**. The nature and scope of this duty depend on the circumstances of the individual case. • **HR:** a trader must store spare parts **for the duration of a guarantee period**. • **IE:** S12 of the Sale of Goods and Supply of Services Act 1980 requires spare parts and servicing to be made available for a **reasonable period**. • **SI:** Art. 20 of the ZVPot provides that the producer of goods for which the **guarantee** is mandatory shall provide spare parts or consumables for at least **three years** upon the expiration of the time limit in the guarantee. Although contained in the ZVPot, these rules do not protect specifically consumers, as Art. 21č of the ZVPot provides that these rights are granted also to persons that are not consumers.	

	consumer protection, **"**The consumers concluding a contract have the following **rights: (e) to beneficiate of spare parts and consumables during the average period of function** which may vary in accordance with the manufacturer's statements, technical legal provisions or specific contractual terms." Any contractual terms charging the consumers for the spare parts or consumables **are void during the legal period of guarantee of two years** within which the repair of goods is free of charge for the consumers. • **SE**[931]: Should there be a lack of spare parts or consumables hampering the use of the goods and the consumer has, at the time of purchase, had good reason to believe that the product would be usable, the product will be considered **defect** under the rules on factual defects of the goods found in the Consumer Sales Act (1990:932).		

[931] *SE: Secondly, pursuant to the Marketing Act (SFS 2008:486) Section 10(2)(8) it is forbidden to use false statements concerning "the need for service, spare parts, replacement or repair" when marketing products*

In your law, are there rules providing **that the trader has <u>to inform</u> the buyer of that?** Are such rules specifically aimed to protect consumers or do they protect contract parties generally? Can they be derogated from by agreement?	**- Some MS provide that the consumer must be informed of the period during which the consumer can find spare parts or consumables that are necessary to use the good he has bought:** ES, FR, HR • **<u>ES:</u>** There is not any express reference to the obligation to inform of the consumer's right to find spare parts, but **<u>it is implicit under art. 60.2 e RCPA</u>**. According to this text, the trader must remind the consumer of the existence of a legal guarantee and, must inform him, in particular, of the existence and conditions of after-sales services and commercial guarantees • **<u>FR</u>**: Article L111-3 of the Consumer code states that "*The manufacturer or importer of tangible goods must **<u>inform the business seller of the period during which parts that are essential for use of the goods are likely to be on the market</u>**. This information is **<u>delivered to the consumer by seller before the conclusion of the contract</u>** in a clear manner and confirmed in writing on the purchase of the property…"* • **<u>HR:</u>** Pursuant to Article 33,	**- For some MS, an information is required. It protect all the buyers and cannot be derogated from**: • **<u>AT</u>**: when this is of major importance to the recipient • **<u>SE</u>**: Failure to inform the buyer on this topic could conceivably occasion an injunction under Section 24(1) of the Marketing Act. Pursuant to this provision, a trader who refrains from giving essential information during marketing, can be ordered to do so. As a rule such injunctions are sanctioned with a fine, as prescribed in Section 26 of the Act. • **<u>SI:</u>** Art. 16 of the ZVPot, setting out the mandatory information that needs to be included in the guarantee. Although contained in the ZVPot, these rules do not protect specifically consumers, as Art. 21č of the ZVPot provides that these rights are granted also to persons that are not consumers.	**In many MS, there is no duty to inform the buyer about the spare parts or consumables**: BE, BG, CY, CZ, DE, DK, EE, EL, FI, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SK, UK

	paragraph 2, point 5 of the CPA, not providing information on availability of spare parts or providing misleading information regarding availability of spare parts is considered **unfair commercial practice**.		

III/ National mandatory rules applicable to contractual obligations in B2B contracts for sales of tangible goods at distance

We are going to distinguish chronologically four periods:

- The pre-contractual period (A)
- The period of formation of the contract (B)
- The period of performance (C)
- The period of termination and after termination (D).

A/ Pre-contractual period

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect her	No mandatory rule, or no rule at all
Q 38- Various: Rules protecting the future consent of the weak professional party…			
In domestic law, are there provisions which are applicable **to B2B contracts for sales of tangible goods at a distance, and in particular on line, in the pre-contractual period?**	- **In FR**, there are also a **lot of special rules** which apply to the weak trader In the field called "trade negotiations", and especially regarding the contracts between the suppliers and the	**- There are rules about behaviour during the pre-contractual negotiations (it can partially be derogated from, but not entirely):** • **In some MS, there are rules** on **pre-contractual duties** and specific liability linked with the breach of such duties*:* ○ **They are based on culpa**	- **In CY,** if the contract is an oral contract then a question may arise as to whether or not a specific representation forms part of the agreement. In general in order for a term to become binding upon a party it must first be proved

Can they be derogated from by agreement?	distributor in the trade retail chain, there are **formal requirements and deadlines to contract every year** (art. L 441-6 et L 441-7 of the commercial code). These contracts provide all the sales and the services for the current year. This formalization is made to facilitate the control of the Administration. There is one legal obligation of transparency in the article L.441-6 of the Commercial Code which is provide that **the trader need to communicate his general conditions of sale to the buyer, even if he's a professiona**l, who makes it the request. One rule is important for the legislator, but not easy to respect: **general conditions of sale are the basis of commercial negotiation.** In case law, it has been decided,	**contrahendo:** AT, CZ ○ **On good faith:** FR [933], LT, LU, PT, RO ○ **Simply on the law: EE**[934] • For the duty to inform: see below • In several MS, the parties are obliged to **take into account the rights, legal interests and other interests of the other party** in the pre-contractual period: DE, EE[935] • In one MS, **RO,** there is **a duty of confidentiality during the pre-contractual stage.** **- There are rules about misrepresentation and appearance** • **Misrepresentation** ○ **IE:** section 46 of the Sale of Goods and Supply of Services Act 1980 prohibits terms which exclude liability for misrepresentation to buyers in the pre-contract phase unless such exclusions are "fair and reasonable". Also, s11 of the Act makes it a criminal offence to advertise or state that a buyer' rights	that it constitutes a term of the agreement.

[933] *FR: In the French reform of contract law, applicable from 1er October 2016, there are 2 provisions that will be applicable at the pre-contractual period: Art. 1104 which provides a good faith principle including the formation period of the contract; Art. 1112-1 which provides a pre-contractual information duty. These two rules exit actually in case-law but they will be in the law.*

[934] *EE: **§ 14. of the LOA "** (2) Persons who engage in pre-contractual negotiations or other preparations for entering into a contract shall inform the other party of all circumstances with regard to which the other party has, based on the purpose of the contract, an identifiable essential interest…."*

[935] *EE: **§ 14. Of the LOA:" Precontractual negotiations** (1) Persons who engage in pre-contractual negotiations or other preparations for entering into a contract shall take reasonable account of one another's interests and rights. Information exchanged by the persons in the course of preparation for entering into the contract shall be accurate."*

	that every modification in the final contract has to have a counterpart or to be justified. If not, it will be an unfair term. But it is discussed if it applies to the price (for a positive answer: CA Paris 1/7/2015), because the law has established the principle of free negotiation of prices, and has abolished the *per se* prohibition of discrimination.	under the act are excluded • **Trust in appearance:** ○ In some MS, the law (or case law) protects the trust in the authority of one person to represent another, where there is a trustworthy appearance of this person attributable to the one apparently represented: AT, FR - **There are rules about promotions** • **<u>In ES</u>**[936], according to art. 19 RTA (**Retail Trade Act)**, commercial promotions shall indicate their validity period. Where "special offers" do not include at least half of the items offered for sale, the promotion cannot be advertised as a sale in general, but only referring to the specific items actually covered. By virtue of art. 20 ART, wherever reduced price items are offered, the original price should be shown along with the reduced one. Finally, according to art. 21 ART, if both normal price items and reduced price items are offered together, they must be distinguished in order not to confuse the purchaser. **- There are rules about knowledge of standard terms:** • **<u>In ES</u>**, GCTA governs both B2C and B2B contracts, so its mandatory rules regarding "incorporation" (art. 5) and "non-	

[936] *ES: a new law has provided that "distant sales shall be governed by corresponding provisions of RCPA" but for the doctrine, it is uncertain that the RCPA consumer-oriented rules (exhaustive pre-contractual information duties ex art. 97 RCPA) applies really to B2B contracts.*

		incorporation" (art. 7) of standard terms are applicable. Especially, **Art. 7 states that** The following standard terms won't be incorporated into the contract: a) Those that the adhering party hasn't had the **actual opportunity to know completely at the time of the conclusion of the contract** or those not signed, when necessary, in the meaning of article 5".	
Are there provisions **about contract on line (or sale online), which are applicable in B2B contracts for sales of tangible goods at a distance, and in particular online, in the pre-contractual period?** Can they be derogated from by agreement?		- In some MS, the rules **transposing the e-commerce directive 2000/31/EC cannot be derogated from, even in B2B contracts: FI** - **In RO**, there are mandatory rules on the duty to provide accurate information on the price and delivery taxes applicable, but seems to be in the European acquis	- Except rules for contracts that are formed electronically, which rule are transposing the e-commerce directive 2000/31/EC (see Q26), **there are no other rules in most MS**: AT, BE, BG, CZ, DE, DK, EL, FR, HR, HU, IE, LT, LU (except for other contracts than sale), LV, MT, NL, PL, SE, SI, SK, UK - In some MS, some provisions of the rule issued from the e-commerce directive can be derogated from, in B2B contracts: BE, BG, EL, FR, SK
Contract terms derived from certain pre-contractual statements			
In domestic law, **is the trader bound by the statements he made before the conclusion of the contract in B2B**	**- In two MS, there are rules specifically made for the professionals, and they cannot be derogated from**:	- In one MS, **the statements made by the seller before the conclusion of the contracts have a binding effect, but it cannot be derogated from**: **LT**	-**In some MS, the statements made by the seller before the conclusion of the contracts have a binding effect, but**

contracts? If domestic law contains rules concerning the binding effect of the trader or other persons' statements, may the parties exclude them in B2B contracts?	• **FI:** According to the Sale of Goods Act (355/1987) Section 18 (1), the goods are defective if they do not conform with information relating to their properties or use which was given by the seller when marketing the goods or otherwise before the conclusion of the contract and the information can be presumed to have had an effect on the contract. • **IT**: In the case of the **franchising,** the trader is bound by the statements he made before the conclusion of the contract, that becomes part of the contract itself (art. 4, § 1, L- 129/2004).	- In one MS, **RO,** as resulting from art. 20 of Law 148/2000 on commercial advertising and art. 73 Consumer Code, the beneficiary of the advertising **should be able to prove the veracity of the statements, indications and presentations** which have been included in the advertising. It is not a general text, but two texts, one for the B2C contracts, and one for the others contracts, but they cannot be derogated from.	**it can be derogated from**: AT, DE, EE, FR, HU, IE, NL • **AT** (except when the seller did not and could not know them). The rule of §§ 922 ff ABGB is not mandatory in B2B. (However, I could be grossly detrimental and considered as unfair in the sense of § 879 (3) ABGB, if the supplier knew about statements deviating from the features of the product without clarifying these points in contract negotiations.) • **EE:** except in cases where the merger clause is used (Art. 31 of the LOA). • **FR:** in Case law, it is admitted that the advertising documents may have a contractual value and bound the trader based on art. 1134 of the Civil Code. • **IE:** the trader may be liable for pre-contract statements (sections 44 and 45 of the Sale of Goods and Supply of

			Services Act 1980). - **In some MS, the pre-contractual statements bind the seller, if**: • It is an offer: **BE, BG, HR, PL, PT** • a public offer: **SK** • a promise: **CZ** • a declaration of will: **EL** - **Some MS do not have such a rule**: SE, SI, UK - In one MS, there is no specific rule, but **similar results may be obtained by virtue of other rules:** • **In ES,** by virtue of the good faith principle (art. 1258 SpCC). Also, the judicial interpretation of art. 1282 SpCC (contract interpretation according to the simultaneous and subsequent acts of the parties) would allow taking into account the statements the trader made before the conclusion o the contract. As stated above, arts. 1258 and

			1282 apply regardless of the subjects involved.
Can statements made by other persons than the trader, as the person responsible for advertising, or the producer of products sold by the trader, commit the latter in B2B contracts? Can it be derogated from?	- Special rule exist for B2B contracts, in some MS: • **BG:** Art. 301 CA provides a presumption that the trader has confirmed the actions of a person who has acted without representative power if the trader does not oppose to such actions immediately after they have been performed. This rule cannot be excluded • **CZ**: An entrepreneur is **bound by the acts of another person in his establishment if a third person is in good faith that the acting person was authorised to perform such acts**. In addition, if an	**- In some MS, the statements made in the pre-contractual period do not bind the trader, but they are regulated:** • by the text about liability for fault: BE, FR, LT, L, RO[937] • or representation: **EL** • or unfair contracts or practices: DK[938], LU • respect of reasonable expectations of the buyer: **NL** • or fraud: **PT** • under the general principles of misrepresentation in contract and in tort: **IE**	- **In some MS, the statements made by other persons than the trader can bind the trader, but this rule can be derogated from**: • **AT**: if these third persons can be attributed to him because he is using them to deal with his affairs. This can include both his employees and other traders like e.g. an advertising agency • **DE:** characteristics of the good mentioned in public statements by the producer or his assistant may also become part of the contract as a quality which the good has to possess to be in

[937] *RO: there is a mandatory rule stating that there is a solidarity in terms of liability, between the multiple debtors, such as:*
(a) the beneficiary of the advertising (the manufacturer, distributor, seller or supplier or one of their agents or representatives),
(b) the author of the advertising (c) the producer of the advertising and (d) the legal representative of the media channel.
(text on commercial advertising)
[938] *DK: the unfair terms provision in Section 36 of the Act on Contracts essentially constitutes a good faith provision, which serves to ensure that unethical contracts are not enforced. When judging unfair contracts, also pre-contractual behaviour may be taken into consideration.*

	entrepreneur's representative exceeds his authority to represent, the **entrepreneur is bound by his juridical acts**; this does not apply if a third person knew or must have known of the excess given the circumstances of the case. • **FI**: The Sale of Goods Act (355/1987) Section 18 provides that the goods are also defective if they do not conform with information which was given **by a person other than the seller,** either at a previous level of the chain of supply or on behalf of the seller, when marketing the goods or otherwise before the conclusion of the contract and the information can be presumed to have had an effect on the contract. However, the goods shall not be considered defective if the seller neither knew		conformity with the contract. • **HU**: The seller will be bound by these statements except if he demonstrates that: a) he was not and could not reasonably have been aware of the statement in question; b) the statement had been adequately corrected by the time the contract was concluded; or) the creditor's decision to enter into the contract could not have been influenced by the statement. • **IT:** As a general rule of contract law (art. 1228 It civil code), the person responsible for advertising commits the trader for any liability deriving from the employment relationship - **Some MS do not have such a rule:** CY, EE, ES, HR, LV, MT, PL, SE, SI, SK, UK.

	nor ought to have known of the information that was given. It is mandatory		
Duty to raise awareness of not individually negotiated contract terms			
Does domestic law require **the trader to raise awareness of the other party on non-individually negotiated contract terms, in B2B contracts?** If such rules exist, can they be derogated from by agreement?		- **Some MS require the trader to raise awareness of the other party on not individually negotiated contract terms, in B2B contracts, and this requirement cannot be derogated from:** AT (but tacit acceptance of such terms is established more easily for B2B contracts), BE, EL (by analogy with B2C contracts), ES, HR, IT (case law), NL, PT, SI • **BE:** article VI.2, 7°CEL provides that the trader has to share the non-individually negotiated contract terms before the closing of the contract. It is possible to insert clauses that aim to *prove* knowledge of the non-negotiated contractual terms, rather than derogation. • **ES**: GCTA contains mandatory provisions that require it in relation to standard terms (which by definition are not individually negotiated contract terms). GCTA applies equally to B2C and B2B contracts. • **HR**: Pursuant to Article 295, paragraphs 3 and 4 of the COA, general contracts terms (i.e. terms which have not been individually negotiated) must be publicised in a usual manner and are binding for a contracting party if it was acquainted or ought to have been acquainted with them at the time of the contract formation. • **IT**: There are no express statutory rules	- **In some MS, this duty applies in B2B contracts but it can be derogated from**: EE, LU (indirectly), SE • **SE:** according to case law it depends on the nature of the terms. Generally, a reference to standard terms is sufficient. However, if the terms are surprising, burdensome or unexpected, the party providing the terms is generally required to take reasonable steps to raise the other parties awareness of them - **In some MS, there is no duty to raise awareness of not individually negotiated contract terms in B2B contracts**: BG, CY, CZ, DE, DK, FI, FR, HU, IE (except in limited circumstances), LT, LV, MT, PL, SK

		requiring that. But the general duty to act in good faith during the formation of the contract gives the judge the possibility of presuming a duty to raise such awareness. • **NL**: Where the trader does not offer the other party a reasonable opportunity to become acquainted with the standard terms in accordance with Article 6:234(1) BW, the standard terms may be voided by the other party (Article 6:233 under b BW). These rules do not apply if not both commercial parties are located in The Netherlands (irrespective whether it is the buyer or the seller that uses the standard terms and irrespective whether the buyer or the seller is located abroad). This is true even where the parties have agreed to Dutch law as the applicable law to the contract • **PT**: Pursuant to Article 6 General Contract Terms Act, the contracting party using general contractual terms *must inform* the other party, *as appropriate in the circumstances*, of those aspects included in the contract that warrant clarification. All clarification that is reasonably requested must also be provided. **- In several MS, it is not a general rule, but it is a mandatory rule on specific contractual terms**: RO, (case law), UK • **RO**: in Art. 1203 Civil code, **applicable to both B2B and B2C contracts: "**Referential clauses which concern restrictions or exclusion of liability, unilateral termination of contract, right to withhold performance, other party's exclusion from the benefit of a	• **In BG**, a merchant may specify in advance general terms for transactions concluded by him. They shall become binding upon the other party should it:…. **be a merchant and has known or been obliged to know them and has failed to object to them immediately.** If a written form has been provided for the validity of a transaction, the general terms established by the merchant shall be binding upon the other party **only if submitted to it upon conclusion of the transaction.** But there is not special duty to raise awareness of not individually negotiated contract terms in B2B contracts • **CZ**: In the case of a contract concluded between entrepreneurs, a part

		suspending time period, exclusion or limitation of remedies, contractual exclusiveness, tacit reinforcement of contract, applicable law, arbitration clauses or territorial competency modification clauses, shall not be binding on the other party, unless the latter's written consent has been obtained for each term." • **UK**: The common law has adopted the "red-hand" rule (see *Thornton v Shoe Lane Parking*, above) for the context of unusual or onerous terms, particularly exclusion clauses.	of the contents of the contract may be determined simply by a reference to standard commercial terms prepared by professional or interest organisations. It can be derogated from • **DE:** the provision to raise awareness in § 305 (2) BGB "does not apply to standard business terms which are used in contracts with an entrepreneur, a legal person under public law or a special fund under public law", - However, there are certain principles concerning the binding nature of not individually negotiated contract terms: DE, FI - In one MS, the trader has also an obligation to draw the other party's attention **to unexpected and harsh terms** in a contract that is not individually negotiated. • **FI**: It might apply to B2B contracts, but it is uncertain

Duty to inform			
Specifically, apart from the EU requirements, are there rules **on pre-contractual obligations to provide information,** in B2B contracts? Can they be derogated from by agreement?	- In a few MS, in some B2B contracts where there is a weak party, there are rules protecting this party during the negotiation: IT, FR • **IT:** the sales that take place as part of the contract of franchising should be preceded by an information. The Italian law imposes special rules in pre-contractual period. Arts. 4 and 6 L. 129/2004 contain detailed rules concerning pre-contractual duties of information on the franchisor, as well as pre-contractual duties of acting in good faith on both parties. These rules intend to protect the enterprise considered as economically weaker. • **FR**: the sales that take place as part of the contract of franchising should be preceded by	**- For some ME, the trader has a duty to inform even in B2B contracts:** AT, BE, BG, CZ, HR, LU, PT • **AT**: there is an obligation to inform the other party about circumstances important to them (culpa in contrahendo) • **CZ**: culpa in contrahendo • **HR:** but it is not a special duty to inform, it is based on good faith	**- For some ME, the trader has a duty to inform even in B2B contracts, but it can be derogated from:** DE[939], LT, SE (case law) • **SE:** according to case law, failure to provide such information can be the cause of liability under uncodified rules of *culpa in contrahendo*, **- Apart from the EU requirements, in some MS, there is no duty to inform in B2B contracts**: DK, EE, ES, FI, HU, IE, LV, MT, NL, PL, SI, SK, UK • **HU**: but there is a general duty to cooperate during the preliminary negotiations

[939] *DE: These rules can be derogated from by agreement only within the boundaries of §§ 134, 138 BGB as well as § 307 BGB in the case of standard terms.*

	the respect of some rules protecting the weak party during the negotiation. Especially in franchising, preliminary contract disclosure documents must be submitted 20 days before the contract is concluded (art L 330-3 of commercial code). They are contracts preparing sales, but they are not the sale itself.		
In domestic law**, can the principle of good faith be invoked to protect a professional buyer against behaviour of the trader, during the pre-contractual period?**	- **In IT,** the sales that take place as part of the contract of franchising should be preceded by respect of special rules in pre-contractual period. Arts. 4 and 6 L. 129/2004 contain detailed rules concerning pre-contractual duties of information on the franchisor, as well as pre-contractual duties of acting in good faith on both parties. These rules intend to protect the enterprise considered as economically weaker	**- In most MS, good faith can be invoked to protect a professional buyer against a behaviour of the trader, during the pre-contractual period:** AT, BE, BG[940], CY[941], CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, LT, LU, LV, NL, PL, PT, RO, SE (only culpa in contrahendo), SI • **AT**: Austrian courts nowadays refer to the concept of good faith on a regular basis, and they do so in all areas of the law. • **CZ**: Culpa in contrahendo is built on the principle of good faith in its objective meaning. • **PL**: Polish law does not contain such a direct provision but has the rules on culpa in contrahendo which uses the notion of good	**- Some MS do not provide a basic duty of good faith or fair dealings in negotiation**: IE, MT, RO, SK, UK

[940] *BG: Art. 289 CA stipulates that the parties cannot act with an intention to cause damages to the other party. Thus, the principle of good faith will be breached.*
[941] *CY: the principle is general, but there is no specific provision about pre-contractual period*

		custom instead.	
In domestic law, are there rules which provide **that unfair trade practices are forbidden between professionals during the pre-contractual period? Are there specific rules concerning unfair trade practices during the pre-contractual period in B2B sale at a distance (specifically online)?** Can any such rules be derogated from by agreement?	- Apart from the principle of good faith (see above), in some MS **unfair trade practices may fall under the rules protecting the unfair competition**: BG, BE, CZ, DE, DK, ES, FI, FR, HR, IT, PL, PT, SI, SK • **BE**: *"prohibited is any practise which is in conflict with the fair market practises whereby a trader damages or can damage the professional interests of one or more traders"* (art. VI.104 CEL). • **CZ**: Section 2976 (2) Unfair competition, as referred to under Subsection (1), shall include, without limitation: a) misleading advertising, b) misleading identification of goods and services, c) creating a likelihood of confusion, d) free-riding on the reputation of an enterprise, product or services of another competitor, e)	**- In some MS, it is a general rule**: • Protection against misleading comparative advertising: AT, LU • Protection against persistent and unwanted contact via phone, email: **AT**	**Apart from competition law (antitrust),** some MS **have no specific regulation in force that specifically addresses unfair trade practices between professionals :** EE, EL, HU, IE, LT, LV, MT, NL, UK • **EE:** It is mainly regulated in the codes of conduct. • **NL:** The Dutch government indicated its support to the European Commission's announcement to strengthen the legislation against misleading B2B commercial practices.

	bribery, f) disparaging a competitor, g) comparative advertising, unless allowed as admissible, h) breach of business secrets, i) unsolicited advertising, and j) threat to health and the environment. • **DE:** such commercial practices during the pre-contractual period may be prohibited according to the provisions in §§ 3 et seq. UWG if they are suited to tangible impairment of the interests of competitors, consumers or other market participants • **DK**: Section 1.1 of the Act on Marketing provides that traders shall exercise good marketing practice with reference to consumers, other traders and public interests • **ES**: According to art. 4.1 UCA which is applicable to traders, businesses and any other person who acts		

	in the market (art. 3.1), any behaviour that objectively fails to abide by the requirements of good faith shall be deemed unfair. • **FI:** Unfair Business Practices Act (1061/78) provides that good business practice may not be violated nor may practices that are otherwise unfair to other entrepreneurs be used in business. The prohibition extends to the pre-contractual period. However, the said provision concerns primarily marketing and competition between businesses, but not unfair trade practices during the pre-contractual period in B2B sale at a distance • **FR:** Art. L.121-1, III of the Consumer Code provides that misleading (deceptive) trade practices that apply even during the pre-contractual period are prohibited, also to protect professional		

	buyers. In addition, Article L 442-6 of the Commercial Code contains a list of unfair practices, which are sanctioned by the nullity of the contract with restitutions, and (or) damages, and a civil fine of up to 5% of sale revenues of the undertaking in France. These practices are not especially made for sale on line, but they can apply in this contract. For instance, are prohibited to "Refuse or return goods or unilaterally deduct from the amount of the invoice raised by the supplier, penalties or discounts corresponding to non-compliance with a delivery date or non-compliance of the goods, when the debt is not certain, liquid and due, without the supplier being able to check the validity of the corresponding claim; » or, « Fail to provide its general terms of sale, as specified in Article L.		

	441-6, to all buyers of products or all persons who request such services for a professional activity; » • **HR:** Articles 63-65 of the Trade Act regulate unfair trading, which applies to B2B relations. These provisions do mention even some unfair trading practices which take place in the pre-contractual period. These rules do not specifically regulate online trading. • **IT:** prohibits for instance abuse of economic dependency of small enterprises • **PL:** protects confidential information. • **PT:** many of the forbidden unfair trade practices laid down by Article 7, nr. 1 and 3 Decree-Law 166/2013 of 27 December 2013 (Unfair Unilateral Trade Practices Act) may concern the pre-contractual period. This being the case, the related unfair trade		

	practices will naturally be considered as prohibited. Contractual clauses containing abusive trade practices are null and void when subject to Portuguese law. • **SI:** As regards pre-contractual practices (negotiation and contract formation), the ones governed by these acts are withholding essential information, misleading advertising or information, discrimination and abuse of bargaining power. • **SK:** According to Section 44 CommC the term „unfair competition "shall mean any competitive conduct, which is contrary to good manners and which is able to cause damage to other competitors or consumers. Unfair competition shall be prohibited. Cases of unfair competition include, but are not limited to the following conduct: misleading		

	advertising, deceitful description of goods and services, contributing toward mistaken identity, parasitic exploitation of a competitor's reputation, bribery, discrediting, disclosure of business secrets.		

B/ Period of formation of the contract

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or not rule at all
Q 39- Defect of consent			
In domestic law, are there different rules for the defect of consent of the professional party, than those you have described in B2C contracts? In domestic law, is the professional victim of an **error, fraud, threats,** entitled to damages? Are the rules different in B2B contracts than those		-In all MS, the rules are **the same or almost the same** as in B2C contracts, for **error, fraud and threat and for damages in these cases**: AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU[942], IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK	

[942] *HU: The only exception is that when there is gross disparity in value in B2B contracts the parties can derogate from these rules.*

you described in B2C contracts? Can such rules be derogated from by agreement in B2B contracts?		• **DE:** In the case of silence being regarded as acceptance, a B2B contract cannot be avoided for error about the significance of his silence. Neither can a contract concluded with the terms of a commercial letter of confirmation be avoided for mistake by the recipient for not knowing that his silence is deemed as an approval; • **NL:** one may sometimes expect more from a professional party as regards the duty to investigate and with regard whether a person in the same situation as this party would be influenced due to the fraud, threat or abuse of circumstance with regard to the conclusion of the contract. -In some MS, the rules about fraud and threat cannot be derogated from, but the rule about error can be: AT[943], BE, DE, NL, PT	
Especially, **can "unfair exploitation" be invoked by a professional who has borne economic difficulties?** Can such	**-In several MS, which admit unfair exploitation in B2C contracts, a trader cannot invoke unfair exploitation:** BG, CZ, SK	**-In most MS, there are rules almost the same as "unfair exploitation" that can apply to a weak professional**: AT, BE, CY, DE,	**-In LU,** rescission for lesion claims can be derogated from by agreement according to

[943] *AT: Rules about error can be derogated from in advance unless the error was caused due to gross negligence and the negligent party was unable to appropriately check the relevant circumstances himself*

rules be derogated from by agreement in B2B contracts?	• **BG:** Unfair exploitation cannot be invoked by a professional who has borne economic difficulties (Art. 297 CA). • **CZ**: For unfair exploitation (usury and lesion) there is special rule excluding the application on B2B contracts (§ 1797). • **SK**: According to Section 267 (2) CommC the provisions of the Civil Code´s Section 49 regulating the right of the participant who concluded an agreement in pressure under strikingly disadvantageous conditions to withdraw from this agreement, shall not apply to the relationships governed by the CommC. The subject can invoke only Section 265 CommC, according to which the exercise of rights, which are at variance with the principles of fair business conduct, shall not be legally protected.	DK, EE, EL, FI, FR, HR, HU, IE, IT, LT, NL, PL, PT, RO, SE, SI, UK (undue influence) • **AT**: Usury (§ 879 (2) no. 4 ABGB) as a case of unfair exploitation can also be invoked by professionals. Where usury applies, the contract is relatively void, ie. the weaker party can choose to let the contract remain valid; waiving this right in advance is not possible • **DE**: A professional who has borne economic difficulties may avoid a contract for unfair exploitation if the objective and subjective requirements of § 138 BGB are met; this might in particular be the case if the professional is urgently in need of money or benefits in kind – thus is in a predicament –, and his contractual partner consciously exploits this situation to conclude a contract granting him pecuniary advantages which are clearly disproportionate to his performance. • **HU**: But the general	Court of Appeal, 19 June 2001[946].

[946] *LU: Codex, 2001/9, p. 290.*

		approach in the field of B2B contracts is that the parties are professionals so they can make a proper assessment of their financial situation and the financial risks associated with the conclusion of a contract. • **IE**: Duress and Undue influence would be expected to be more difficult to prove for a professional. They can be pleaded for economic duress but the principles in Irish Law are not yet developed on this topic. • **NL**: The reported case on economic threats (HR 27 March 1992, NJ 1992/377 (Van Meurs/Ciba Geigy)) is in fact a commercial case. • **RO**: But there are no legal provisions in Romanian law expressly permitting the "unfair exploitation" to be invoked by a professional who has borne economic difficulties • **SE**: In fact financial difficulties are the primary example of hardship triggering the rule on unfair exploitation in Swedish law, i.e. Section 31 of the Contracts Act[944]. • **SI**: "Unfair exploitation" can be invoked by a professional	

[944] *SE: See e.g. Förslag till lag om avtal (1914) p. 130.*

		who has borne economic difficulties, if the other party has exploited this situation (Art. 119 of the CO)[945].	
In domestic laws, **are there rules which provide that are forbidden unfair trade practices <u>affecting the consent</u> of a professional and which are applicable in B2B sales at a distance (specifically online)?** In this case, are there **specific sanctions?** Can such rules be derogated from by agreement in B2B contracts?	-In some MS there are special rules which apply to the traders and provide **that are forbidden unfair trade practice <u>affecting the consent</u> of a professional:** ES, FR, SK • **<u>ES</u>**: Unfair competition Act defines misleading acts and omissions that cause error to the addressee (either a consumer or a professional) and exploitation by a professional party of the economic dependence of his/her clients or providers as unfair commercial practices (see arts. 5, 6, 7, 8 and 16 UCA). • **<u>FR</u>**: Article L 442-6 I 4° of the commercial code states that is forbidden the practice consisting on "*4° Obtaining, or seeking to obtain clearly abusive terms concerning prices, payment times, terms of sale or services that do not come under the purchase or sale obligations,* ***under the threat of an abrupt total or partial termination of business relations****; »*	-In some MS, **<u>the rules about aggressive and misleading trade practices or misleading advertising apply to the trader:</u>** AT, EE, LU, SI • **<u>EE</u>**: There are rules on basic requirements for advertising, prohibition of misleading advertising, use of comparison in advertising, etc. provided for in the Advertising Act. • **<u>LU</u>**: the law prohibits any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor. **<u>Sanctions:</u>** • Claim for a cease-and-desist order: AT • Claim for damages: AT	-In some MS, **<u>there are no such rules</u>**: BE, BG, CY, CZ, DE, DK, EL, FI, HR, HU, IE, LT, LV, MT, NL, PL, PT, RO, SE, UK

[945] *SI: In case of economic difficulties, also the clausula rebus sic stantibus provision can be invoked (Art. 112 of the CO).*

	• **SK**: Cases of unfair competition include, especially misleading advertising, deceitful description of goods and services, and contributing towards mistaken identity. **Specific sanctions:** • The claim for damages: ES, FR • Injunction against the unfair conduct or prohibition of its continued practice: ES • Declaratory action of unfair competition: ES • Action to counter the effect produced by the unfair practice: ES • Action to rectify misleading, incorrect or false information: ES • Fines: FR	• Fines and penalty payment: EE, SI	

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or not rule at all
Q 40- Unfair terms and unfair trade practices in B2B contracts			
Unfair terms in B2B contracts			
Are there domestic rules whereby unfair	-**In one MS, there are special rules which forbid generally unfair terms in**	**-In many MS, there are general rules which forbid unfair terms, and which**	**In some MS, unfair terms are not forbidden in B2B**

terms in B2B contracts are forbidden?	**B2B contracts:** FR • **FR**: Art L. 442-6-I-2° of the commercial code forbids the terms which create a significant imbalance between rights and obligations of the parties. This text applies only in B2B contracts (commercial contracts). In addition, the other paragraphs of the article L 442-6 of the civil code contain others prohibition of special unfair terms[947]. **-In several MS, there are special rules which forbid special unfair terms in B2B contracts**: ES, LU, UK • **ES**: Art 9 of Act 3/2004 of 29 December 2004 ((last modified in 2014 by Act 17/2014), on combating late payment in commercial transactions provides for a specific legal mechanism aimed at review of unfair terms and unfair practices in B2B contracts. Its states that "**Clauses and practices regarding the period for payment, the consequences of late payment or the compensation** shall be null when they are grossly unfair to the detriment of the creditor taking	**can apply to B2B contracts**: AT, DE, EE, EL, HR, HU, IT, NL, PT, SI • **AT**: § 879 (3) ABGB considers as unfair and void a term which is grossly detrimental to one party, considering all circumstances of the case. It concretises the general clause of § 879 (1) ABGB (violation of moral principles) • **DE**: the provisions concerning unfair terms in §§ 305 et seq. BGB are applicable to B2B contracts (§ 310 (1) BGB)[948]. • **EE**: In Estonian law, the regulation of standard terms applies to all contracts, not only to consumer contracts. • **EL**: The general rules of articles 178, 179, 197, 198, 281, 288, 919 of the Greek Civil Code are applicable to B2B contracts • **HR**: Article 296 of the COA states that «any provision of the general contract conditions shall be void if it, contrary to the principle of good faith and fair dealing, causes evident inequality in rights and obligations of the parties to the detriment of the contracting party of the drafter or if it compromises the achievement of the purpose of the contract concluded, even if the general contract conditions	**contracts**: BE, BG, IE, LV, MT, PL, RO, SK • **PL**: It must be noted that in Polish law the definition of consumer includes partially individual undertaking (when the contract is not **directly** related to his business or professional activity). Then, in this limit, the rules of B2C contracts can apply to B2B contracts with an individual undertaking.

[947] *FR: it is provided as a general rule in the French contract law reform applicable from 1er October 2016 (Art. 1171 of civil code). The text states that it is only for standard term.*
[948] *DE: With the exception of § 305 (2) and (3), § 308 No. 1, 2-8 and § 309 BGB*

	into account all the circumstances of the case and, in particular: a)Any grave deviation from the good commercial practices, contrary to the good faith and the fair dealing; b) the nature of the goods or services; c) whether the debtor has some objective reason to deviate from the statutory interest rate for late payment laid down in art. 7.2, or from the compensation referred to in art. 8.1" (but this is implementation of directive 2011/7/UE of 16 February 2011) • **LU**: in B2B contracts, the law prohibits **only unfair terms in payment deadlines** (laws of 29 March 2013 implementing the Directive 2011/7 / EU of the European Parliament and of the Council of 16 February 2011 concerning the fight against late payment in transactions commercial) • **UK**: There is some statutory control over certain types of contract terms under the Unfair Contract Terms Act 1977, but this control does not extend to all contract terms – **primarily only to exclusion and limitation**	including such provisions are approved by an authority....» • **HU**: Section 6:102 of civil code concerns "Unfair standard contract terms" and applies also to B2B contracts • **IT**: In case of unfair terms in standardised contracts, reference to terms expressly listed by the law (art. 1341, § 2, It. civil code) is sufficient, provided that the terms considered as unfair by the law have been expressly and separately signed by the offeree. • **NL**: Article 6:233 sub a BW provides that the party that has accepted the incorporation of the other party 's standard term may avoid an unfair standard term. The same rules as to B2C contracts apply to B2B contracts (except black and grey lists). Article 6:235(1) BW provides that where the other party is a commercial party with 50 employees or more or who has lastly made public its annual account in accordance with company law, that party may not invoke avoidance under Article 6:233 BW. The same applies where the other party or repeatedly makes use of the same	

	clauses. The common law has historically controlled **penalty clauses**, but this aspect is currently subject to a case before the Supreme Court which could alter, or abandon, this principle.	or virtually the same standard terms[949]. • **PT**: Prohibition of using unfair terms is provided in Article 25 General Contract Terms Act. • **SI**: Art. 121 of the CO provides that any provisions of general terms and conditions that oppose the actual purpose for which the contract was concluded or good business customs shall be null and void, even if the general terms and conditions they are contained in were approved by the relevant authority. -**In some MS, there are no special rules which provide prohibition of unfair terms in B2B contracts, but some unfair terms may be disregarded on the basis of**: • good faith: CY, DK, LT • "surprising terms": CZ • basic rule on adjustment of unconscionable contractual terms found in Section 36 of the Contracts Act: SE (In addition, Case law may, in specific instances, prohibit the use of contractual terms deemed unfair)	
If this is the case, **what**	**The sanctions are the following**:	**The sanctions are the following**:	

[949] *NL: These rules do not apply if not both commercial parties are located in The Netherlands (irrespective whether it is the buyer or the seller that uses the standard terms and irrespective whether the buyer or the seller is located abroad). This is true even where the parties have agreed to Dutch law as the applicable law to the contract. Cf. Article 6:247(2) BW.*

is the sanction? Avoidance, damages, punishment, or other sanction?	• Nullity or avoidance: ES, FR • Restitution of the payment made on the basis of the contract which is void (=repetition of undue payments), which is a consequence of the nullity but which is used as a sanction: FR • Cessation of the use of the unfair term: LU • Term non-binding: UK • Damages: FR • Civil fines (up to 5% of the capital gain of the undertaking in fault): FR	• Nullity or avoidance: DE, HR, LT, NL, PL, SE, SI • Ineffectiveness: IT • Contested: HU • Damages: AT, DK, SI • Modification of the unfair term, reduction to a level at which the term is no more unfair: AT, LT, SE • Restitution: AT • Termination: DK • Compulsory pecuniary sanction: PT (no more than 4987,98 euros for each infraction Article 33, nr. 1 General Contract Terms Act).	
If this is the case, **are the rules on unfair terms in B2B contracts similar to the rules on unfair terms in B2C contracts?** If not, how do you define unfair terms in B2B contracts?	**-It is different from B2C contracts**: ES, FR, LU • **ES**: the special review mechanism provided for in Act 3/2004 covers both standard and individually negotiated terms • **FR**: It seems to be the same as decides the Constitutional court[950]. But in fact, it is not: in B2C contracts, prohibition of unfair terms applies only for ancillary terms ; In contrary, in B2B contracts, prohibition of unfair terms can apply to main terms, either on art L 442-6 I 2° (concerning significant unbalance,	**-It is similar, or almost similar to the rules which apply to B2C contracts**: • almost but not at all: AT, DK (but stricter), NL • similar for DE, EE, EL, HR, HU, o **EE**: The only difference is that in B2B contracts the unfairness is presumed and can be rebutted (Art. 44 of the LOA). If an unfair standard term specified in Art. 42 para 3 of the LOA is used in B2B contracts there is a presumption that the term is unfair and void. Business can prove that	

[950] *Cons. const., Dec. n°2010-85 QPC, 13 Jan. 2011*

	but it is discussed), or on art. L 442-6 I 4° of the commercial code which prohibits the practice consisting in "*4° Obtaining, or seeking to obtain clearly **abusive terms concerning prices**, payment times, terms of sale or services that do not come under the purchase or sale obligations, under the threat of an abrupt total or partial termination of business relations; »* • **LU**: In determining whether a contractual term or practice is grossly unfair to the creditor, all circumstances of the case are taken into consideration, including any deviation from good shows commercial practice, contrary to good faith and a fair use; the nature of the product or service; and whether the debtor has any objective reason to deviate from the statutory rate of interest for late payment.	the term is not unfair on given circumstances. • not exactly the same: PT, SI • general but almost different: IT, LT **-There is not a lot of definitions in the MS:** • **AT**: the term is unfair, if there is disproportionality between the legal positions. It can concern ancillary and main obligations. • **DE**: the term is unfair, if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. • **NL**: The same criterion to determine whether is a term is unfair in B2C contracts applies in B2B contracts. However, the fact that both parties are commercial parties will influence the outcome of the unfairness test as the identity of the parties is one of the factors to be taken into account	
Are there **special unfair terms concerning the B2B sales at a distance, especially online?**			In all the MS, which have general or special rules which forbid unfair terms in B2B contracts, there are no unfair terms which concern especially sales at a distance: AT, CY, CZ, DE, DK, EE, EL, ES, FR, HR, HU, IT, LT, LU, NL, PT, SE,

			SI, UK
Are there lists (black, grey or indicative) of unfair terms in B2B contracts?	-**<u>There is a black list in a few MS</u>**: ES, LU, FR • **<u>ES, LU</u>**: Clauses and practices regarding the period for payment, the consequences of late payment or the compensation shall • **<u>FR</u>**: article L 442-6 II of commercial code provides terms which are always void (black list)[951]. There is second list of unfair practices (but some of these practices consist in stipulating unfair terms: Article L 442-6 I of the commercial code) . **<u>-In ine MS, there is a grey list</u>**: IT	In one MS, there is a black list, and a grey list, in the general law: **PT** In one MS, the black list which exists for B2C contracts, is a grey list for B2B contracts: **EE**	**<u>In some MS, there are no lists, neither black, nor grey, especially for unfair terms in B2B contracts</u>**: AT, DE, DK, EL, HR, HU, LT, NL, SI, UK • **<u>DE</u>**: But there is a presumption: § 307 (2) BGB contains an assumption for terms to be ineffective "if a provision is not compatible with essential principles of the statutory provision from which it deviates", or "limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised."
<u>Unfair trade practices in relation to B2B contracts</u>			

[951] *FR: art. L 442-6 I 2°: "II. - Clauses or contracts that allow a producer, trader, manufacturer or a person listed in the trade register to commit the following acts are null and void: Benefit retroactively from discounts, rebates or commercial cooperation agreements; Obtain the payment of a fee to obtain accreditation prior to the placing of all orders; Prohibit the co-contracting party from transferring the debts held against it to a third party; Benefit automatically from more advantageous terms granted to competing undertakings by the co-contracting party; Obtain from a reseller operating a retail space of less than 300 square metres that it supplies, but which is not linked, directly or indirectly, to it by a trademark or know-how licence, a preferential right on the assignment or transfer of its business or a post-contractual non-competition obligation, or to condition supplies to this reseller upon an exclusivity or quasi-exclusivity commitment undertaking to buy its products or services for a period of more than two years. «*

Are there domestic **rules which forbid unfair trade practices <u>affecting the content of B2B contracts?</u>** In this case, are there specific sanctions? Are there specific rules concerning such unfair trade practices in B2B sale at a distance (specifically online)?	**<u>-In some MS, there are special rules which forbid unfair trade practices affecting the content of B2B contracts</u>:** AT, BE, BG, CZ, ES, FR, SI • **<u>AT</u>**: It is considered as unfair if there is an unjustifiable breach of law or contract in the course of a commercial practice that leads to a noticeable distortion of competition (§ 1 (1) no. 1 UWG) • **<u>BE</u>**: The CEL stipulates that it is forbidden for a trader to harm the professional interests of one or two companies by using unfair practises (article VI.104 CEL). • **<u>BG</u>**[952]: Under Art. 37a PCA any action or omission by an undertaking taking a stronger position in negotiations shall be prohibited, if such action or omission is in contradiction with the fair trade practice and causes or might cause any harm to the interests of the weaker party in the negotiations, as well as to the interests of users. • **<u>CZ</u>**: Some unfair practices are restricted by market competition regulation. Section 2976(1) If, in business relations, a person gets into conflict with good morals of competition as a result of his conduct capable of causing harm	-**<u>In a few MS, there are general rules prohibiting unfair trade practices even if the victim is a professional</u>**: DE, DK • **<u>DE</u>**: According to § 4 No. 1 UWG trade practices can in particular be unfair and thus prohibited when a person uses commercial practices that are suited to *impairing the freedom of decision* of consumers **or *other market participants*** through applying pressure, through conduct showing contempt for humanity, or through other inappropriate, non-objective influence. Specifically, **<u>one practice is about trade on line</u>**: § 7 UWG specifically assumes a commercial practice to be unconscionable pestering and thus illegal in the case of i.e. advertising using an automated calling machine, a fax machine or electronic mail without the addressees prior express consent; or advertising using a communication where the identity of the sender, on whose behalf the communication is transmitted, is concealed or kept secret, or where there is no valid address to which the recipient can send an instruction to terminate	**<u>In some MS there are no rules about unfair practices in B2B contracts</u>**: CY, EE, EL, HU, IE, LT, LV, MT, NL, PL, RO, SE, SK, UK

[952] *BG: It concerns for instance, misleading actions, prohibition for misleading and comparative advertising, imitation, unfair solicitation of clients*

	to other competitors or customers, such a person has competed unfairly. Unfair competition is prohibited[953]. • **ES**: Unfair competition Act contains some unfair trade practices which concern the period after the conclusion of the contract: for instance, a conduct shall be regarded as unfair if it creates confusion with the activity, the characteristics or the branch of a competitor (art.6). It shall be regarded as unfair the exploitation of the economic dependency of a client or a supplier that believes that he will not be able to find an equivalent alternative for the exercise of its activity (Art 16) • **FR**: L. 442-6 of the commercial code prohibits a lot of unfair practices in B2B contracts • **HR**: Article 6 of the trade Act states that: "(1) Unfair trading comprises of traders' actions by which good trade practices are infringed, due to competition. (2) Unfair trading is prohibited". • **IT**: 'Provisions aiming at protecting the enterprises' contractual freedom' provides on	transmission of communications of this kind, without costs arising by virtue thereof, other than transmission costs pursuant to the basic rates. • **DK**: Section 1.1 of the Act on Marketing provides that traders "shall exercise good marketing practice with reference to consumers, other traders and public interests." **The sanctions are the following one:** • whoever uses such illegal commercial practice can be sued for elimination: DE • injunctions: DK • damages: DE, DK • restitution: DE, DK	

[953] *CZ: Section 2976 (2) Unfair competition, as referred to under Subsection (1), shall include, without limitation: misleading advertising, misleading identification of goods and services, creating a likelihood of confusion, free-riding on the reputation of an enterprise, product or services of another competitor, bribery, disparaging a competitor, comparative advertising, unless allowed as admissible, breach of business secrets, unsolicited advertising, and threat to health and the environment.*

	one side the control of the AGCM over the commercial practices considered as abuse of economic dependency of small enterprises; on the other side, the provision presumes as unfair continuous practices violating the Directive on late commercial payments, even though there is no evidence of the economic dependency of small enterprises. • **LU**: Art. 14. Of the Act of 30 July 2002 regulating certain commercial practices, states that "*Commits an act of unfair competition, anyone who carries on business, industrial, craft or profession which, by some illegal act or to honest practices in commercial, industrial, craft or profession, or a contractual commitment, removes or attempts to remove its competitors or any part of them their customers or violates or attempts to undermine their ability to compete.*" • **PT**: Unfair Unilateral Trade Practices Act deals with unilateral restrictive trade practices. • **SI**: the abuse of bargaining power is forbidden. It is governed by the Protection of Competition Act and the Prevention of Restriction of Competition Act.		

	<u>The sanctions are the following one:</u> • Injunction: BE, ES • Declaratory action for bad faith: ES • Action to counter the effect produced by the unfair practice: ES • Action to compensate damages: ES • Action against unjust enrichment, which shall only apply when the unfair practice prejudices a legal position protected by an exclusive right or some other of similar economic content: ES • Nullity and avoidance: FR • Restitution: FR ○ **<u>FR</u>**: The sanction of restitution is very effective. For instance, in case law, some distributor of the retail chain have been condemned to restitute 77 or 61 millions of euros, which are not negligible amounts. Such sanction applies mostly against distributor of the retail chain. • Damages: FR, HR • Fines: FR (civil fines up to 5% of the capital gain of the undertaking in fault), PT (fines depend on the classification of the company: 250 Euros for a individual enterprise, 2.500.000		

	euros for a large enterprise). • Interim measures: PT		
Are there lists (black, grey or indicative) of unfair trade practices in B2B contracts?	**-In some MS, there is black list of unfair trade practices**: ES, FR, PT • **ES**: Act 3/2004 contains a black list of unfair commercial practices in art. 9.1. • **FR**: article L 442-6 I of the commercial lists twelve practices which are unfair (black list). On the wording of the text, the weak party can only ask damages, and the Minister of Economy can ask for nullity. But Case law have decided that the weak party can also ask for nullity of all these terms or practices. • **PT** (**this MS has also a grey list**) **-One MS has an indicative list**: HR • **HR**: Article 64 of the Trade Act contains an indicative list of unfair trading practices.	**-One MS has a black list:** AT **One MS has an indicative list**: DE • **DE**: The black list in the annex of the UWG only applies to B2C contracts (§ 3 (3) UWG). §§ 4-7 UWG contain a list of examples for unfair trade practices. The unfairness is partly indicative, partly inherent.	**In some MS which prohibit unfair trade practices in B2B contracts, there is no list of such practices**: BE, BG, CZ, DK, IT, LU, SI

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or not rule at all
Q 41 – Interpretation in favour of weak professional party			
Does domestic law recognise **a**		**-Some MS have a principle of interpretation in**	-**Some MS have no such a rule**:

principle of interpretation of contracts in favour of the weak party, even if this party is a professional? Does this principle bind the judge or does the judge keep his power of interpretation in B2B contracts? If this principle exists, could it be derogated from by agreement in B2B contracts?		**favour of the weak party, even if he or she is a professional.** It is a binding principle: BE, RO **-Some other MS do not have this principle, but a rule which is almost the same**: • **Interpretation contra proferentem or standard terms:** AT, DE, EE, CZ, ES, FI, HR, IE, IT, LT, PL, PT, SI, UK ○ **AT**: § 915 ABGB does provide a principle of interpretation contra proferentem in mutually binding contracts. It cannot be derogated from ○ **DE**: However, § 305c (2) BGB provides that any doubts in the interpretation of *standard business terms* are resolved against the user. ○ **EE**: standard terms shall be interpreted to the detriment of the party supplying the standard terms (Art. 39 para 1 of the LOA). So, this is not a principle of interpretation in favour of the weak party, but in favour of the other party. ○ **CZ:** It is almost the case in CZ: there is no such a rule, but Section 557 of civil code provides that "If a term is used which allows various interpretations, in the case of doubt it is to be interpreted to the detriment of the person who used	BG, DK, LV, MT, SE, SK -**One MS has a rule which provides that the interpretation must be against the party who imposes the term to the other party, but it can be derogated from:** HU -**Several MS have a principle of interpretation in favour of the weak party, even if he or she is a professional, but it is not binding**. Even if it is mentioned in the law, it is advices given to judges by the law for the interpretation of conventions. The reason of non-binding effect (in FR) is that the Court of cassation doesn't want to control interpretation. Then the parties can a fortiori derogate from it: FR[954], LU[955], NL • **NL:** For B2B-contracts the *contra proferentem*-rule is not a binding rule but merely a factor to be taken into account when interpreting a contract term

[954] *FR: On the new reform of contract law, applicable from 1er October 2016, there is also a principle of interpretation for non-negotiated contracts (art. 1190 of the civil code)*
[955] *LU: Following a semantic shift it is now often used to justify an interpretation of standard contracts against the drafter of the condition (in this sense: Court of Appeal February 13, 2002, No. 24910 of the role; Trib. Luxembourg 31 January 2003, No. 73548).*

		the term first". It can be used to protect the weak professional party ○ **ES**: In case of standard terms, the interpretation must be made in favour of the adhering party (art. 6.2 GCTA:B2C and B2B contracts). ○ **FI:** interpretation to the detriment of the contract party who drafted if the term is not individually negotiated. ○ **HR**: Article 320, paragraph 1 of the COA does contain *contra proferentem* method of interpretation according to which pre-formulated contract terms prepared by one contractual party shall be interpreted in favour of the other contracting party. ○ **IE:** The *contra proferentem* principle of interpretation may be applied in limited circumstances. This principle is not limited to consumers. ○ **IT**: general principle of interpretation of contracts in favour of the party who has not prepared the contractual form. ○ **LT**: In the event of doubt over conditions of a contract, they shall be interpreted against the contracting party that has suggested thereof, and in favour of the party that accepted those conditions. ○ **PL**: only in standard terms (case law) ○ **PT**: Article 11 of *General*	

		Contractual Clauses Act states that "1- Ambiguous general contractual clauses have the sense given by a indeterminate normal contractor who would be limited to subscribe or accept these last when in the position of a real *adherent*; 2- When in doubt, the sense most favourable to the *adherent* prevails" ○ **SI**: Art. 83 of the CO provides that if a contract was concluded using content printed in advance or the contract was otherwise prepared and proposed by one of the contracting parties it shall be necessary to interpret unclear provisions in favour of the other party (in dubio contra stipulatorem). ○ **UK**: There is **a limited *contra proferentem* principle at common law, but this has a fairly restricted application these days.** • **Interpretation according to the requirements of good faith:** EL, LT • **Interpretation in accordance with better balance of the considerations**: PT ○ **PT**: in negotiated individual contracts, an interpretation in favour to the weak party may be assured by article 237 CC, pursuant to which, *in case of doubt* in valuable transactions the declaration shall have the meaning that ensures *a better balance of the considerations*.	
If this principle exists, is it		-**For some MS, the protection exists for all the**	

limited to the terms offered by the seller?		**terms:** AT, BE, LT, PT **-In some MS, it is limited to the terms offered by the seller:** IE, LU, RO **-The principle is limited to the terms offered by the party using standard terms. It can be the seller, but it could also be the other party ?**: DE, CZ, EE, ES, FI, HR, HU, IT, SI • In **DE**, § 305c (2) BGB applies to the *user* of unfair terms, no matter if the weaker party is the buyer or the seller. But when the buyer is the weak party, it is limited to the standard terms used by the seller • In **CZ**, it could be limited to the terms offered by the seller, if he is "the person who used the term first" (see above)	

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or not rule at all
Q 42– Merger clauses in B2B sales			
In B2B sales, **does domestic law give effect to a merger clause, that**	**In one MS, this term could be unfair in B2B sales**:	**-In some MS, this term is allowed, but the parties are not absolutely bound by merger clauses,**	**Most MS admit mergers clauses in B2B sales, where they have binding effects**: BE, CY, CZ[956], EE,

[956] *CZ: this term must respect section 547 of the Czech Civil Code which states that "Juridical acts must, in **terms of their content and purpose**, be consistent with **good morals and statutes"***

is to say, a clause under which the contract contains all terms agreed? **Does this clause bind the professional weak party? Does this clause bind the trader?**	• **FR**: Article L 442-6 of the Commercial Code allows the Court to cancel **unfair terms in B2B contracts**. According to this text, in contract **between a supplier and a distributor of the retail chain**, a merger clause would probably be unfair (doctrinal opinion). This text applies to all commercial parties, but in fact, it applies often against the distributor of the retail chain, or against the bis undertaking of Internet.	**especially if it a standard term**: AT, DE, NL, PT • **DE**: It is possible to reverse the presumption by proving that a deviating individually negotiated term exists which prevails according to § 305b BGB. • **NL**: Merger clauses are valid. However, notwithstanding the merger clause, the other party may rely on previous statements by the party that incorporated the term into the contract **if it proves the parties had intended to give effect to these statements, in particular if that party was not assisted by a lawyer and did not negotiate** the text of the contract but merely accepted a draft thereof by the party that incorporated the merger clause into the contract. • **PT**: In B2B contracts rules of interpretation of the contract are admitted and a merger clause may prevent the parties' prior statements from being used to interpret the contract. Nevertheless, under the	ES[957], HR, HU, IE, IT[958], LT, RO, SK, UK • **RO**: Art. 1185 Civil code states that "when, during the negotiations, one party insists on not being bound by a substantial or formal contractual term, this term shall not be binding on the party unless an agreement has been reached on that specific contractual term.". To prevent to be bound by pre-contractual statements, the parties may use a clause stating that the contract is the final word on what the parties have agreed to, superseding all previous negotiations or agreements. **-Some MS do not provide this merger clause**: EL, LU, LV, MT, PL, SE, SI • **PL**: But Art.92 of the draft of the First Book of the new Polish Civil Code provides: If in a written agreement between the parties it was stated that the document covers the whole substance

[957] *ES: unless the merger clause was intended to exclude the parties' common intention.*
[958] *IT: According to this provision, a conventional agreement imposing the (written) form to a future contract must be interpreted as imposing a (written) form to the validity of the future contract*

		General Contract Terms Act **individually negotiated terms take priority over terms in a standard form contract** (Article 7); consequently, a merger clause in such a contract cannot set aside a prior or simultaneous individual agreement. -**In several MS, this term is not allowed, and therefore it does not bind the professional party**: BG, DK	of the contract, then all prior arrangements do not constitute the part of the contract but may be used for its interpretation

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or not rule at all
Q 43 Unilateral determination of the price or other contract term by a party or by a third party			
Unilateral determination of the price by a party			
Does domestic law admit **unilateral**		-**In some MS, the price cannot be**	-**In most MS, it is possible. This**

determination of the price of the contract by one party in B2B sales? If such a domestic rule exists, can it be derogated from by agreement in B2B contracts?		**determinate unilaterally by a party**: CZ, ES[959], FR (except when framework-contract)[960], HR, IE, LU (except when framework-contract), LV, MT, SI	**follows from the freedom of contract:** AT, BE, BG, DE, DK, EE, EL, FI, HU, IT, LT, NL, PL, PT, RO, SE, SK, UK -**In some MS, there is no such a rule, but it is provided that if the price is not agreed by the parties the buyer will pay the seller a reasonable price:** • **CY**: The right to unilaterally determine the price is only practiced when no price is determined in the contract, or no price is determined by the parties at a later stage
If this is the case, what are the **rules that protect the other party against unreasonable or abusive determination of the price?** If such rule exist in the domestic laws, can such rules be derogated from by agreement in B2B contracts?		-**In some MS, the protection of the party who does not determinate the price is based**: • On abuse of weakness: AT[961], IT[962] • On the principle of good faith: BG, DK, EE, NL • On the abuse of right: FR (when framework-contract), LU (when framework contract) • On the unreasonableness of the price fixed by one party: CY, DE, EE, FI, LT, RO, SK • On equitable criteria: EL[963], PT	

[959] *The SpCC expressly prohibits it (art. 1449), although there is some case law that allows it under certain circumstances (see Q23)*
[960] *FR: But it is possible when the sale in an application of a framework-contract (case law). And the French reform of contract law, applicable from 1er October 2016, states that, in the framework contracts, it can be agreed that the price of the service will be fixed unilaterally by one party, with the order to justify the amount in case of dispute. » (art. 1164 of the civil code in the reform). The Court will sanction abuse in fixing unilaterally the price.*
[961] *AT: it could be also invoked that « If one party, in a mutually binding transaction, has not received at least half of the common value of what he gave to the other party, then the impaired party is entitled by law to demand cancellation or restitution. The other party may however save the transaction by substituting the difference to the common value. The difference in values is determined by the time the transaction has been concluded" (§ 934 ABGB); but this rule can be derogated from)*
[962] *IT: It is an exception to the general principle of contract law according to which no economic balance is required, but a free and spontaneous consent is sufficient.*

		• On provision on gross disparity in value (at the time of the conclusion of the contract): HU • On unfair terms: HU • On unfair exploitation: IT, PL	
Unilateral determination by a third party			
Do domestic law admit a **third party to determine the price? Are the rules different in B2B contracts than those you describe in B2C contracts?**		In one MS, **the parties cannot entrust a third party to determine the price**: HU (except if the party is the Court).	-In most MS, **a third party can determine the price and it is mandatory:** AT, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, IE, LT, LU, NL, PL, PT, RO, SE, SI, SE (uncertain), UK • **FI**: Contrary to B2C contracts, there are no rules about the reasonableness of the price in B2B contracts. However, unreasonable contract terms in B2B contract may be adjusted under the Section 36 of the Contracts Act. -In one MS a third party can determine the price but **it is only possible when parties give the third party enough factors to determine it**: BE -In two MS, **such rule is not provided**: LV, MT
What happens when the third party does not determine the price in B2B		**If the third party does not determine the price**:	

[963] *EL: according to article 372 of the Greek Civil Code, "A contract whereby the determination of a performance has been left to the absolute discretion of one of the contracting parties shall be void.".*

contracts?		• **The contract has no effect or is void**: AT, BE, CY, ES (unless the parties have agreed to designate a substitute), FR, IE, LU (doctrinal opinion), PT • **The price can be determined by the Court**: BG, CZ, HR, NL, SI • **The Court will appoint another third party**: IT, NL, RO	

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or not rule at all
Q 44– Various			
Are there domestic **rules whereby the sale to a professional buyer must conform to formal conditions?** Can such rules be derogated from by an agreement in B2B contracts?	**In one MS, some formal conditions can apply in B2B contracts**: • **FR**: Article L. 441-7 of the commercial code states that « *a **written agreement concluded between the supplier and the distributor…**shall set out the obligations assumed by the parties in order to set the price at the end of the sales negotiation. ». Failure to prove that an agreement complying with the requirements of I has been concluded within the*	-**In some MS, there are some rules which provide that the sale to a professional buyer has to respect formal conditions, but they cannot be derogated from**: BE, BG, CZ, IT • **BE**: There are formal conditions for e-commerce concerning the writing (a set of understandable signs which are accessible for each future consultation), and the signature (a set of electronic information that can be attributed to a particular person and which demonstrates the preservation of the integrity of the contents of the deed, is recognized as a	**-In many MS, there is no rule which provides that the sale to a professional buyer has to respect formal conditions**: CY, DE, DK, EE, ES, FI, HR, HU, IE, LT, LU, LV, MT, NL, PL (except for sale of immovable property where the notary act is obligatory), PT, RO, SE, SI, UK -**In some MS, there is some rule which provide that the sale to a professional buyer has to respect formal conditions, but they can be derogated from**: AT, EL, SK

	given deadline shall be punishable by a fine of 75,000 Euros »	signature) • **BG**: Art. 293. CA (1) To be valid a commercial transactions shall require a written or other form only in the cases provided for by a law. • **CZ**[964]: Written form is required for a juridical act creating or transferring a right in rem to an immovable thing, as well as a juridical act altering or extinguishing that right. • **IT**: A written form is required in the case of sale of immovables, the sale of heritage, sale of ships, sale of aircrafts and, according to administrative scholars, the sales with public entities. It is not the scope of sale on line.	• In **AT**, Contracts with blind persons require a notarial deed to be valid, unless it is a contract about an everyday matter or (excluding certificates of bond) the blind person expressly declares to waive compliance with this formal requirement (§ 1 (1) e, § 1 (3) no. 1 and 2 NotaktsG (law on notarial deeds)). • **EL**: Except when otherwise agreed by parties who are not consumers, in cases where the recipients of the service places his order through technological means, the following principles apply: - the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means ; - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to

[964] *CZ: Section 1758: If the parties agree to use a particular form to conclude a contract, they are presumed not to intend to be bound by such a contract unless the form is complied with. This also applies where one of the parties expresses its will to conclude the contract in written form.*

			access them ; - the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order (article 10 of Presidential Decree 131/2003)
Are there domestic rules regulating cases where **the professional buyer is <u>an incapable person</u> in certain circumstances?** Can such rules be derogated from by an agreement in B2B contracts? The word "incapable" can be used in a broadest sense. For instance, a prohibition to conduct business can be considered as the same than being incapable, because the act made by the professional who is not allowed to do business, could be contested before the Court.	**<u>-In some MS, there are rules which provide that some persons cannot conduct a business</u>**. It concerns the following cases: • **<u>Public officers, or judges</u>** ○ **<u>ES</u>**: Magistrates, judges and officers of the State Prosecution Service in active service ○ **<u>IT</u>**: public officers • **<u>When there is a possible conflict of interest</u>** ○ **<u>IT</u>**: in case of agents, as prospective buyers of the goods they are in charge to sell in the principal's interest: IT (art. 1471, § 1, n. 4) It. civil code). ○ **<u>LU</u>**: The agent cannot act as counterparty to	**<u>-In some MS, there are rules which provide protection of the buyer if he is an incapable person</u>**: AT, FI • **<u>FI</u>**: the rules on Contracts Act Section 33 may make contracts with e.g. drunk or other temporarily incapacitated persons ineffective.	**<u>Except the rules of the general law, in many MS, there is no special rule</u>** about the incapability of the professional buyer: BE, BG, CY, CZ, DE, DK, EE, EL, HR, HU, IE, LT, LV, MT, NL, PL, SE, SI, UK

	the act he must pass to his principal. Article 1596 of the Civil code expressly provides for the sale. ○ **PT**: when a professional buyer acts, in sales of a thing or right under litigation, as a middleman of persons whom the law does not permit to receive the assignment of credits or rights under litigation ○ **RO**: Art. 1654 Civil code states that **"**Are incapable to buy, directly or through intermediaries and not even on a public auction: (a) agents of the seller, for the goods which the seller entrusted them to sell on its behalf, except in the cases which fall under art. 1304." • **Persons who are condemned for Bankruptcy:** ES, FR, LU • **Persons subject to a collective insolvency proceedings,** and who cannot conclude a contract by		

	themselves: FR
	
	• **Branch:**
	  ○ **In LU,** the Court stated that the branch of a company does not have no own legal personality. This is its "parent" which has the personality and capacity (Court of Appeal, January 6, 2005, No. 28682, BIJ, 2006, p. 49) and can therefore validly contract.
	• **Association or foundation**
	  ○ **In LU**, the principle of specialty is particularly marked for associations and foundations, non-profit groups: Article 15 of the Law of 21 April 1928 states that "the association cannot possess property or otherwise that buildings necessary to achieve the purpose or purposes for which it is formed, "which implies the invalidity of all contracts by which an association pretend acquire rights in a building completely exterior to its business.		

	• **<u>When there is a decision of a court:</u>** ○ **<u>SK</u>**: The decision of the court can be determined that the period specified in the court decision or by a court decision for a period of three years from the effective date of the decision (hereinafter "decision to exclude"), a natural person shall not act as member of the statutory body or supervisory Authority in the company or cooperative (the "excluded representative"). This applies equally to act as head of a branch company, the head of a foreign entity, the head of a branch of a foreign entity or clerk.		
Are there domestic rules whereby **it is forbidden to sell <u>things which may not be owned or alienated</u>?** Is it applicable in a B2B contract? Can such rules be derogated from by an		**<u>Goods which cannot be owned</u>** -**<u>In many MS, such sales are forbidden</u>**: AT, CZ, DK, EE, ES, FR, HU, IT, LU, NL, PL, PT, RO, SE[965] It is the case of: • **<u>Sale of organic material</u>** or	**<u>Goods which cannot be owned</u>** -**<u>In a few MS, there is no such rule</u>**: FI, MT

[965] *SE: such a contract would be contra legem, unconscionable, impossible to perform etc., etc. It would not be upheld.*

agreement in B2B contracts?		persons to facilitate a medically assisted reproduction are forbidden: AT, LU, NL ○ **NL**: The sale of living human being would not only be invalid for reasons of public policy or good morals, but is even inexistent since living human beings are no goods within the meaning of the law and therefore cannot be the object of a sales contract. • **sale of a good which is not in commercium**: CZ, FR, HR[966], LU • **sale of illegal items**: DK, IT • **sales of weapons and narcotics**: EE, LU • **mineral resources, caves, underground waters, natural healing sources and streams**: SK (this things are the property of the Slovak Republic • **case of sale where the performance is impossible**: HR, HU[967], IT, PL, PT, SI, UK ○ **IT**: According to art. 1346 it. civil code the object must be (not only possible and ascertained, but also) lawful, otherwise the contract shall be void.	**Goods which cannot be alienated** -**In some MS, sales of good which cannot be alienated is in principle forbidden, but it can be derogated from**: • **CZ**: Section 1760 states that "the fact that a party **was not entitled to dispose** of the subject of performance under the contract at the time the contract was concluded does not in itself invalidate the contract. Section 1761 adds that "a prohibition to encumber or alienate a thing **has effect only between the parties,** unless it has been established as a right in rem…." • **LV**: Article 1544 of the Civil Law sets: "A contract regarding property which cannot be circulated is not valid, even if it might later be able to be circulated". But it can be derogated from by agreement.

[966] *HR: pursuant to Articles 270 and 271 of the COA, a contract whose subject matter of performance is impossible of impermissible shall be null*
[967] *HU: Any contract which is incompatible with the law or that was concluded by circumventing the law shall be null and void, unless the relevant legislation stipulates another legal consequence*

		○ **Contra: NL**: "Under Dutch law, one is allowed to sell the moon, if one pleases ». However, performance of the contract is not possible, as delivery is not possible, which means that the seller will be in breach of contract. ○ **UK**: Such contracts might well not be upheld because they are effectively impossible to perform **Goods which cannot be alienated** -**In some MS, sales of good which cannot be alienated are forbidden**: BG, DE, ES, FR, RO	-**In one MS, there is no rule about sales of goods which cannot be alienated**: FI
Are there domestic rules that provide for **what happens where the sold thing is lost at the date of the sale? Are they applicable in a B2B contract?** Can such rules be derogated from by an agreement in B2B contracts?		**-In two MS, the buyer can withdraw from the contract, or the contract can be terminated, if the debtor knew or had to have known that the good (which is unique) is lost at the date of the sale:** AT, HU • **AT**: When the object was unique or limited so that the obligation cannot be fulfilled, the creditor is allowed to withdraw from the contract and to claim damages if the debtor knew or had to have known about the impossibility to fulfil the contract.	-**In some MS, there is a rule about the good lost before the conclusion of the contract but it is not mandatory**: DK, LU, PL • **DK**: Section 21.1 of the Sale of Goods Act provides "If the goods are not delivered by the agreed time and this is not due to circumstances attributable to the buyer or an accidental event for which the buyer bears the risk, the buyer may demand performance or declare the

		-In some MS, the contract is null and void (or ineffective) if the thing which has been sold, is lost at the date of the sale: BG, ES, FR, HR, RO • **BG**: Art. 184 OCA provides that if at the time of signing the contract the good has been destroyed, the contract shall be null and void. • **ES**: the contract shall become ineffective[968]. • **FR**: article 1601 of the Civil code provides the avoidance of the contract if the thing, which has been sold, is lost at the date of the sale. • **HR**: Article 381 of the COA states that «A contract of sale shall have no legal effect if at the moment of its conclusion the thing the contract is on had perished». • **RO**: Should the goods which have been identified in the contract be lost at date of the sale, the contract shall be deprived of all its effects. **-In some MS, in this case, the seller will not perform his obligation, and the buyer can ask for remedies**: • **General:** NL, LV ○ **NL**: If the goods are lost at the date of the conclusion	contract avoided." This also will apply if the goods are lost. • **LU**: According to article 1601 of the Civil code: *If at the moment of the sale the thing sold had been totally destroyed, the sale is null. If only a part of the thing was destroyed, the buyer may choose either to abandon the sale or claim the part preserved, by having the price of that part estimated proportionately.* Nothing in Luxembourg law prohibits the contractors from derogating from these provisions by agreement • **PL**: In this case the rules on implied warranty for legal defects will apply (art.556 CC). But, the liability for legal defects can be derogated in case of B2B contracts -**In a few MS, there are no specific rules for such issue:** LT, MT, SI

[968] *ES: Nevertheless, in case of partial loss, the buyer may withdraw from the contract or claim the existing part paying its proportional price. This rule is applicable in a B2B contract.*

		of the contract the seller will not be able to transfer the ownership of the goods or to deliver the goods. That implies that he will not be able to perform his obligations under the contract ○ **LV**: Article 1545 of the Civil Law sets: "A contract regarding the property of another, even though it is entered into without the owner's consent and knowledge, shall establish valid rights to claim, except in the case when the contract concerns property acquired by means of a criminal offence, and the promisee is aware of it" • **In one MS, the buyer is entitled to a reduction of the price**. ○ **EL**: Article 549 of the Greek Civil Code: If the thing has been destroyed completely or to a large extent or has been lost or has substantially deteriorated by reason of a fortuitous event the purchaser shall only be entitled to a reduction of price.	

		• **In some MS, the buyer may claim damages**: CY, DE, EE ○ **CY**: If the promise constitutes an impossible act or an illegal act and the promisor knew or could have known, had he applied reasonable care, of its impossibility or illegality, whilst the promisee did not know, the promissor is obliged to compensate the promisee for any damage caused due to non-performance of the promise. ○ **DE**: In this case, the contract of sale is not invalid in these cases the buyer can demand, at his choice, damages or reimbursement of expenses ○ **EE**: damages or other remedies of non-performance (except of delivery which is impossible). But, the validity of a contract is not affected by the fact that, at the time of entry into the contract, performance of the contract was impossible	

Are there domestic rules **whereby the sale of a thing which is not the property of the seller is forbidden** Are they applicable to a B2B contract?	**In some MS, there is a special rules in the commercial code**: • **PT**: if the principle is that the sale of assets belonging to another is null and void (Art. 892 cc), however, in trade, the sale of a thing that is not the property of the seller (as well as a sale of uncertain things) is allowed provided that the seller *acquires* by legitimate title the ownership of something sold and *delivers* it to the buyer, under penalty of liability for loss or damage (Article 467 Commercial Code)[969]. • **SK**: According Section 446 CommC, the buyer shall acquire the ownership rights even in the event that the seller is not the owner of the sold goods, unless at the time when the buyer was to acquire the title to the goods the buyer knew that the seller was neither the owner, nor authorized to sell the goods.	**-In some MS, the sale of a thing which belongs to another person is null or void, or ineffective:** BE, FI, FR, LU • **BE**: Article 1599 CC states that the consequence of the sale of goods that belong to another person then the seller, is nullity. • **FI**: No one can sell a good that he or she does not own. No explicit provisions, however, exist. Contracts for the sale of stolen goods are ineffective. **-It is a breach of contract**: SE • **SE**: selling goods belonging to someone else would constitute a breach of contract under the sales law rules on third party rights and claims **-In some MS, the buyer can claim damages**: DK, LT (warranty), SI **-In some MS, in such a sale, the buyer can still acquire the property of the good**: BG, EL • **BG**: Art. 78 of the Ownership Act stipulates that whoever acquires the possession of tangible goods on a legal ground, even if not	**In one MS, the sale of a thing which is not the property of the seller is perfectly possible. It can be derogated from by agreement**: ES

[969] *PT: but there is not a real difference between civil code and commercial code because civil code admits that the sale of assets belonging to another as a sale of future assets, if the parties consider it in this light (Article 893 CC).*

		from the owner, but without knowledge of that fact, acquires the property right. • **EL**: if the buyer is not acting in bad faith[970] **-In several MS, in such a sale, the buyer cannot acquire the property of the good:** CY, IE, IT • **CY**: According to Section 27 of the Sales of Goods Law 10(I)/1994 when goods are sold by a person who is not their owner and who has also not received the authorization or consent of the owner, the buyer does not receive a better title to the goods than the title of the seller, unless the owner of the goods is prevented from denying his authorization to the seller for the sale of goods, through his conduct. • **IE**: The sale is not forbidden but it is ineffective to transfer a title that the seller does not have (*nemo dat quod non habet)* • **IT**: the conclusion of the contract does not transfer the property of the goods, but is imposes an obligation on the seller to become the owner of the promised good. If the buyer is not aware that the	

[970] *EL: In addition, the article 1038 [Things stolen or lost] of the Greek Civil Code states that «: A transfer by a person who is not the owner to the acquirer of good faith shall not be effective if the owner was dispossessed of the thing transferred by theft or loss ».*

		seller is not the owner, the buyer may ask the termination of the contract, the restitution of the price and of the expenses (art. 1479 It. civil code). -**In some MS, the sale of the property of a third party is not forbidden:** AT, BG, CZ, DE, EE, HR, HU, NL, RO, SI, UK • **AT**: but it is a case of warranty • **BG**: but this contract cannot transfer the property rights to the buyer • **CZ**: there is a rule saying that contract where party was not entitled to dispose of the subject of performance is not automatically invalid. • **DE**: The sale of a good which is not property of the seller is generally not prohibited by German law. The sales contract (§ 311a (1) BGB) *obliges only* the seller to transfer property. The seller has to do everything in his power deemed acceptable in order to recover the good or gain the approval of the true owner. • **EE**: There is a general rule providing that the validity of a contract is not affected by the fact that, at the time of entry into the contract, one of the parties did not have the right to dispose of the thing or right which is the	

		object of the contract (Art. 12 para 1 of the LOA). • **HR**: pursuant to Article 382 of the COA, such contract shall be valid and binding on the parties. But, if a purchaser did not know nor should have known that the object is not property of the seller, he may rescind the contract and claim damages if the purpose of the contract cannot be achieved. • **NL**: The seller may sell goods of which he is not (yet) the owner and even of goods that do not yet exist. If he subsequently becomes the owner of the sold goods, he can transfer the ownership to the buyer; if not, he is in breach of contract • **RO**: The sale of goods not owned by the seller at the date of the sale is valid, in Romanian law, subject to the condition that the seller obtains the property of the goods from their owner and be able to transfer it to the buyer. • **SI**: Article 440 of the CO provides that the contract for the sale of another person's goods is binding. However, a buyer that did not know and was not obliged to know that the thing was another's may withdraw from the contract if for this reason the purpose thereof cannot be achieved, and may demand compensation.	

		• **UK**: s.12 of the Sale of Goods Act 1979 and now s.17 of the Consumer Rights Act 2015 require that the seller must have the right to sell, i.e., must be able to transfer ownership (property) to the buyer. It seems that this does not necessarily mean that the seller must have ownership, as long as under the contract the seller is able to transfer ownership of the goods in question to the buyer.	
Are there domestic rules which provide for **the rescission for lesionof the sale? Is it applicable in a B2B contract?** Can such rules be derogated from by agreement in B2B contracts?		-**In many MS, the contract can be rescinded in a case of usury, laesio enormis, lesion against good moral, or unfair exploitation:** AT, BE, DK, EE, FR, HR, LU, PL, PT, RO, SI • **AT**: In both cases, the contract can be rescinded. In a case of laesio enormis this can be avoided by the other party paying the difference the common value. • **BE**: art. 1674 C.C: if the seller of a building has been disadvantaged for more than 7/12 of the price, he can demand nullity of the sale. • **DK**: There is no special rule, but lesion may be considered to be covered by the unfair terms provision in Section 36.1 of the	-**In some MS, there is no rescission for lesion in sale in B2B contracts**: BG, CY, CZ, DE[971], ES, FI, IE, LT, NL, SE, SK, UK. **In some MS, the contract can be rescinded in a case of usury or laesio enormis, but in B2B contracts, it can be derogated from**: HU

[971] *DE: But legal transactions which are contrary to public policy are void (§ 138 BGB).*

		Act on Contracts. • **EE**: If there is a situation of lesion, the contract is valid and cannot be rescind except if the lesion is against good morals (Art. 86 of the GPCCA). • **FR**: if the seller of a building has been disadvantaged for more than 7/12 of the price, he can demand nullity of the sale. • **IT**: The Italian civil code admits the termination of a contract for abuse of weakness and unfair exploitation. In both cases of abuse of weakness and unfair exploitation the reciprocal obligations are significantly imbalanced. • **LU**: Rescission of a sale for lesion is provided for immovable sales by Article 1674 of the Civil code. For all sales contracts, Article 1118 of the Civil code provides that the lesion vitiates the contract, when an obvious disproportion results from the contract and that this disproportion has been introduced in the contract by a party operating from a position of strength, knowingly abusing discomfort, weakness or inexperience of the other party. • **PL**: The concept of laesio enormis is not adopted in Polish law. Polish law uses the general concept of exploitation., also	

		possible in B2B contracts • **SI**: Article 118 of the CO states that if there is clear disproportion between the contracting parties' obligations when a bilateral contract was concluded, the injured party may request the rescission of the contract if such party did not know and was not obliged to know of the true value at the time.	

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
Q 45- Other mandatory rules			
Are there **other rules, concerning the period of formation of the contract** based on the ordinary law, that can concern **B2B sales at a distance?** Can such rules be derogated from by agreement in B2B contracts?	**-In a few MS, there are rules about offer, silence, or liability during the period of formation of the contract, which cannot be derogated from in B2B contracts**: PT, RO, SE • In **PT**, Article 217 CC states that **a business declaration can be express or implied**. Article 218 CC provides that "**the silence is valid as a business declaration**		-**In many MS, there is no other rules**: AT, BE, BG, CY, CZ, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT[972], LU, LV, NL, PL, SK, UK -**In some MS, there are other rules, but they can be derogated from by agreement**: • **SI** (rules on negotiations (Art. 20), offer (Art. 22) and

[972] *LT: Article 6.163 of the Civil Code: 1. In the course of pre-contractual relationships, parties shall conduct themselves in accordance with good faith.*

	if it is granted this value by law, usage or convention. "Article 222 CC states that if the written form is not required by law, but has been adopted by the author of the declaration, **accessory oral stipulations prior to, or contemporaneous with, the written matter are valid**, when they provenly correspond to the intention of the declarant Art. 224 CC: a business declaration which has a specific addressee produces effect as soon as it reaches him or he is informed of it. **Article 228 CC** a contract proposal binds the proponent in the following terms: a) If a deadline for acceptance has been established by the proponent or agreed by the parties, the proposal remains open until this time expires; b) If no deadline is established, but the proponent requests an immediate answer, the proposal remains open until, in normal conditions, both proposal and acceptance reach their destination; • **<u>In RO,</u> there are rules about irrevocable offer.** According to Romanian law provisions, an offer is irrevocable: when it states a fixed time for its acceptance; when it is reasonable to consider it as irrevocable, based on the parties' previous agreements,		preliminary contract (Art. 33 of the COA)

	their commercial practices, their statements during negotiations, the particularities of the object or general commercial practices for that type of object. **There are also rules about silence**: Silence or inaction does not amount to acceptance, except in the case where the legal provisions, the parties' agreement or usage applicable to the contract contain provisions to this effect. • **In SE,** one principle is the one entitling a contracting party to receive damages for loss suffered as a consequence of the other party's culpa in contrahendo. This principle is founded on case law. It gives the party suffering the loss right to compensation for the negative interest.		
Are there **other rules, concerning the period of formation of the contract based on the special law on electronic contract, that can concern B2B sales at a distance?** Can such rules be derogated from by agreement in B2B contracts?			**In the MS there are no rules, except those which are based on the e-commerce directive 2000/31/EC:** AT, BE, BG, CY, CZ, DK, EE, EL, ES, FR, HR, HU, IE, IT, LT, LU, LV, NL, PL, PT, RO, SE, SI, SK, UK • **FR**: Article 1369-6 al. 2 of the Civil code (maintained on the reform art. 1127-3 al. 2), which provides that the different obligatory steps to contract online are not obliged when it's a B2B

			contract.
Are there **other rules, concerning B2B international sales?** Can such rules be derogated from by agreement in B2B contracts?	-**In PT**, Article 6 Commercial Code states that all provisions of this Code **shall apply to commercial relations with foreigners**, except in cases where the law expressly provides otherwise, or if there is a treaty or convention that would otherwise determine and regulate them. As, **Portugal has not acceded to CISG**, where Portuguese Law is the applicable law to an international sale of goods, the rules on sales contracts laid down by the Commercial Code apply.	-In **RO**, there is a special rule for prescription in international sales: **Rules on the period of prescription** for an judicial action based on a contract of goods shipping when the shipping has its starting point or its finishing point outside Europe, in which case the prescription period is of 18 months.	-**Except the rules of international private law which are issued from Rome I regulation, the CISG is relevant in principle for the international B2B sales, in many MS**: AT, BE, CZ, DK, EL, ES, FI, FR, IT, LT, NL, SE[973], SK (but with a reservation under art. 95 CISG) Application of the CISG is not mandatory (art. 6 of the CISG) • **DE**: According to § 346 HGB all acts and omissions as between mercantile traders must be interpreted as regards their significance and effect with reference to mercantile usage and customs. With regard to international sales this may include for example specific rules provided in the Trade Terms or the Incoterms (which are, however, not considered in their entirety as mercantile customs). • The **UK** is not a party to the UN Convention on the International Sale of Goods 1980 (CISG).

[973] *SE: the CISG is applicable in Sweden unless both seller and buyer operates from the Nordic countries. In the latter case Nordic contract law will apply.*

C/ Period of performance

	Mandatory rules made to protect weak professional parties	**Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her**	**No mandatory rule, or no rule at all**
Q 46 – Remedies in B2B sales			
Relevant time for establishing conformity			
In domestic law, are the rules concerning the **relevant time for establishing conformity, the**		**-For one MS, rules concerning the relevant time for establishing conformity are the same** in B2B contracts as those described for B2C contracts **and they are mandatory:** EL	**-For several MS rules concerning the relevant time for establishing conformity are the same** in B2B contracts **as those described for B2C contracts and they can be derogated from.** • **At the time of delivery**: AT, DE, HR, HU, ES, IE,

same in B2B contracts as those you have described in B2C contracts? Can such rules be derogated from by agreement in B2B contracts?		**-For one MS rules concerning the relevant time for establishing conformity are different** in B2B contracts **and** they are **mandatory:** • **BG:** Bulgarian law does not explicitly discuss the time for establishing conformity so it is be determined by interpreting the two legal provisions of Art. 194 OCA and Art. 324 CA and it is generally the time of delivery. However, Art. 194 of the OCA provides that after the acceptance (i.e. after the delivery) of the delivered good the buyer should examine the good for as long time as it is usually needed for the respective cases, meaning that in certain cases the time for establishing conformity could be prolonged.	LT, NL, RO, UK[974] • **At the time when the risk of accidental loss of or damage to the thing passes to the purchaser even if the lack of conformity becomes apparent after that time**: EE: **-For several MS rules** concerning the relevant time for establishing conformity **are different in B2B contracts and they can be derogated from. The relevant time is as follows:** • **at the time of transfer of risk:** CZ, HR, SE, FI ○ **FI**: The seller is liable for any defect that existed at that time even if it appeared only later. However, there are two exceptions. If the goods deteriorate after the risk has passed to the buyer, the goods are considered defective if the deterioration was due to a breach of contract by the seller. The same applies if the seller, by giving a guarantee or a similar promise, has assumed liability for the fitness or other properties of the goods for a fixed period of time and the deterioration relates to a property of the goods that falls within the scope of such promise. • **At the time of the delivery: LU[975]:** For B2B contracts, there is general article 1641 of the Civil code that provides that "*The seller is bound to a warranty against hidden defects in the thing sold…* ". As soon as the delivery has been made, *a buyer who does not make his claims for visible defects immediately after the arrival of the goods is*

[974] *UK: in a B2B context, risk may pass independent of delivery.*
[975] *LU: In addition, it can be noted that the buyer must take immediate steps to ensure the identity of the goods declaration and the state in presence of both parties. (Court August 30, 1926, 11, 249)*

			supposed to have definitively approved supplies; he must take immediate steps to ensure the identity of the goods declaration and the state in presence of both parties. (Court August 30, 1926, 11, 249). So, implicitly, that means that the time to establish conformity is at the date of delivery. • **5 years to establish the lack of conformity of the goods has been sold and 2 years for hidden vices**: FR • **Duty to check the goods as soon as possible after receipt and duty to notify the seller regarding them without delay**: LV, PL ○ **LV:** The rule on establishing conformity in B2C contracts is specific to consumer law and does not apply to B2B contracts. Instead, Article 411, Part 1 of the Commercial Law specifies that: "*A purchaser has a duty to check the goods as soon as possible after receipt thereof. In determining deficiencies of the goods, the purchaser has a duty to notify the seller regarding them without delay, indicating their type and scale*." This provision does not explicitly specify the time for specifying conformity, but it implicitly points to the time of delivery. The provision may be derogated from in B2B contracts, so that the parties may agree on a time for establishing conformity. • The buyer must notify the seller of the defect or lack of quality of the thing, except in the case of fraud. The notification shall be done within **thirty days** after the defect is known and within **six months** after delivery of the thing. These timeframes are, respectively, one year and five

			years if the thing sold is real property: **PT** **-There is a specific rule in IT** In the Italian law on the sale of goods as designed in the civil code there is no obligation to deliver goods in conformity with the contract. The fundamental obligations of sellers are (art. 1476 It. Civil code): a) to deliver the goods; b) to transfer title; c) to guarantee the buyer against eviction and material defects of the goods. Whereas the obligation to deliver the goods sold is limited to the duty to put the buyer into the actual possession of the goods. Whereas the obligation to transfer title and to guarantee the buyer against eviction and material defects does not include the notion of conformity, as designed by the European legislator for the consumers' sales. The violation of the fundamental obligations by the seller represents a breach of contract. A different and extremely fragmented discipline (that some scholars would qualify as a special contractual liability regime) is reserved to the guarantees related to material defects, which are classified as follows: A. Material defects that affect the goods' economic value and /or the goods' fitness for the purpose (art. 1490-1496 It. civil code); B. Lack of expected and/or fundamental qualities of the goods, like height, length or weight (art. 1497 It. civil code); and *C. aliud pro alio*, a guarantee designed by the courts in order to protect the buyer against the delivery of goods radically and fundamentally different from the goods promised in the contract. Such a guarantee has been created by courts mainly in order to avoid the draconian deadline linked to the duty to give notice and the to the short limitation period imposed by the law in the case of breach of the guarantees **The discipline of the guarantees can be derogated from by the parties**, provided that there is no fraud on

			the seller (art. 1490, § 2, It. civil code). A term restricting or excluding the seller's guarantees can be considered as a limitation or restriction of the seller's liability: therefore, these terms are *void* in case of gross negligence (art. 1229 It. civil code) and *ineffective* because they are unfair, in case of the seller's negligence, in compliance with art. 1341, § 2, It. civil code. **-<u>In a few MS there is no specific mandatory rule</u>** concerning the relevant time for establishing conformity in B2B contracts: BE, CY, DK
In domestic law, if the incorrect installation by the seller is a lack of conformity, is there a rule which provides when this lack must exist in case of incorrect installation by the seller in B2B contract? Can such rules be derogated from by agreement in B2B contracts?		**<u>-In a few MS rules concerning the relevant time for establishing conformity are the same</u>** in B2B contracts **<u>as those described for B2C</u>** contracts and they are **<u>mandatory:</u>** EL, SI -**<u>Under IT law, there is as specific mandatory rule</u>**: The incorrect installation by the seller does not represent a lack of conformity. It is worthy to remind that because the Italian law on sales of goods is not founded on the notion of conformity, the installation follows the same discipline. Installation may even not be part of the contract of sale of goods: it depends on the goods, the local uses and the terms of the contract. There are no statutory provisions dealing with installation and post-sale services, and case law does not provide coherent classifications of installations that	**<u>-For several MS, in the rule relative to the incorrect installation by the seller, there is no provision as</u>** <u>to relevant time for establishing conformity</u> (such as the time when the installation is complete or such as the time when the buyer had reasonable for installation). **<u>They provide that incorrect installation is considered as a lack of conformity</u>. They are non-mandatory rules:** AT, EE, FI, FR, HR, PT[976], SK, UK[977] • **Where the creditor accepts the installations as performance**: AT • **Where the risk passes even if it did not appear until later, including incorrect installation:** EE, FI • **at the moment of the transaction:** FR **<u>-In a few MS:</u> there is no explicit such rule. However, <u>doctrinal opinion considers that the risk passes when the installation is complete:</u>** • DE, SE

[976] *PT:* ***the lack of conformity exists by the time of the fulfilment of the primary duty i.e. the delivery of goods.***
[977] *UK: Incorrect installation could be a failure to perform the installation with reasonable skill and care required by s.13 of the Supply of Goods and Services Act. A breach of this requirement is established using a fault-based standard rather than strict liability*

		may be considered as part of the contract of sale. If the installation is not part of the contract of sale, but it is considered as an autonomous contract for services, the discipline concerning that contract shall apply. If the installation is part of the contract of sale of goods, the general rule on breach of contract shall apply (art. 1455 It. Civil code) and therefore - unless the breach is irrelevant - the contract of sale may be terminated. In both cases the general rules on contract law cannot be derogated from by the parties.	**-In <u>SI, incorrect installation is not considered as a lack of conformity</u>** if the goods have all the attributes needed for proper use and the problem is only in the lack of professional knowledge to install it correctly **-<u>In many MS</u>,** there are **<u>no</u> <u>specific mandatory rule</u>** concerning the incorrect installation in B2B contracts: BE, BG, CY, CZ, DK, ES, IE, LT, LU, LV, MT, NL, RO -**<u>HU</u>** indicates that the general rule (Civil Code art 6:157) applies, that is at the time of performance (delivery). Section 6:157 [Lack of conformity] (1) Lack of conformity means when the obligor's performance at the delivery date is not in compliance with the quality requirements laid down in the contract or stipulated by law. The obligor is not liable for any lack of conformity if, at the time of the conclusion of the contract, the obligee knew or should have known the lack of conformity. (2) Any clause of a contract that involves a consumer and a business party that derogates from the provisions of this Chapter on warranties and commercial guarantees to the detriment of the consumer shall be null and void.
<u>Overview of buyer's remedies</u>			
In domestic law**, is there a hierarchy of remedies available to the professional buyer or does he**		**<u>In a few MS</u>, the remedies are provided in a <u>mandatory rule</u>:** LU, PT • **<u>LU:</u>** The buyer has **the choice** either to return the thing and to have the price returned to him or to	**-<u>In a few MS, the rules about hierarchy of remedies are the same</u>** in B2B contracts **as those described for B2C contracts and they are <u>non-mandatory</u>:** AT, BE, CY, DE, SE **-In <u>most MS there is no hierarchy between the</u>**

have the choice? If there is a hierarchy, give **the order of the professional buyer's remedies** (without developing them, as they will be later). If it is the same as in B2C contracts, you can refer to your previous answer. **In domestic law, If there is a hierarchy in your law, can such rules be derogated from by agreement in B2B contracts?**		keep the thing and have a part of the price returned to him, as decided by experts. There is no case law as to whether parties may derogate from these rules by agreement. • **PT: There is a hierarchy of remedies: repair, replacement, reduction of the price, and termination of the contract.** Such hierarchy of remedies in **B2B contracts is asserted by case law and does not result from a disposition in the Civil Code, so that there is not a such rule that could be derogated by agreement**	**remedies available to the professional:** BG, CZ, DK, EE, EL, ES, FI, FR, HU, IE, LT, LV, PL RO, SI, SK, UK • **EL:** The purchaser shall have the right according to his option: 1. to demand the goods brought into conformity free of charge by repair or replacement, unless such action is impossible or demands disproportionate expenses. 2. to reduce the price. 3. to rescind from the contract, unless the real defect is insignificant. • **CZ:** There is a set of rights depending on whether the defective performance means essential breach of a contract or not. The choice between the different rights is upon the buyer. See § 2106 and 2107. Section 2106 (1) If a defective performance constitutes a fundamental breach of contract, the buyer has the right to: a) have the defect removed by having a new defect-free thing or a missing thing supplied, b) the removal of the defect by having the thing repaired, c) a reasonable reduction of the purchase price, or d) withdraw from the contract. (2) The buyer shall notify the seller of the right he has chosen upon the notification of the defect or without undue delay thereafter. The buyer may not change the choice made without the consent of the seller; this does not apply if the buyer requested the repair of a defect which proves to be irreparable. If the seller fails to remove the defects within a reasonable time limit or if he notifies the buyer that he will not remove the defects, the buyer may, instead of having the defects removed, request a reasonable reduction of the purchase

			price or withdraw from the contract. (3) If the buyer fails to make his choice of right in time, he has the rights under Section 2107. • Section 2107 (1) If a defective performance constitutes a non-fundamental breach of contract, the buyer has the right to have the defects removed, or to a reasonable reduction of the purchase price. (2) Until the buyer asserts his right to a reduction of the purchase price or withdraws from the contract, the seller may supply what is missing or remove a legal defect. The seller may remove other defects by repairing the thing or supplying a new thing, the choice being the seller's; the choice must not cause the buyer to incur unreasonable costs. (3) If the seller fails to remove a defect of a thing in time or refuses to remove the defect, the buyer may request a reduction of the purchase price or withdraw from the contract. The buyer may not change his choice without the consent of the seller. • **ES:** The buyer may opt to cancel the contract or to fulfil it according to the terms agreed, but always with compensation of the damages caused by the defects • **FI (same rule as for the consumer but not mandatory):**Regarding the remedies for delay the hierarchy is as follows: 1) Right to demand fulfilment of the contract (CPA (38/1978) Chapter 5 Section 8) 2) Cancellation of the contract (CPA (38/1978) Chapter 5 Section 9), the buyer has set the seller a reasonable additional time period for the delivery of the goods and the seller has not delivered or has declined to deliver within that time period or if the seller has declined to

			deliver the goods or delivery at a certain time must be deemed or was known by the seller to be essential to the buyer. Remedies which can be cumulated with both 1) and 2) or used separately without a hierarchy are: a) Right to withhold payment (CPA (38/1978) Chapter 5 Section 7) b) Compensation (CPA (38/1978) Chapter 5 Section 10) Regarding the remedies for non-conformity the hierarchy is following: 1) Rectification (CPA (38/1978) Chapter 5 Section 18) 2) Reduction of price or cancellation of contract if the defect is not slight (CPA (38/1978) Chapter 5 Section 19) Remedies which can be cumulated with both 1) and 2) or used separately without a hierarchy are: a) Right to withhold payment (CPA (38/1978) Chapter 5 Section 17) Compensation (CPA (38/1978) Chapter 5 Section 20) • **FR:** There is no hierarchy of available remedies to the professional buyer. He can use both the lack of conformity based on the delivery obligation or the hidden vices action based on the obligation of guarantee art. 1603 of the Civil Code. Based on the lack of conformity: The buyer can ask or the rescission or the performance of the contract. He has the right to choose the better option. Art. 1610 of Civil code. Based on the hidden vices: The buyer has the choice either to return the thing and to have the price returned to him or to keep the thing and have a part of the price returned to him, as decided by experts (art. 1644 of the Civil Code).

			• **HR (same rule as for a consumer but not mandatory):** The buyer has a choice of remedies, and there is in principle no hierarchy between the remedies. But the buyer's choice is limited in one way: according to Article 412, § 1 of the COA, a buyer can terminate a contract only after having given to the seller a subsequent adequate time to perform the contract. • **HU (same rule as for a consumer but not mandatory):** To choose either repair or replacement, or to ask for a commensurate reduction in the consideration, repair the defect himself or have it repaired at the obligors expense, or to withdraw from the contract if the obligor refuses to provide repair or replacement or is unable to fulfil that obligation), or if repair or replacement no longer serves the creditors' interest. • **IE:** The buyer may in appropriate circumstances reject the goods or seek damages • **LT (same rule as for a consumer but it is not indicated if it is mandatory):** (1) to replace the goods (2) to reduce the purchase price accordingly; (3) that the seller eliminates the defects (4) to refund the payment of the price and cancel the contract • **RO:** Like the consumer, the professional buyer may request for: a. repair or b. replacement of the goods c. termination of contract (complete refund of price) d. a proportionate reduction of the price These remedies are not hierarchized by the law; nevertheless, as stated in art. 1710(2) Civil code, at the request of the seller, the court, taking into

			account the seriousness of the defects and the purpose for which the contract was concluded, as well as other circumstances, it may order another measure referred to in par. (1) than that requested by the buyer. S**uch rules can be derogated from in B2B contracts,** except for the case of fraud, gross negligence or malicious conduct of the seller, as in these cases the seller remains bound by its duty to guarantee against the hidden deficiencies of the goods. • **SI:** The professional buyer has the choice of remedy pursuant to Article 468 of the CO. He may: 1. demand that the seller rectify the defect or deliver another thing without the defect (performance of contract) 2. demand that the price be reduced 3. withdraw from the contract. In each of these cases the buyer shall have the right to demand the reimbursement of damage • **SK:** There are various kinds (different than in B2C contracts) of remedies available to the professional buyer. They are different according to the nature of breach (CommC section 345 (2)) defines what is considered to be fundamental and non-fundamental breach of contract). A) In case of fundamental breach (CommC section 436 (1)), the buyer may: 1) demand the elimination of defects by delivery of substitute goods to replace the defective goods, demand delivery of missing goods or demand the elimination of legal defects, 2) demand the elimination of defects of the goods by their repair, if the defects are repairable, 3) demand an appropriate discount from the purchase price, or 4) withdraw from the contract.

			According to their hierarchy, CommC section 436 (2) sets that the buyer may choose between the claims stated in Subsection 1 only if they notify the seller of their choice in a timely sent notice of defects or without undue delay after such notice. The buyer may not change the exercised claim without the seller's consent. However, if the defects of the goods prove to be irreparable, or if their repair would involve unreasonable costs, the buyer may demand the delivery of substitute goods, provided they request the seller accordingly without undue delay after the seller notified the buyer of the aforementioned facts. If the seller fails to eliminate the defects of the goods within a reasonable additional period, or if they announce before expiration of such period that they will not eliminate the defects, the buyer may withdraw from the contract or require an appropriate discount from the purchase price. B) In case of non-fundamental breaching (CommC section 437 (1)), the buyer may (up to his choice without hierarchy): - demand the delivery of the missing goods and elimination of other defects of the goods - demand a discount from the purchase price. According to their hierarchy, CommC section 437 (2) sets that until the buyer exercises a claim to discount from the purchase price or withdraws from the contract under Subsection 5, the seller is obliged to deliver the missing goods and eliminate the legal defects of the goods. The seller is obliged to eliminate other defects in the manner of their choice, either by their repair or by delivery of substitute goods; however, their choice in the manner of eliminating defects must not cause the buyer to incur unreasonable costs. It may be noted that the regulation of the sale

			contract for B2B relations in CommC has been highly influenced by CISG. • **UK:** Termination for breach (if a condition or a sufficiently serious breach of an innominate term) and/or a claim for damages (see s.53 Sale of Goods Act 1979). **-Under IT law, there are specific rules:** **The discipline of the guarantees is in the Italian civil code is very fragmented: for each guarantee there are different sets of remedies.** A. As for material defects: *i.* termination of the contract, as special remedy disciplined by art. 1497 It. civil code (action '*redibitoria*'); alternatively: *ii.* reduction of price (action '*quanti minoris*'): art. 1492 It. civil code; and *iii.* damages, if the seller's negligence is pleaded by the buyer and the seller is not able to rebut the presumption (art. 1494 It. civil code). Damages can be claimed in addition to both termination of the contract and reduction of the price, or even autonomously and in alternative to the first two remedies. B. As for lack of expected and/or fundamental qualities: *i.* termination of the contract (action 'redibitoria': see above at A. *i.:* art. 1497 It. civil code*);* and *ii.* damages (see above, at A. *iii*) Although they are very similar to the general regime concerning contractual liability, these sets of remedies provided for the guarantees suffer of certain limitations. First of all, they are subject to a period of notice and a shorter limitation period *(see hereunder at Q53-1);* they may be excluded by local commercial practices and by the parties (*see above at Q46-1*); they admit a higher level of tolerance, as compared to the general standard provided for at art. 1453 It. civil code, that admits the

			claim of termination when the breach is *substantial*. C. As for *aliud pro alio*: case law would usually admit the same remedies as for the guarantee for lack of expected and/or fundamental qualities (B.), though their discipline follows the general rules of contract law (art. 1453 It. Civil code), especially as concerns the absence of a duty to give notice and the ordinary (and longer) limitation period. There is no hierarchy in the remedies listed hereinbefore. The buyer has therefore the choice within the three different set s of remedies corresponding to the three different species of guarantees. Nevertheless, once the buyer has chosen a remedy he/she has to stick to it in the course of the judgment. According to the prevailing scholarship and case law, the general contractual remedies aiming at obtaining the specific performance of the obligations promised in the contract (see art. 1453 It. civil code), as well as the right to withhold performance (art. 1460 It. civil code) are not available to the buyer, who cannot therefore require the seller neither to repair the defective goods nor to replace them. The repair or replacement of the goods is nevertheless possible (within a period imposed by the judge) through a supplementary and conventional guarantee, that covers the malfunctioning of the goods sold within a fixed period of time (usually 2 years: 'garanzia di buon funzionamento', art. 1512 It. civil code). This conventional guarantee is subject to a period of notice of 30 days from the discovery of the malfunctioning, and the claim must be filed within 6 months from the discovery of the malfunctioning. This provision is not mandatory, and can be derogated by the parties.

In domestic law, is there a rule whereby **the professional buyer has special duties to examine the goods at the time of delivery and that would condition his right to complain of lack of conformity?** Can such rules be derogated from by agreement in B2B contracts?			**-<u>In most MS</u>, the <u>buyer must examine the goods at the time of delivery and such duty conditions his right to complain of lack of conformity</u>. <u>Except in SI, it is not a mandatory rule:</u>** AT, BG, CZ, DE, DK[978], EE, EL[979], ES, ES, FI, HR, HU, LV, PL, RO, SE, SI • **<u>CZ:</u>** the buyer has special duties to examine the goods *as soon as possible after the passage of the risk of damage to the thing and verify its properties and quantity*. **<u>-In a few MS</u>, the buyer <u>do not have special duties to examine the goods at the time of delivery:</u>** BE[980], LU, NL, UK • **<u>NL</u>:** The buyer is not under any duty to examine the goods. However, he is under a duty to notify any defect he has or should have noticed, and must do so within a reasonable period after he has or should have noticed the defect (Article 7:23(1) BW). From this an indirect duty to also examine the goods may be inferred. All these rules are default rules only, which implies that the parties may introduce a formal duty to examine the goods, as well as a stricter or more lenient duty to notify. **-<u>In a few MS</u>, the <u>examination of the goods is not formulated as a duty but as a right for the buyer:</u>** CY, LT

[978] *DK: Section 47 of the Sale of Goods Act provides: "If, prior to the conclusion of the contract, the buyer has examined the goods or the buyer has, without due cause, failed to examine the goods after a request to examine from the seller or if, prior*
to the conclusion of the contract, the buyer was given the opportunity to examine a sample of the goods, the buyer may not rely on any lack of conformity that he ought to have discovered by such an examination unless the seller has acted fraudulently."
[979] *EL: This obligation might derive from article 537 par. 1, subpar. a and b, of the Greek Civil Code, relevant also for B2B contracts.*
[980] *BE: as the buyer has a lot of background and professional knowledge about the good, the judge will decide that the buyer could have seen the defect.*

			• **LT**: only in case it is clearly indicated in the sales agreement that the buyer must inspect the quality of items at the time of delivery, the failure to do that will result in inability to complain a lack of conformity. **-In a few MS, there is no specific provision:** FR, IE, IT, PT, UK • **FR:** case law admits the unconditional acceptance forbids the buyer to call upon the lack of conformity (Com. 1er mars 2005, Bull. Civ. IV, n°42). It can be derogated from by agreement. • **IE**: However, where any buyer fails to reject the goods for non-conformity he may be deemed to have accepted them – see section 34 of the Sale of Goods Act 1893. This rule is subject to agreement of the parties in B2B contracts. • **IT**: Although there is no special duty to examine the goods at the time of delivery, the right to complain the lack of compliance of the goods with the contract is subject to a very short period of notice (8 days) and a shorter limitation period that provided for by the general contract law • **PT**: As provided by art. 798 CC, "a debtor that negligently fails to fulfil an obligation becomes liable for the damages caused to the creditor". Otherwise, Art. 796 nr. 1 CC applies: "In agreements that involve the transfer of title to a certain thing or that establish or transfer an in rem right over it, the perishment or deterioration of the thing due to a cause not attributable to the seller is borne by the buyer."

In domestic law, is there a **rule whereby the seller may reply to the professional buyer's demand by imposing on him to repair the goods?** Can such rules be derogated from by agreement in B2B contracts?		**-In a few MS The seller cannot demand that the goods must be repaired.** This rule cannot be derogated from by agreement: LT, SI • **IT:** There is no statutory rule whereby the seller may impose the buyer the repair of the goods. Although this issue is still controversial, in the case of goods affected by material defects, according to the majority of scholars and case law, the guarantee regime precludes the remedies of specific performance. In the case of a general action for breach of contract, the general rule provided for at art. 1453 It. Civil code states that the choice between termination of the contract or performance (that includes a claim to repair the goods) lays on the innocent party.	**-In a few MS the seller has such a right:** DK, LU, FI, PL **-In many MS there is no specific provision. In some of them the law only provides the right for the seller to refuse the kind of cure chosen by the buyer if this cure is possible only at disproportionate expense (as for consumer):** AT, BE, DE, EE, NL **-In EL,** this obligation might derive from article 537 par. 1, subpar. a and b, of the Greek Civil Code, relevant also for B2B contracts **-In RO, the seller may request the judge to order *another measure than that requested by the buyer***, taking into account the seriousness of the defects and the purpose for which the contract was concluded, as well as other particular circumstances (Art. 1710(2) Civil code). In B2B contracts, this rule can be derogated from by agreement, and the seller may discard its right to request for another measure. **-There is no specific provision in some MS:** BG, CY, CZ, ES, FR, HR, HU, IE, LV, PT, SE, SK,
In domestic law, is there a **rule whereby the professional buyer who suffers a non-performance may obtain damages?** Can such rules be		**In many MS, the buyer who suffers a non-performance may obtain damages (mandatory rule):** AT, BE, BG, CY, CZ, ES, IT, LT, LV, NL, PL, PT, RO, SI, SK	**-In many MS, the buyer who suffers a non-performance may obtain damages** (Such rule can be derogated from by agreement): DE, DK, EE, EL, FI, FR, HR, HU, IE, LU, SE • **DE:** § 437 No. 3 BGB in conjunction with §§ 280 (1), (3); 283 BGB grant the consumer a claim for damages in the case of non-performance where the duty of performance is excluded because of

derogated from by agreement in B2B contracts?			impossibility according to § 275 BGB. § 437 No. 3 BGB in conjunction with §§ 280 (1), (3); 281 BGB grant such a claim in the case of non-performance or failure to render performance as owed. If the obstacle to performance already exists at the time when contract is entered into, the claim for damages arises out of § 437 No. 3 BGB in connection with § 311a BGB. **These rules can be derogated from by agreement in B2B contracts within the boundaries of §§ 134, 138, 242 and, in standard terms, §§ 305 et seq. BGB.** However, a seller may not invoke an agreement that excludes or restricts the rights of the buyer with regard to a defect insofar as the seller fraudulently concealed the defect or gave a guarantee of the quality of the good (§ 444 BGB). • **SE:** Strict non-performance (no goods delivered) is handled as a case of delay. In such cases, the Buyer is entitled to damages according to Section 27 of the Sales of Goods Act, which states that the buyer is entitled to compensation for the damage he suffers through the seller's delay, unless the seller proves that the delay is due to an obstacle beyond his control that he could not reasonably have foreseen at the purchase and whose consequences he could not reasonably have avoided or overcome. This rule can be derogated from by agreement. **-In UK,** Common law principles on damages apply. It may be possible to insert a "liquidated damages" clause into the contract, or use a reasonable limitation clause, to affect the amount that could be recovered.

In domestic law, is there a **rule which provides that the professional buyer have remedies, even when the seller is excused?** Can such rules be derogated from by agreement in B2B contracts?		**-BG: The seller is not liable.** **-HU:** The seller is liable, despite his fault. The buyer can request all remedies (mandatory provision) **-PT:** When the seller is excused due to impossibility of fulfilment and delay not attributable to him, Art. 795 CC shall apply. According to Article 795, nr.1, when in a bilateral agreement one of the considerations becomes impossible, the creditor is released from the counter-consideration and has the right, if the consideration has already occurred, to demand restitution subject to the rules on unjustified enrichment. Nevertheless, if consideration becomes impossible through some fault of the creditor, the latter is not released from the counter-consideration, but if the debtor benefits in some way from the exoneration, the value of the benefit shall be offset in the counter-consideration (Article 795, nr. 2). These rules cannot be derogated by agreement (Article 809 CC). **-ES:** There is no rule. In SpCC, an impediment to performance (*force majeure*) relieves the party that has not performed from liability (art. 1105, 1182), but there is no rule that provides which remedies are available to the other party. Damages should be excluded as far as the non-performance is excused and therefore	**-In some MS the seller is liable, despite his fault:** • **The buyer can request all remedies** (CZ, DE, FI, FR[981], LT, LU, NL) **with the exception of damages** (AT, EL, SK) • **The buyer can request right to withhold performance of the obligation of the obligee, withdraw from or cancel the contract or reduce the price:** EE **-RO:** Where the seller sold the property and did not know the vices, should the court have ordered one of the measures provided for in art.1.710 par. (1) c) and d), he is however obliged to reimburse the buyer only the price and the expenses made during the sale, in whole or in part, as appropriate, as stated in art. 1712 (2). This rule can be derogated from by agreement, as the seller takes upon him the duty to pay damages even for the obvious deficiencies of the goods, thus the contractual term expanding the warranty is valid. **-SI:** If the seller is excused, the buyer may not resort to damages. Article 240 of the CO provides that the debtor shall be released from liability for damage if it is shown that the debtor was unable to perform the obligation or was late in performing the obligation owing to circumstances arising after the conclusion of the contract that could not be prevented, eliminated or avoided. **-SE:** There is no general rule referring to the seller being excused. There are however certain rules applicable to cases where there are extenuating circumstances. The Buyers right to claim damages is contingent on the damage being within the control of the seller, in the sense of Sections 27 and 40 of the Sales of Goods Act.

[981] *FR: the buyer always has remedies except when the seller can set him a case of force majeure.*

		"*culpa*" or fault is lacking (art. 1101 SpCC). It is also reasonable to think that courts would allow the buyer to terminate the contract in order to recover (or not to pay) the price (art. 1124 SpCC). If non-performance is only partial, it is also reasonable to grant the buyer the right to reduce the price (ex art. 1460 SpCC). **-IT:** The discipline concerning the guarantee's regime is special insofar as it can be applied notwithstanding the diligence of the seller: it is considered as a regime of strict liability. Nevertheless, if the buyer claims damages *in addition* to the remedies linked to the guarantee, he/she must plead the seller's negligence	There is also a rule providing the possibility of adjusting the level of damages, in Section 70 paragraph 2 och the Sales of Goods Act. If the obligation to pay damages, because of the seller's defect or delay, would be unconscionable given the compensation debtor's (i.e. Sellers) ability to anticipate and prevent the damages, and other special circumstances, the level of damages can be adjusted. As concerns delay, the seller will generally be obligated to perform, meaning the Buyer may stick with the purchase and demand performance, even though there are extenuating circumstances. In accordance with the above stated, the Buyer may however not be entitled to any damages, and the delay might therefore be unsanctioned, so to speak. **-UK:** Common law principles on damages apply. It may be possible to insert a "liquidated damages" clause into the contract, or use a reasonable limitation clause, to affect the amount that could be recovered. **-No specific provision:** BE, CY, DK, HR, IE, LV, PL
In domestic law, is there a **rule which provides that the professional buyer may [?] seek remedies, even if he caused the seller's non-performance?** Can such rules be derogated from by agreement in B2B contracts?		**-In a few MS the buyer has no remedy if he has caused the seller's non-performance. It is a mandatory rule:** BG, EE, LT, PT • **PT:** As general rule, the creditor who causes the seller's non-performance can be considered in default (Art. 813 CC) and as such shall indemnify the debtor for the major expenses that the latter may be obliged to incur through the fruitless offering of the consideration and the storage and safekeeping of	**-In many MS the buyer has no remedy if he has caused the seller's non-performance. It is not a mandatory rule**: AT, BE, DE, EL, ES, FI, FR, IE, LU, SE • **DE:** If the buyer causes the non-performance, this constitutes a "*Obliegenheitsverletzung*"*. According to § 323 (6) BGB revocation (termination) is excluded if the obligee is solely or very predominantly responsible for the circumstance that would entitle him to terminate (revoke) the contract. This principle expressed in § 323 (6) BGB is also called upon in the case of cure. Thus, in most cases claims by the buyer will be precluded (this may not be the case in singular

			the respective object (Art. 816 CC). However, two exceptions shall be envisaged. 1°) *Impossibility of fulfilment and delay not attributable to the debtor*: if consideration becomes impossible *through some fault of the creditor*, the latter is not released from the counter-consideration. That is the general rule laid down by Article 795, nr. 2 CC. Nevertheless, if the debtor benefits in some way from the exoneration, *the value of the benefit shall be offset in the counter-consideration* (Article 795, nr. 2, *in fine* CC). That is the first hypothesis in which, despite he caused the seller's non-performance, the professional buyer is entitle to seek for a specific remedy. 2°) *Supervening impossibility of consideration - Default by the creditor*: the default by the creditor causes the risk of supervening impossibility of consideration, resulting from causes not attributable to malicious intent on the part of the debtor, to rest upon the creditor. When it is a bilateral agreement, the creditor who, being in default, loses his credit wholly or in part due to a supervening impossibility of consideration is not exonerated from the counter-consideration. That is the general rule laid down by Article 815, nr. 1	instances, e.g. if the buyer is unaware of the defect and has the goods repaired). The claim to damages is precluded when the buyer causes the non-performance because the seller is not responsible for the breach of duty (second sentence of § 280 (1) BGB). These rules can be derogated from by agreement in B2B contracts within the boundaries of §§ 134, 138, 242 and, in standard terms, §§ 305 et seq. BGB. However, a seller may not invoke an agreement that excludes or restricts the rights of the buyer with regard to a defect insofar as the seller fraudulently concealed the defect or gave a guarantee of the quality of the good (§ 444 BGB). **-The damages shall be proportionately reduced: SI** **-NL: the buyer may also seek a remedy for lack of conformity if he caused the lack of conformity** **-SK:** It can be stipulated in contract. If so, CommC section 376 as a mandatory rule must be taken into account "The damaged party is not entitled to any compensation of damage if non-fulfilment of the obligations of the obliged party was caused by the conduct of the damaged party or by a lack of the cooperation which the damaged party was obliged to provide." **-UK:** It may be possible to seek some remedy in such circumstances, although the buyer's actions would be taken into account. The precise answer would depend on the type of breach complained of (non-conformity; late or non-delivery) and the extent of the buyer's fault. **-The law does not specify:** CY, CZ, DK, HR, HU, LV,

		and 2 CC. Nevertheless, if the debtor derives some benefit from the extinguishment of his obligation, the amount of the benefit must be deducted from the counter-consideration. This is the second hypothesis in which, despite he caused the seller's non-performance, the professional buyer is entitle seek for a specific remedy if he caused the seller's non-performance. **-IT:** The regime on the remedies for the enforcement of the guarantees is based on strict liability. To his/her defence, the seller can give evidence that the non-performance was caused by the buyer's waiver of his/her right to the guarantee: art. 1491 It. civil code. This provision refers to the guarantee for lack of expected and/or fundamental qualities (*see above at A46-1, B*.), but it can be extended to the guarantees for material defects (*see above at A46,* A.). It does not apply to *aliud pro alio* (*see above at A46* C.) The same rule is applicable also in case of contractual liability not based on the guarantee regime, but on breach of the contract of sale. It is a mandatory rule that cannot be derogated by the parties. **-RO:** 1. Generally the aggrieved party's fault exonerates the non-performing party; should the buyer has caused the seller's non-performance, the latter is exonerated.	MT, PL

		The non-performing party is excused from the consequences of its non-performance to the extent that this non-performance was due to an act of the aggrieved party (art. 1371 Civil code on the aggrieved party's contribution to the losses). 2. A mitigation of losses principle is stated in art. 1371 of the Romanian Civil code, according to which "Should the aggrieved party maliciously or by negligent conduct, contributed to the arrival or the augmentation of the losses, despite the fact that he may have had the possibility of total or partial avoidance of the loss, the liable party shall not be held responsible for the loss which could have been avoided by the aggrieved party." These rules cannot be derogated from by agreement, as in Romanian law exonerating for liability clauses are not valid in cases of fraud and gross negligence, since gross negligence is assimilated to fraud. As resulting from art. 1355(1) of the Civil code, „All contractual terms excluding or restraining liability for the losses caused by malicious conduct or gross negligence, are void." Therefore, when the seller's non-performance is excused by the buyer's fault, the aggrieved party may not resort to any of the remedies set out in the specific provisions of law. 3. In accordance with art. 1517 Civil code, „Should a party have caused by its actions or omission, the other party's non-performance, the former may not seek remedies for the non-performance."	

In domestic law, is there a **rule whereby the professional buyer may combine remedies?** Can such rules be derogated from by agreement in B2B contracts?		**One MS allows the buyer to cumulate remedies. It is a mandatory rule:** IT	**-Many MS allow the buyer to cumulate remedies. It is not a mandatory rule:** AT, DE, EE, ES, FI, FR, LU, NL, RO, SE, SK, UK • **AT**: If a defect is only partially repairable, the prevailing opinion is that repair and reduction of price can be combined • **DE:** In addition to cure, the buyer can also demand damages in addition to performance and in some cases damages resulting from the delay. The demand for cure and the demand for revocation (termination) or price reduction or damages instead of performance however are mutually exclusive. This becomes clear when considering that the expiration of a reasonable time limit for cure or the dispensability of a specification of a period of time is a necessary precondition (§ 323 (1), (2) BGB). The combination of revocation and price reduction is also not possible (first sentence of § 441 (1) BGB). However, the combination of a claim for damages with the remedies of price reduction or revocation (§ 325 BGB) remains possible. These rules can be derogated from by agreement in B2B contracts within the boundaries of §§ 134, 138, 242 and, in standard terms, §§ 305 et seq. BGB. However, a seller may not invoke an agreement that excludes or restricts the rights of the buyer with regard to a defect insofar as the seller fraudulently concealed the defect or gave a guarantee of the quality of the good (§ 444 BGB). • **ES:** There are some rules regarding the possibility

			of combining remedies under Spanish law. Yet, their mandatory nature is difficult to admit as far as B2B sales are concerned. Specifically for B2B sales, it has to be reminded that art. 336.3 SpCCom allows combining contract termination/enforcement with compensation for damages. In the same line, according to art. 329 SpCCom, if the seller does not deliver the goods sold within the stipulated period, the buyer may demand performance or termination of the contract, with compensation, in either case, for the damages that may have been caused by the delay. • **NL, RO**: Remedies may be combined unless they exclude each other. • **SK:** All possible combinations arise from CommC sections 436 – 441 as well as their restrictions In details see legislation. E. g. in case of fundamental breach (CommC section 436 (2)) - the buyer may not change the exercised claim without the seller's consent. However, if the defects of the goods prove to be irreparable, or if their repair would involve unreasonable costs, the buyer may demand the delivery of substitute goods, provided they request the seller accordingly without undue delay after the seller notified the buyer of the aforementioned facts. If the seller fails to eliminate the defects of the goods within a reasonable additional period, or if they announce before expiration of such period that they will not eliminate the defects, the buyer may withdraw from the contract or require an appropriate discount from the purchase price, (CommC section 436 (4)) - in addition to the claims set out in Subsection 1, the buyer is entitled to compensation of damage as well as to a contractual fine, if such penalty has been agreed. It can also be stipulated in contract, stated above

			are considered to be non-mandatory provisions. • **UK**: As a general principle, termination and a claim for damages can be combined, but this must not result in double recovery. **-BG allows the buyer to cumulate one remedy with a claim for damages:** **-In a few MS the buyer cannot cumulate the remedies:** BE, EL, IE, SI **-The law does not specify if it is possible to cumulate the remedies but it could be possible in case of agreement:** CZ, DK, HU **-The law does not specify if it is possible to cumulate the remedies:** CY, HR, LV, PL, PT
Requiring performance of seller's obligation			
In domestic law, is there a **rule** which cannot be derogated from by agreement and **which provides that the professional buyer may**		**-Almost all the MS admit that the professional buyer may require performance (mandatory provision):** AT, BE, BG, CZ, DE, ES, IE, LT, LV, PT, RO, SI, SK, UK **-CY:** Section 59 of the Sale of Goods Law prescribes that in any claim for breach of contract the court may decide, after a	**-Many MS admit that the professional buyer may require performance but it is not a mandatory provision:** • EE, EL, FI FR[982], HR, HU, LU, NL, PL, SE **-In one MS, there is not such a rule:** DK

[982] *FR: actually, there is a provision that denied the right to the buyer to seek for the performance on the grounds that the burden or expense caused by the performance would be disproportionate to the benefit that the buyer would obtain (art. 1613 of the Civil code) but, this rule can be derogated from by agreement.*
In the reform of contract law, applicable from 1er October 2016,, there is a provision which provides that the professional buyer may be denied the right to seek for performance on the grounds that the burden or expense caused by the performance would be disproportionate to the benefit that the buyer would obtain (art. 1221).

require performance by the seller?		request by the claimant to order special performance of the without giving the defendant the chance to pay damages and keep the goods. **-IT:** See above **-UK:** Specific performance under s.52 Sale of Goods Act 1979 is only available in restricted circumstances, and the general common law approach to specific performance is similarly restrictive, with an award of damages the preferred alternative.	
In domestic law, is there a **rule** which cannot be derogated from by agreement and **whereby the professional buyer may be denied the right to seek performance on the grounds that the burden or expense caused by the performance would be disproportionate** to the benefit that the buyer would obtain?		**-A few MS recognise that the buyer cannot require replacement or repair when this is impossible, or when the expense would be disproportionate. It is a mandatory rule:** AT, BE, IE, LT, RO **-SK:**The right to performance is never excluded. Only in connection to remedies, according to CommC section 436 (2) 3rd sentence, if the defects of the goods prove to be irreparable, or if their repair would involve unreasonable costs, the buyer may demand the delivery of substitute goods, provided they request the seller accordingly without undue delay after the seller notified the buyer of the aforementioned facts. **-In some MS, there is no such specific rule. However, general principles of law or other rules can have the same effect.** Rules concerning good faith or	**-Many MS admit that the professional buyer may require performance but it is not a mandatory provision:** EE, FI, FR, HU, IE, PL, DE, EL • **EL:** The seller has a right of replacement of the thing as long as its performance is not disadvantageous for the buyer • **DE:** German law does not contain such a *mandatory* rule for B2B contracts. However, there are rules which can be derogated from by agreement in B2B contracts within the boundaries of §§ 134, 138, 242 BGB; as well as §§ 305 et seq. BGB in the case of standard terms — unless the seller fraudulently concealed the defect or gave a guarantee of the quality of the thing (§ 444 BGB): In respect of the claim to subsequent performance (cure), § 439 (3) BGB provides that the seller can refuse cure due to disproportionality. Besides the specific § 439 (3) BGB in sales law, the general provision of § 275 (2), (3) BGB which

		abuse of rights can be taken into consideration by courts: PT, LU **-IT :** See above **-UK:** Specific performance under s.52 Sale of Goods Act 1979 is only available in restricted circumstances, and the general common law approach to specific performance is similarly restrictive, with an award of damages the preferred alternative.	applies to any kind of performance remains applicable; however, its threshold to deny performance is disputed to be higher. According to § 275 (2) BGB the obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. § 275 (3) BGB provides the obligor with a right to refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor. It is controversial, whether you can derogate from § 275 (2) BGB. Aptly you can assume that you cannot derogate from § 275 (2) BGB itself. However, the boundaries of what is unreasonable can be variable **-In one MS, there is no such specific rule. However, general principles of law or other rules can have the same effect but they are not mandatory:** • **SE**: Such an agreement can however be subject to adjustment pursuant to the generally applicable Section 36 of the Contracts Act, if the contractual term by which derogation is done is deemed unconscionable. **-NL:** In a B2B-contract the seller is only required to repair the goods if he can reasonably comply therewith, and he is only required to replace the goods if the lack of conformity is not too minor to justify replacement and the condition of the goods have not deteriorated because the buyer has not properly take care of the goods as of the

			time he should have taken the future possibility of replacement into account. These provisions are thought to create a weaker right to repair and replacement than in a consumer sales contract, cf. Asser-Hijma 7-I*, no. 391. In a B2B-contract the parties may derogate from this rule. **-In several MS, there is not such a rule:** BG, CY, CZ, DK, ES, HR, LV, SI
Buyer's choice between repair and replacement			
In domestic law, is there a **rule** which cannot be derogated from by agreement and **whereby** the **professional buyer seeking performance has the choice between the free repair or the replacement of the goods?** In domestic law, is there a **rule in B2B contracts,** which cannot be derogated from by agreement and		**-In a few MS, the professional buyer has the choice between repair and replacement and it is a mandatory provision:** BG, CZ, LT, PT, RO -**IT:** See above **-In a few MS this choice is limited by the requirement that the chosen option does not cause the seller disproportionate costs and it is a mandatory provision:** CZ, LT, RO **-SK:** The right to performance is never excluded. Only in connection to remedies, according to CommC section 436 (2) 3rd sentence, if the defects of the goods prove to be irreparable, or if their repair would involve unreasonable costs, the buyer may demand the delivery of substitute goods,	**-In most MS, the professional buyer has the choice between repair and replacement but it not a mandatory provision:** AT, BE, DE, DK, EE, EL, ES, FI, HR, HU, NL, PL, SE, SK **-In SI, the professional buyer has the choice between repair and replacement.** It is not specified if it is a mandatory provision or not. **-No specific provision:** BG, CY, ES, FR, HR, IE, LU, LV, UK **-In many MS this choice is limited by the requirement that the chosen option does not cause the seller disproportionate costs but it not a mandatory provision:** AT, DE, DK, EE, EL, FI, HU, PL, SE, • **SE:** The provisions of Sections 34 to 36 regulate and limit the Buyers freedom of choice between

which provides that if this choice exists in your law, it is nevertheless limited by the requirement that the chosen option does not cause for the seller disproportionate costs?		provided they request the seller accordingly without undue delay after the seller notified the buyer of the aforementioned facts. **-In a few MS this choice is limited by other rules such as <u>abuse of rights</u>:** BE, LU, PT[983]	free repair or replacement. According to the first paragraphs of Sections 34 and 36 of the Sales of Goods Act, the Seller may repair the goods, despite the buyer requesting replacement, if the reparation can be performed without significant inconvenience to the buyer, and without the risk that the buyer does not get his costs reimbursed by the seller. And vice versa, the seller may replace the goods despite the buyer requesting reparation, subject to the same criteria. **<u>-NL:</u>** In a B2B-contract the seller is only required to repair the goods if he can reasonably comply therewith, and he is only required to replace the goods if the lack of conformity is not too minor to justify replacement and the condition of the goods have not deteriorated because the buyer has not properly take care of the goods as of the time he should have taken the future possibility of replacement into account. These provisions are thought to create a weaker right to repair and replacement than in a consumer sales contract. In a B2B-contract the parties may derogate from this rule.
In domestic law, is there a **rule** which cannot be derogated from by agreement and **which provides that when the professional buyer requires repair or**		**<u>-Some MS provide the right of the buyer to withhold performance under general principles of law which are mandatory provisions:</u>** CZ, IT, LT, LU • **<u>LU</u>:** Exception of non-performance was enshrined in Luxembourg by Court of Appeal July 10, 1903, Pas.06, p. 366 t is now incorporated in the Civil code, Articles 1134-1 and	**<u>-Some MS provide the right of the buyer to withhold performance under general principles of law but it not a mandatory provision:</u>** AT, BE, BG, DE, EE, EL, HR, HU, PL, RO, FI, NL, SE, • **<u>FI:</u>** The buyer always has the right to withhold performance <u>to the extent that does not exceed his claim on the basis of the defect.</u> Such provision can be derogated from by agreement. • **<u>NL:</u>** Under the condition that the performance he

[983] *PT: it must be stressed that there is a similar rule in construction law (Article 1221, nr. 2 on a building contract) that should be applied by analogy in sales law.*

replacement, he may withhold performance during that time?		1134-2. The buyer who finds a lack of conformity of the goods purchased and has not made the payment of the price, however, could refuse such payment on the basis of non-performance exception in Article 1134-2 the Civil Code: "When a party has failed to perform an obligation to his office, the other party may suspend performance of its obligation forming direct-against part of it that the other party does not run, to unless the agreement has provided for this part a deferred execution. "Notwithstanding the highly restrictive wording of Article 1134-2 (requiring direct counterpart), it might be possible to apply it even when the unfulfilled obligation, without constituting strictly speaking the direct counterpart, prevents the achievement of the contractual purpose.	withholds, is proportionate to the non-performance of the seller and it is the direct counter-obligation of the seller's obligation (art. 6:262 BW) or, if this is not the case, performance by the seller is neither impossible nor already secured (e.g. by way of an independent bank guarantee) and the non-performance of the seller is not the consequence of *mora creditoris* on the part of the buyer (art. 6:52, 54 and 55 BW). In a B2B-contract the parties may derogate from this rule. • **SE:** According to Section 42 of the Sales of Goods Act, the Buyer may withhold payment, if he has a claim because of the Sellers Breach of Contract, in as much as corresponds to the claim. According to Section 64 paragraph 3, if the Seller is to deliver replacement goods, the Buyer may withhold what he has received (the originally delivered defective goods), until the replacement is delivered. **-Several MS do not mention anything special about the right of the buyer to withhold performance:** CY, DK, ES, FR, IE, LV, MT, PT, SI, SK, UK
In domestic law, is there a **rule** which cannot be derogated from by agreement and **whereby if the professional**		**-In some MS a mandatory provision** provides that the buyer has the right to seek subsidiary remedies when he cannot claim the primary (repair and replacement) remedies, or when the seller cannot repair/replace the goods within a reasonable time, or without any significant	**-Several MS consider that the buyer has the right to seek subsidiary remedies when he cannot claim the primary (repair and replacement) remedies, or when the seller cannot repair/replace the goods. They do not fix a period at the end of which the seller will be considered to have failed:** DE, EE, HR

buyer requires repair or replacement, he must not be entitled to seek other remedies (except to withhold performance)? In this case, when is he entitled to seek other remedies?		inconvenience to the buyer**:** BE, LT, SI **-One MS considers that, when the buyer requires repair or replacement, the seller has a period during which to perform accordingly. It is only after this period, that the buyer could require other remedies,** such as termination of the contract or a reduction in price (mandatory provision). • **RO:** 15 days	• **HR**: Since, once a buyer obtains conformity of a contract with one particular remedy (i.e. repair), it cannot pursue other remedies intended for the same purposes. **-One MS considers that, when the buyer requires repair or replacement, the seller has a period during which to perform accordingly. It is only after this period, that the buyer could require other remedies,** such as termination of the contract or a reduction in price. This period varies according to the domestic law. It is reasonable time: **NL** **-In one MS, the right to claim damages is always available** when the prerequisites for damages exist. Such provision can be derogated form by agreement: FI **-In SK**, **in case of fundamental breach** there is non-mandatory rule CommC section 436 (2) according to which the buyer may choose between the claims stated in Subsection 1 only if they notify the seller of their choice in a timely sent notice of defects or without undue delay after such notice. The buyer may not change the exercised claim without the seller's consent. However, if the defects of the goods prove to be irreparable, or if their repair would involve unreasonable costs, the buyer may demand the delivery of substitute goods, provided they request the seller accordingly without undue delay after the seller notified the buyer of the aforementioned facts. If the seller fails to eliminate the defects of the goods within a reasonable additional period, or if they announce before expiration of such period that they will not eliminate the defects, the buyer may withdraw from the contract or require an appropriate discount from the purchase price. According to CommC section 436 (4), In

			addition to the claims set out in Subsection 1, the buyer is entitled to compensation of damage as well as to a contractual fine, if such penalty has been agreed. **In case of non-fundamental breach,** there is non-mandatory rule CommC section 437 (3) according to which if the buyer demands that defects of the goods be eliminated, they may not, before the expiry of an additional reasonable period which the buyer is obliged to provide the seller for this purpose, exercise any other claims arising from defects of the goods, except for a claim for compensation of damage and a claim for a contractual fine, unless the seller notifies the buyer that they will not fulfil their obligations within such period. **-There is no such a rule:** AT, BG, CY, DK, EL, ES, FR, LU, HU, IE, LV, MT, PL, PT, SE, UK • **EL: because the buyer cannot cumulate the remedies** • **LU:** Luxembourg law does not expressly exclude the buyer cannot claim other means of action (resolution, restitution of part of the sales price). But insofar as it leaves options to the buyer, the buyer who requested the repair or replacement of the good cannot ask at the same time the termination or restitution of part of the sales price. Except successively. **-IN CZ,** the buyer is entitled to seek for other remedies if the seller fails to remove a defect of a thing in time or refuses to remove the defect. (2107/3). The buyer may request a reduction of the purchase price or withdraw from the contract. The buyer may not change his choice without the consent of the seller **-IT:** As said above the discipline of the guarantees is in the Italian civil code is very fragmented: for each

			guarantee there are different sets of remedies. A. As for material defects: *i.* termination of the contract, as special remedy disciplined by art. 1497 It. civil code (action '*redibitoria*'); alternatively: *ii.* reduction of price (action '*quanti minoris*'): art. 1492 It. civil code; and *iii.* damages, if the seller's negligence is pleaded by the buyer and the seller is not able to rebut the presumption (art. 1494 It. civil code). Damages can be claimed in addition to both termination of the contract and reduction of the price, or even autonomously and in alternative to the first two remedies. B. As for lack of expected and/or fundamental qualities: *i.* termination of the contract (action 'redibitoria': see above at A. *i.:* art. 1497 It. civil code*);* and *ii.* damages (see above, at A.*iii*) Although they are very similar to the general regime concerning contractual liability, these sets of remedies provided for the guarantees suffer of certain limitations. First of all, they are subject to a period of notice and a shorter limitation period *(see hereunder at Q53-1);* they may be excluded by local commercial practices and by the parties (*see above at Q46-1*); they admit a higher level of tolerance, as compared to the general standard provided for at art. 1453 It. civil code, that admits the claim of termination when the breach is *substantial*. C. As for *aliud pro alio*: case law would usually admit the same remedies as for the guarantee for lack of expected and/or fundamental qualities (B.), though their disipline follows the general rules of contract law (art. 1453 It. Civil code), especially as concerns the absence of a duty to give notice and the ordinary (and longer) limitation period. There is no hierarchy in the remedies listed hereabove. The buyer has therefore the choice within the three different set s of remedies corresponding to the three

			different species of guarantees. Nevertheless, once the buyer has chosen a remedy he/she has to stick to it in the course of the judgment. According to the prevailing scholarship and case law, the general contractual remedies aiming at obtaining the specific performance of the obligations promised in the contract (see art. 1453 It. civil code), as well as the right to withhold performance (art. 1460 It. civil code) are not available to the buyer, who cannot therefore require the seller neither to repair the defective goods nor to replace them. The repair or replacement of the goods is nevertheless possible (within a period imposed by the judge) through a supplementary and conventional guarantee, that covers the malfunctioning of the goods sold within a fixed period of time (usually 2 years: 'garanzia di buon funzionamento', art. 1512 It. civil code). This conventional guarantee is subject to a period of notice of 30 days from the discovery of the malfunctioning, and the claim must be filed within 6 months from the discovery of the malfunctioning. This provision is not mandatory, and can be derogated by the parties.
Return of replaced item			
In domestic law, is there a **rule** which cannot be derogated from by agreement and **which provides**		**-In one MS, a specific mandatory provision provides that the seller has the right, when he replaces goods, to recover the goods originally provided, at his own expense:** CZ	**-In many MS the seller has the right, when he replaces goods, to recover the goods originally provided, at his own expense. This is either a specific non mandatory provision in B2B contracts, or a general non mandatory rule:** AT[984], BG, CY, DE, EE, EL, FI, PL, PT, SE, SK

[984] *AT: This can be derogated from, it might be considered as unfair if it leads to disproportionate positions of the parties (§ 879 (3) ABGB)*

that, when there was replacement of the goods, the seller has the right to recover the goods originally provided, in B2B contracts? If, so is it at his **own expense or at the professional buyer's expense?**		**-In a few MS, under general contract law which is mandatory provision, the seller would have the right, when he replaces goods, to recover the goods originally provided, at his own expense:** IT, SI, LT, RO • **LT:** The parties are free to agree on whose expense this should be done. • **RO:** According to the rule mentioned in art. 1554 of the Civil code, applicable to contracts generally, "A contract which has been terminated is considered to have never been concluded. Unless a specific provision of law state otherwise, each party has the right to recover the goods originally provided."There is no mentioning, however, in regard to the expenses (the seller's or the buyer's).	**-No specific provision:** BE, DK, ES, FR, HR, HU, LU, LV, UK **-NL:** The notion of 'replacement' implies that the seller need only provide a replacing good if the buyer, at the time of delivery thereof, hands over the original good or the remains thereof. In a B2B-contract the parties may derogate from this rule.
In domestic law, is there a **rule** which cannot be derogated from by agreement and **whereby the professional buyer has (or has not) to pay compensation for the use he has made of the defective goods**		**The buyer has nothing to pay for any use of the replaced item, in the period prior to the replacement** (This is a mandatory provision):RO **-IT:** There is a special statutory rule about interests for delay in payment: according to **art. 1499 It. civil code** interests for the use of the goods are due by the buyer from the time of delivery ('interessi compensativi'), provided that the goods delivered actually produce fruits. In case of formal delay in payment ('mora	**In a few MS there are rules but they can be derogated from by agreement. If there is no agreement, the buyer must pay such compensation with the amount depending on:** • **whether he was bona fide** (advantages/use made subjectively as seen from the buyer) **or mala fide (**highest amount earnable on the market): AT • **the use he has made of the defective goods** before replacing it: BE, PL, NL, SE ○ **NL:** The decision in CJEU 17 April 2008, case C-404/06, [2008] ECR, p. I-2685

before replacing it?		del debitore') the general discipline on pecuniary obligations shall apply (a**rt. 1224 It. civil code**). Therefore, the buyer has a duty to pay the late payment interests (whether legal or conventional), unless the seller gives evidence of supplementary damages. Such interests do not include the compensatory interests due by the buyer according to **art. 1499 It. civil code**.	(Quelle AG) applies to both consumer and commercial sales contracts. In a B2B-contract the parties may derogate from this rule. **In several MS there is no specific rule. However, general contract law provides rules which could apply:** DE, EE, EL, HR, SK • **DE:** § 346 (1) BGB states that emoluments taken are to be returned, if one party hat contractually reserved the right to revoke or if that party has a statutory right of revocation. So the buyer is obliged to pay compensation if the requirements of § 346 I, II, No. 1 BGB are fulfilled • **EE:** The buyer has to return the fruits and other gain received during the possession of the goods. It covers also compensation of the use of the goods (Art. 189 para 1 of the LOA) and gains obtained (Art. 191 para 1 of the LOA). • **EL:** He shall be obliged to render the thing free of any burden of his doing as well as the advantages he derived there from. • **HR:** No specific rule in Croatian law addresses this issue. However, pursuant to Article 368, paragraph 4 of the COA, in case of rescission of a contract, each party owes a compensation for the benefits it had in a meantime from what it is obliged to return. Pursuant to Article 419 of the COA, general rule on consequences of a rescission of a contract from Article 368 of the COA shall also apply in situations where a professional buyer rescinds a contract due to non-conformity. Article 419, paragraph 2 of the COA furthermore provides that in case of rescission due to non-conformity, a buyer will be obliged to compensate for the use of

			the goods even when he/she is not in a position to return the goods either entirely or in part. These rules are however not of mandatory nature. • **SK:** Upon delivery of substitute goods, the seller is entitled to demand that the buyer returns to them, at the seller's expense, the goods being exchanged in the same condition in which the goods were delivered to the buyer. The provision of Section 441 shall apply accordingly." **-In one MS, the buyer has nothing to pay for any use of the replaced item, in the period prior to the replacement** (This is not a mandatory provision in B2B contracts):FI **No specific provision:** BG, CY, CZ, DK, ES, FR, HU, HR, IE, LT, LU, LV, MT, PT, SI, UK
Right to withhold performance			
In domestic law, is there a **rule** which cannot be derogated from by an agreement and **whereby the professional buyer may withhold performance as long as the trader has not regularly performed his**		**-Several MS provide such a right on the basis on the general law. It is a mandatory provision:** BG, CZ, LT, RO, SI • **BG**: A merchant shall enjoy a right of retention (which is exactly the same that the right to withhold performance) for his due claimed from another merchant, under a transaction concluded between them, to the movables and negotiable securities of the debtor received by that merchant in a	**-Many MS do not provide such a right in the remedies of the buyer. But, the buyer may withhold performance, on the basis on the general law. It is a mandatory provision for B2B contracts:** AT, BE, DE, EE, EL, ES, FI, FR, HR, HU, IE, LU, NL, PL, SE, SK • **ES:** The wording of art. 339 SpCCom implies that the obligation of the professional buyer to pay the price does not begin until the goods are delivered or placed at the buyer's disposal. • **FR:** Case law based on the articles 1131, 1146 of the Civil code and the adage *non adimpleti contractus*. In the contract law reform project,

own obligations?		lawful manner. Such right shall exist as long as the merchant holds the movables and the negotiable securities. The right of retention shall subsist if the debtor has ordered otherwise prior to the delivery of the thing or if the creditor has undertaken to handle the thing in a particular manner, provided the circumstances under Paragraph (5) have come to the knowledge of the creditor after the delivery of the thing. • **CZ:** Section 1912 (1) A person who is to perform in advance in case of a mutual performance may withhold such a performance until the mutual performance is provided or ensured to him, but only if the performance of the other party is jeopardised by circumstances which occurred in respect of the other party of which he was not and should not have been aware at the conclusion of the contract. (2) In the case under Subsection (1), an appropriate additional time limit for the discharge of the debt or ensuring the performance may also be provided, and it is possible to withdraw from the contract upon the expiry of the additional time limit within which the debt is not discharged or performance ensured. • **LT:** Article 6.46 (2) of Civil Code: 2. The debtor shall also have the	there is a specific provision whereby the creditor may withhold performance as long as the debtor has not regularly performed his own obligations (art. 1217 and 1219 of the project). • **PL (it is not indicated if it is mandatory):** The general provision of the Polish Civil Code declares that (Art. 488) performances which are the object of obligations under reciprocal contracts (reciprocal performances) should be made simultaneously unless it follows from the contract, the law, a decision of a court or other competent authority that one of the parties is obliged to make an earlier performance. If reciprocal performances are to be made simultaneously, each party may withhold the performance until the other party offers the reciprocal performance. • **No specific provision: CY, DK, LV, MT, UK**

		right to suspend performance of the obligation if the creditor fails to perform his counter-obligation and where the counter-obligations of the debtor and creditor are connected in such a manner that justifies the suspension of the performance of the obligation. • **RO:** A party may withhold performance during that time implied by the other's party action of performing. The rule describes the possibility to withhold party's own performance as a non-litigious meaning of pressure upon the other party in order to determine performance of reciprocal contractual duties. A party who is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has performed. The rule is mentioned in Article 1556 of the Romanian Civil Code, which holds that "(1) Where obligations arising from a synallagmatic / bilateral contract are payable and one party does not perform or provide performance of the obligation, the other party may, as an appropriate counter-measure, refuse the execution of their duties, unless where the law, the will of the parties or customs provide that the other party is obliged to execute first. (2) Execution may not be refused if, under the circumstances	

		and given the small magnitude of the benefit that was not executed, this refusal would amount to a conduct contrary to the requirements of good faith." Therefore, should the seller do not perform or provide performance of the obligation, the buyer may, as an appropriate counter-measure, refuse the execution of their duties: (i) unless where the law, the will of the parties or customs provide that the other party is obliged to execute first; (ii) unless, under the circumstances and given the small magnitude of the benefit that was not executed, this refusal would amount to a conduct contrary to the requirements of good faith. • **SI:** The principle of simultaneous performance is a general rule according to general law of obligations. Art. 101 of the CO provides that in bilateral contracts neither party shall be obliged to perform their own obligations if the other party is not simultaneously performing the latter's obligations or is unwilling to do so, unless agreed otherwise or stipulated otherwise by law, or unless it follows otherwise from the nature of the transaction. Thus, in general the professional buyer may withhold his performance until the seller performs his own obligations.	

		-IT: A special rule concerning the right to withhold performance concerns the sales by documents. According to art. 1528, § 2, It. civil code, once the buyer has given evidence of the lack of qualities of the goods delivered he/she may withhold performance. It is a mandatory rule that cannot be derogated by the parties. As for the contract of sale in general, according to some scholars the general rule on the right to withhold performance (art. 1460 it. civil code) would apply. The *rationale* for such a remedy is based on the practical opportunity to provide both parties with quick and clear remedies; nevertheless, the goal has not been achieved, as they are not much used by the parties in the commercial practice.	
In domestic law, is there a rule which cannot be derogated from by agreement and which provides in B2B contracts, that the right to withhold performance can be done as a preventive remedy when he must perform		**-Many MS provide that the right to withhold performance (even if it is based on ordinary law) can be used as a preventive remedy. It is a mandatory provision:** BG, CZ, LT, PT, RO, SI • **BG:** Pursuant to general commercial law, whether it is reasonable to believe that the seller will not perform at his term is irrelevant for the right of withhold under Art. 315 CA. As long as all other conditions are present, the right may be exercised. Such rule is present, however, in the OCA. According to	**-Many MS provide that the right to withhold performance (even if it is based on ordinary law) can be used as a preventive remedy where it is reasonable to believe that the seller will not perform at his term.** It is a non-mandatory provision for B2B contracts : AT, CY, DE, EE, FI, HU, IE, NL, SE, SK • **CY:** Cyprus Contract Law CAP. 149 Article 54 provides a remedy regarding anticipatory breach. • **IE:** It is possible to repudiate for anticipatory breach at common law. -**Under UK law, there is no such rule**. However, if the seller's non-performance amounts to a **repudiatory breach of the contract**, then the buyer can accept the

prior to the seller but it is reasonable to believe that the seller will not perform at his term?		Art. 90, Para. 2 OCA when it is clear that there is a possibility for one of the parties not to perform, the other party could withhold its performance unless the former party provides proper security. • **CZ:** Section 1912 states that "(1) A person who is to perform in advance in case of a mutual performance may withhold such a performance until the mutual performance is provided or ensured to him, but only if the performance of the other party is jeopardised by circumstances which occurred in respect of the other party of which he was not and should not have been aware at the conclusion of the contract.(2) In the case under Subsection (1), an appropriate additional time limit for the discharge of the debt or ensuring the performance may also be provided, and it is possible to withdraw from the contract upon the expiry of the additional time limit within which the debt is not discharged or performance ensured". • **LT:** Where the contractual obligation is counter-performed, and the party who is the first to make actions of performance fails to perform his obligation, or where it is evident that the party will delay the performance of the obligation, the other party shall have the right to suspend the performance of his counter-	repudiation and treat the contract as terminated, which would mean that he no longer needs to perform. But it is not exactly the same as withholding the performance. **-ES:** The wording of art. 339 SpCCom implies that the obligation of the professional buyer to pay the price does not begin until the goods are delivered or placed at the buyer's disposal. **-FR:** Actually no, but in the contract law reform, there is a provision which allows one part to use the withhold as a preventive remedy when it is reasonable to believe that the debtor will not perform his own obligation at his term (art. 1220 of the reform, applicable from 1er October 2016). **-HR:** Pursuant to general rules on performance from Article 359 of the COA, if according to a contract a party must perform its obligation first, it may withhold performance until the other party fulfils its obligation or gives security if performance of the other party becomes uncertain. The rule from Article 359 of the COA is not of mandatory nature. **-PL (it is not indicated if it is mandatory):** According to the Article 490 of the Civil Code if one of the parties is obliged to make a reciprocal performance earlier, and the performance by the other party is doubtful due to its financial condition, the party obliged to make the earlier performance may withhold the same until the other party offers the reciprocal performance or provides security. A party which, when executing the contract, was aware of the bad financial condition of the other party does not have the above rights. **-A few MS do not provide that withholding**

		obligation, or refuse to perform it altogether, inform of this the other party, and claim damages. 2. No right of suspension shall exist where: 1) the other party produces adequate security of performance of his obligation and this will not bring about groundless delay of performance of the obligation; 2) the performance of the obligation of the other party is impossible for the reason beyond the control thereof; 3) the performance of the obligation of the other party is prevented by the fault of the opposite party. 3. In the event of a contractual obligation being not performed in full by one of its parties, the other party shall also have the right to suspend the counter-performance of his obligation, or to refuse performance to the degree correspondent to that non-performed by the party obliged to perform first. 7. The right of suspension of performance of an obligation must be used by the parties in good faith and reasonably. • **PT:** According to article 428 nr. 1 CC a creditor who is to perform a reciprocal obligation at the same time as the debtor performs it has a right to withhold performance of the reciprocal obligation until the debtor has tendered performance or	**performance is a preventive remedy for the buyer:** BE, EL, LU **-No specific provision:** DK, LV, MT

		proposes to perform simultaneously. This rule corresponds to the "exception non adimpleti contractus" and cannot be derogated by agreement (for details, see Pires de Lima and Antunes Varela, *Código Civil anotado*, vol. I, 4th ed., reprint, Coimbra 2011, notes under Article 428, p. 405 ff). Moreover, general contractual clauses that exclude the right to withhold performance are *strictly prohibited* (Article 18, lit. *f* General Contract Terms Act). • **RO:** In cases in which the seller's performance becomes temporarily or partially impossible, thus the buyer having reasons to believe that the seller will not perform at his term. Art. 1556/2) Civil code – „(2) Should the performance of the party's contractual duties become partly or temporarily impossible, the other party may withhold its performance or terminate the contract." • **SI:** If it is agreed that one party will perform its obligations first and after the contract is concluded the other party's performance is uncertain for serious reasons, the party that undertook to perform the obligations first shall defer performance until the other party performs the other party's obligations or until the other party provides sufficient security that the obligations will be performed (Art. 102(1) of the CO). Moreover, in such a case the buyer	

		may terminate the contract without allowing an additional period (Art. 470(2) of the CO). This is possible if after being notified regarding a defect the seller informs the buyer that the contract will not be performed or if from the circumstances of the case in question it is clear that the seller will not be able to perform the contract in the additional period. **-IT:** A special rule concerning the right to withhold performance concerns the sales by documents. According to art. 1528, § 2, It. civil code, once the buyer has given evidence of the lack of qualities of the goods delivered he/she may withhold performance. It is a mandatory rule that cannot be derogated by the parties. As for the contract of sale in general, according to some scholars the general rule on the right to withhold performance (art. 1460 it. civil code) would apply: *see above at Q46—3, and Q46-6.* The *rationale* for such a remedy is based on the practical opportunity to provide both parties with quick and clear remedies; nevertheless, the goal has not been achieved, as they are not much used by the parties in the commercial practice.	
In domestic law, is there a **rule** which cannot be derogated from by agreement and		**-Several MS provide that this right (even if it is based on ordinary law) can be used as a partial remedy. The rule is mandatory:** BG, LT, PT, RO	**-A few MS provide that this right (even if it is based on ordinary law) can be used as a partial remedy. It is a non-mandatory rule:** EL, HU, LU, NL

which provides for cases, in B2B contracts, where this preventive withholding can only be partial?		• **BG:** It could be partial. Generally, the withheld part should correspond to the required performance. • **LT:** Where the contractual obligation is counter-performed, and the party who is the first to make actions of performance fails to perform his obligation, or where it is evident that the party will delay the performance of the obligation, the other party shall have the right to suspend the performance of his counter-obligation, or refuse to perform it altogether, inform of this the other party, and claim damages. 2. No right of suspension shall exist where: 1) the other party produces adequate security of performance of his obligation and this will not bring about groundless delay of performance of the obligation; 2) the performance of the obligation of the other party is impossible for the reason beyond the control thereof; 3) the performance of the obligation of the other party is prevented by the fault of the opposite party. 3. In the event of a contractual obligation being not performed in full by one of its parties, the other party	**-In one MS, it is not provided that withholding performance can be partial. So, the solution is uncertain.** • **HR:** Argumentum a majore ad minus interpretation of Article 359 of the COA would suggest that a withholding could also be only partial. **No specific provision:** AT, BE, CY, CZ, DE, DK, ES, FR, IE, LV, PL[985], SI, SK, UK

[985] *PL: Under PL law, the rule is provided in an opposite way. Where it is the buyer who delays, according to Article 552 of the Civil Code, if the buyer defaults on paying the price for any part of any items sold and supplied, or if, given the buyer's financial condition, it is doubtful that the price for any part of any items that are to be supplied later will be paid on time, the seller may refrain from supplying further items sold, and may set the buyer an appropriate period in which to secure payment; after this period passes to no effect, the seller may rescind the contract.*

		shall also have the right to suspend the counter-performance of his obligation, or to refuse performance to the degree correspondent to that non-performed by the party obliged to perform first. 7. The right of suspension of performance of an obligation must be used by the parties in good faith and reasonably. • **PT:** Article 429 (Insolvency or diminished guarantees) Even if he has the obligation to comply with firstly, the party has the ability to refuse the respective consideration until the other party comply with, or give guarantees of compliance, if, subsequent to the contract, any circumstances involving the loss of the deadline benefit occur. This rule cannot be derogated by agreement. • **RO:** The provisions of the Romanian law only mention that, in cases in which the performance of the party's contractual duties is not totally and permanently impossible, but it only becomes partially or temporarily impossible, the preventive withholding of the other party's performance may occur. According to Art. 1556/2) Civil code – „(2) Should the performance of the party's contractual duties become partly or temporarily impossible, the other party may withhold its	

		performance or terminate the contract." The provision of law above mentioned does not explicitly, but only indirectly mention that the preventive withholding of the other party's performance may be partial or that the aggrieved party may withhold the whole of its performance or a part of it as may be reasonable in the circumstances. **-EE:** A party shall not withhold performance if this would be unreasonable in the circumstances or contrary to the principle of good faith, in particular if the other party has performed the obligations thereof for the most part or without significant deficiencies (Art. 111 para 3 of the LOA). This rule cannot be derogated from by agreement. **-Under IT law, there is a specific mandatory rule:** A special rule concerning the right to withhold performance concerns the sales by documents. According to art. 1528, § 2, It. civil code, once the buyer has given evidence of the lack of qualities of the goods delivered he/she may withhold performance. It is a mandatory rule that cannot be derogated by the parties. As for the contract of sale in general, according to some scholars the general rule on the right to withhold performance (art. 1460 it. civil code) would apply: *see above at Q46—3, and Q46-6.* The *rationale* for such a remedy is based on the practical opportunity to provide both	

		parties with quick and clear remedies; nevertheless, the goal has not been achieved, as they are not much used by the parties in the commercial practice.	
<u>Termination for fundamental non-performance</u>			
In domestic law, is there a **rule** which cannot be derogated from by agreement and **whereby the professional buyer may terminate the contract without going to court in case of non-performance by the trader?** Should this **non-performance respect some conditions** (not essential, substantial)?		**<u>-In many MS, a mandatory rule considers that the buyer can terminate the contract by notice, without having to refer to a court:</u>** AT, BG, CY, CZ, FR, HR, IT, LT, LV, LU, PL, PT, RO, SI **<u>-Such termination is possible under the following conditions:</u>** AT, BG, CY, CZ, FR, HR, IT, LT, LU, LV, PL, PT, RO, SI • **<u>AT:</u>** Concerning cases of warranty, termination of the contract is possible when the requirements described above are met no repair/replacement, significant defect). It must be asserted before court (the same applies to a claim for reduction of the price) (cf. *Zöchling-Jud* in Kletečka/Schauer, ABGB-ON[1.02] § 932 mn. 41). Concerning cases where no performance is rendered at all, cancellation of the contract is possible, if the trader is at fault or accountable for this impossibility (§ 920 ABGB). In this case (the same applies in case of default) going to court is not required for the	**<u>-In many MS, the buyer can terminate the contract by notice, without having to refer to a court. It is a rule which can be derogated from by agreement:</u>** BE, DE, EE, EL, IE, FI, HU, NL, SE, SK, UK **<u>-Such termination is possible under the following conditions:</u>** • **<u>BE:</u>** Termination of the contract without judicial intervention is possible in Belgian common law in bilateral contracts when: - Serious breach of contract; - Judicial intervention has no sense because of the urgency or the loss of trust and; - The debtor is notified and he knows about the fact that the creditor (consumer) wants to terminate the contract (and has given the reasons why). The termination without judicial intervention needs to be considered as an exception. • **<u>DE:</u>** As a rule, according to § 349 BGB, termination (revocation) is effected by declaration to the other party, thus the right of termination (revocation) is framed as right allowing the parties to alter the legal relationship by declaration (*Gestaltungsrecht*; "formative right"). The nature of the right of termination (revocation) cannot be changed by agreement. Requirements of termination for non-performance are contained in § 437 No. 2, 323 (1) BGB: The

		cancellation to take effect (cf. *Gruber* in Kletečka/Schauer, ABGB-ON[1.02] § 918 mn. 25). If the performance becomes impossible by chance however, even a declaration is not needed since the contract 'collapses'. • **BG:** non-performance/delay; - notice; - failure to perform after the notice. • **CY:** If one of the parties to a contract refuses to perform or renders himself incapable of performing • **CZ:** (1) If a party fundamentally breaches a contract, the other party may withdraw from the contract without undue delay. A fundamental breach means such a breach of which the breaching party, at the conclusion of the contract, knew or should have known that the other party would not have concluded the contract had it foreseen such a breach; in other cases, a breach is presumed not to be of a fundamental nature. (2) A party may withdraw from a contract without undue delay after the conduct of the other party undoubtedly indicates that the party is about to commit a fundamental breach of contract and fails to provide a reasonable security after being requested to do so by the obligee. • **FR:** Actually there is no legal rule	buyer can generally only terminate the contract, if he has specified, without result, an additional period for performance or cure. In particular according to § 365 HGB however, if there is a stipulation that the performance by one party of his part of the contract must be completed at a definitely fixed time or within a definitely fixed period, the other party may, if it is not so completed, terminate the contract without such an additional period. However this rules can be derogated from by agreement in B2B contracts within the boundaries of §§ 134, 138, 242 BGB; as well as §§ 305 et seq. BGB in the case of standard terms — unless the seller fraudulently concealed the defect or gave a guarantee of the quality of the thing (§ 444 BGB). • **EE**: Termination need following conditions: 1) fundamental non-performance (Art. 116 para 1 of the LOA); 2) notice made during reasonable time period after the party becomes or should have become aware of a fundamental breach of the contract or the additional term for performance granted expires (Art. 118 para 1 of the LOA). Grounds and conditions for termination may be agreed by the parties in the limits provided for in the Art. 106 para 2 of the LOA or in case of standard terms in the Art. 42 of the LOA. Fundamental non-performance is defined in the Art. 116 para 2 of the LOA: 1) non-performance of an obligation substantially deprives the party of what was entitled to expect under the contract, except in cases where the other party did not foresee such consequences of the non-performance and a reasonable person of

		whereby the creditor may terminate the contract without the intervention of the judge, but **case law** admits that right. In the contract law reform applicable from 1er October 2016, it will be a mandatory rule, art. 1224 and 1226. • **HR:** In case of non-performance creditor can terminate the contract by unilateral statement, unless the contract is terminated by virtue of law. There are some special conditions which must be fulfilled in order for a party to be able to terminate the contract. Pursuant to Article 367 of the COA, a contract cannot be terminated for non-fulfilment of insignificant part of obligation. Hence, in order for a contract to be terminated due to non-fulfilment, this non-fulfilment must be significant. • **IT**: Art. 1517 It. civil code provides special rules and procedures (in derogation to the general rules imposed by arts. 1454, 1456, 1457 It. Civil code and dealing with the termination of the contract out of courts: 'risoluzione di diritto') for the sales of goods, aiming at terminating the contract of sale without going to justice. According to this provision, the innocent party must first propose his/her performance before the expiring date for performance, and then notify the party in breach his/her will	the same kind as the other party could not have foreseen such consequences under the same circumstances; 2) pursuant to the contract, strict compliance with the obligation which has not been performed is the precondition for the other party's continued interest in the performance of the contract; 3) non-performance of an obligation was intentional or due to gross negligence; 4) non-performance of an obligation gives reasonable reason to believe that the party cannot rely on the other party's future performance; 5) the other party fails to perform any obligation during an additional term for performance (Art. 114 of the LOA) or gives notice that the party will not perform the obligation during such term. In addition to that Art. 223 para 1 of the LOA provides that in sales the non-performance is fundamental if repair or substitution of a thing is not possible or fails, or if the seller refuses to repair or substitute a thing without good reason or fails to repair or substitute a thing within a reasonable period of time after the seller is notified of the lack of conformity. • **FI:** If the breach of contract is of substantial importance to the buyer and the seller knew or ought to have known this. • **HU, IE:** The non-performance cannot be non-essential • **NL:** Termination is possible only in case performance is impossible (either permanently or temporarily) or in case the seller is in default. Where the seller states he will not perform (or repair or replace, as the case may be) or the parties had agreed on a specific date for performance, the buyer is entitled to terminate the contract without giving the seller a period to

		to terminate the contract within 8 days from the expiring date. The provisions aim at protecting both parties (art. 1517, § 1, It. civil code) or the seller only (art. 1517, § 2, It. civil code). Art. 1517 It. civil code does not provide special conditions of non-performance, although it can be inferred that the general rule on the fundamental breach (art. 1453 It. Civil code) should apply. Another special remedy that may terminate the contract without going to court is regulated by arts. 1515, 1516 It. civil code. According to these special rules, in case of breach of contract by the seller the buyer can buy the same fungible goods from third parties, and debit the difference of the price to the (former) seller. Damages can also be claimed by the buyer. It is a special form of non-judicial defence against non-performance, or it may be considered as a form of specific performance. Please note that a comparable rule is stated in favour of the seller (art. 1515 It. civil code). • **LT:** In the event of non-performance or improper performance of the contract by the other party. The condition for such termination is fundamental breach of a contract. • **LU:** Case law allows unilateral termination of a contract by one party. In that case, such unilateral	perform ; otherwise he will have to bring the buyer into default by a *mise-en-demeure* and to respect the period mentioned in there for performance. No termination is possible if the non-performance is too minor or of such a nature that it does not justify termination; however, it is up to the seller to argue and to prove that this is the case. • **SE:** Strict non-performance is generally handled according to the rules of delay. If a buyer suffers strict non-performance (no goods delivered) he may rescind the contract according to Section 25 of the Sales of Goods Act, when there is a delay of *substantial* importance to the buyer and the seller realized or should have realized this (both the breach and the importance of it). If the buyer has submitted the seller a certain additional time of delivery of the goods and if this time is not unreasonably short, the buyer may rescind the purchase if the goods are not delivered within the additional time, Section 25 paragraph 2 of the Sales of Goods Act. While the additional time expires the buyer may rescind the purchase only if the seller announces that he will not fulfil the purchase within this time, Section 25 paragraph 3 of the Sales of Goods Act. The buyer need not go to justice to rescind the contract, a notice of rescission need only be sent to the Seller, for the rescission to take effect de jure (provided the requisites for a right of rescission are met). If either party is unwilling or unable to fulfil his obligations when liquidating the contract (e.g. the sellers obligation to reimburse the buyer for any payment he has made, when a contract is rescinded), the other party will however need to have assets seized by way of execution, according to the Swedish law of execution and insolvency.

		termination is subject to certain conditions. It is indeed necessary for the party seeking performance to serve the other one with a formal notice ("mise en demeure") to perform before making a judicial claim. Although case law admits unilateral termination without notice in case of emergency (Court of Appeal, November 9, 2005, No. 27581). In addition, case law requires the alleged breach to be serious enough to proceed to termination (Court of Appeal, 19 October 2011, JTL, 2012, p. 114) Otherwise, the party who terminated unilaterally the contract may be liable for abusive termination. When the contracting part is facing a breach of contract by the debtor, and terminates the contract unilaterally out of a judicial claim he or she does so at his/her own risk and is liable if it turns out that the termination was not justified. (G. Ravarani, *La responsabilité civile des personnes privées et publiques*, No. 2006, No. 487). Appreciation of the importance of the non-performance is for the judge to make. • **LV:** Article 2039 of the Civil Law sets: "Unilateral withdrawal from a purchase contract shall not be permitted even if the other party does not perform his or her obligations". Additionally, Article	• **SK:** In case of fundamental breach of contract there is non-mandatory rule CommC section 436 (2) according to which the buyer is entitled to withdraw from the contract with restrictions according to CommC section 441 - notify the seller of defects in time, condition of goods when returning. In case of non-fundamental breach there is non-mandatory rule CommC section 437 (5) according to which if the seller does not eliminate the defects of the goods within the period arising from Subsection 3 or 4, the buyer may exercise his claim to a discount from the purchase price or withdraw from the contract, provided the buyer notifies the seller of his intention to withdraw from the contract when determining the period under Subsection 3, or within a reasonable period before withdrawal from the contract. The buyer may not change the chosen claim without the seller's consent. The buyer may not withdraw from the contract if he did not notify the seller of defects in time - CommC section 441 (1) with its addition in sections 2, 3. Within general regulation of withdrawal, there is comprehensive regulation in CommC sections 348-351 (non-mandatory) not particularly aimed at purchase contract, but it applies on this contract as well. • **UK:** If the breach is of a "condition" or a sufficiently serious breach of an innominate term, then the innocent party can terminate by informing the other party of this. **Some domestic law do not contain such a rule:** DK, MT

		2040 of the Civil Law sets: "As an exception, a purchase contract may be set aside pursuant to the claim of one party: 1) where one party has been compelled to enter into the contract through the acts of bad faith of the other party, or by fraud or duress; 2) due to the defects in the purchased property; 3) on the basis of ancillary agreements by means of which the right of withdrawal has been retained; 4) due to excessive loss suffered by one or the other party; or 5) in the circumstances specified in Section 1663, also on account of default" • **PL:** The buyer may terminate the contract basing on general contractual responsibility rules but only in particular situations – there in no general termination clause. The party to the contract (professional as well) may terminate the contract in case of impossibility and in case of default. According to Article 491§1 of the Polish Civil Code, if one of the parties defaults on the performance of an obligation under a reciprocal contract, the other party may set an additional period for its performance, with the sanction that if the specified period passes to no effect, it will be entitled to rescind the contract. It may also,	**Some domestic law do not contain such a rule but it is generally accepted by doctrine and courts:** • **ES:** If non-performance is essential.

		either without setting an additional period or after the set period passes with no effect, demand that the obligation be performed and that any damage resulting from the default be remedied. • **PT:** According to Article 432, nr. 1 CC, the termination of the contract may result from the Law or from an agreement. Pursuant to Article 436, nr. 1 CC, the contracting parties may terminate the contract without going to justice. Pursuant to Article 432, nr. 1 CC the termination resulting from an agreement can stipulate for one of the parties or for both of them the right to termination. • **RO: In Romanian law, there are two known types of unilateral termination for non-performance. One is mandatory and the other one can be derogated from by agreement.** (a) termination occurring by the giving of a notice: As stated in Art. 1552 of the Civil code on Unilateral termination, "(1) Unilateral termination of a contract occurs by the giving of notice, in the cases in which the right to unilateral termination has been provided for by a resolution clause, or when the debtor is considered by a provision of law to be automatically in delay for performance, or when the debtor did not perform within the additional	

			time for performance fixed in the notice. (2)The notice of unilateral termination shall be given during the period fixed by law for the prescription of the action in the judicial termination of the contract." Resolution clauses, Art. 1553 Civil code – „Resolution clauses must expressly indicate the obligations, the non-performance of which will result in the termination of the contract. (2) In the cases concerned by the provisions of paragraph (1), the termination is subject to the defaulting party being put on formal notice, if it has not been agreed that termination would result from the mere fact of non-performance. (3) The formal notice is only effective if it restates in clear terms the resolution clause." **Such a rule can be derogated from by agreement.** (b) automatically occurred termination for fundamental non-performance: Art. 1557 Civil code – "(1) Whenever the performance of a fundamental contractual obligation becomes totally and permanently impossible, the contract shall be automatically considered to be terminated without a given notice, from the time the event occurred. The provisions of art. 1274(2) remain applicable.	

			(2) Should the non-performance of a contractual obligation not be totally and permanently impossible, the aggrieved party may withhold the performance of its obligations or may seek for termination of the contract. In the latter case, the provisions of law on contract termination remain applicable." In these cases (in which the performance of a fundamental contractual obligation becomes totally and permanently impossible), the contract shall be automatically considered to be terminated without a given notice. **In the field of non-performance of fundamental obligations, the rule on automatically occurred termination cannot be derogated from by agreement, as it is mandatory.** However, it should be pointed out that the Romanian law provisions do not describe the meaning of the terms "fundamental obligation", nor do they enumerate the cases in which a non-performance of an obligation should be considered "fundamental". The doctrine interprets the provisions of art. 1557 Civil code as referring to strict compliance with the obligation being of the essence of a contract (Dan Chirică, Tratat de Drept civil, Contracte speciale, vol. I, Ed. CH Beck, Bucharest, 2008, p. 363).	

		No specific provisions on the cases in which the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance. Technically, these cases fall under the provisions of art. 1557 on unilateral termination without a notice for non-performance of a fundamental obligation, despite the fact that the mentioned provisions of law do not explicitly describe the exact meaning of the term "fundamental obligation". In the case of contractual obligations implying a progressive or continuous performance, the right to unilateral termination of the contract is subject to a given notice within a reasonable period of time, even after the beginning of the performance; nevertheless, the notice of unilateral termination has no effect on the performance which has been completed or is in completion (art. 1276(2) Civil code). • **SI:** Art. 468 of the CO governs termination as one of alternative remedies for material defect. Art. 470 of the CO provides that the buyer may only terminate the contract if an appropriate additional period for performing the contract was allowed for the seller. In that case the termination is governed by the rules laid down for termination	

		of a bilateral because of non-performance (Art. 477 of the CO).	
In domestic law, is there a **rule** which cannot be derogated from by agreement and **whereby the professional buyer may seek judicial termination of the contract in case of non-performance by the trader?**		**-In many MS, <u>corresponding rule exist and it is mandatory</u>:** AT, BG, CY, IT, LT, LU, LV, PL, PT, RO, SI • **<u>AT:</u>** As far as warranty is concerned, the right to terminate the contract cannot be waived in case of brand new wares, concealed defects or defects that are significant and not repairable (cf. *Zöchling-Jud* in Kletečka/Schauer, ABGB-ON[1.02] § 932 mn. 13 ff). Concerning delay and subsequent frustration, as specified in 40-4), it is considered as unfair in the sense of § 879 (3) ABGB to completely exclude the right to withdraw from the contract. <u>While §§ 918 – 921 ABGB are modifiable between professionals, agreements that lead to disproportions or arbitrary treatment, ie. when in case of a justified withdrawal a sum must be paid (cf. *Gruber* in Kletečka/Schauer, ABGB-ON[1.02] § 918 mn. 44 ff.) will be considered as unfair and therefore relatively void.</u> • **<u>PT:</u>** There is not a rule in the Civil Code about the judicial termination of the contract in case of non-performance (*resolução*). <u>Article 71 of the new Code of Civil</u>	**-In many MS, <u>corresponding rule exist and it is a non-mandatory rule:</u>** BE, EL, FR, NL **-<u>Some domestic law do not contain such a rule</u>:** CZ, DE, DK, EE, HR,IE, SE, SK, UK • **<u>CZ</u>**: Generally, the professional buyer would terminate the contract (out-of-court) and when the seller claims that the withdrawal was e.g. invalid or groundless and that the professional buyer is still bound by the contract, court decision would be called to declare whether the termination was valid or not. • **<u>HR:</u>** In case of non-performance the contract is terminated by unilateral statement, hence without the need for judicial intervention. • **<u>UK:</u>** There is no rule of this kind, but it is always open to the party seeking termination to go to court if the other party does not accept the termination. **<u>Some domestic law do not contain such a remedy called "judicial termination" but the court can allow the party to terminate the contract:</u>** ES, FI **SI:** <u>It is implied.</u> **MT:** <u>Not applicable</u>

		Procedure (CCP, Act nr. 41/2013 of 26 June 2013) makes clear that judicial termination of the contract in case of non-performance is admitted. This solution was already admitted by the STJ.	
Termination for delay in delivery			
In domestic law, is there a **rule** which cannot be derogated from by agreement and **which provides, in B2B contracts, what are the conditions to terminate a contract in a case of delay in delivery?**		**-In several MS a reasonable additional period must be given to the seller. It is a mandatory rule:** BE, CZ, PL, PT, SI • **CZ :** Section 1977 If, by its default, a party fundamentally breaches its contractual duty, the other party may withdraw from the contract if it notifies the party in default accordingly without undue delay after learning of the default. Section 1978 (1) If a default of one of the parties constitutes a non-fundamental breach of its contractual duty, the other party may withdraw from the contract after the defaulting party fails to fulfil its duty even within a reasonable additional time limit expressly or implicitly provided by the other party. (2) If a creditor notifies the debtor that he grants him an additional time limit to perform and that there	-**In a few MS a reasonable additional period must be given to the seller. It is a non-mandatory rule:** EE, ES, NL, SK, SE • **SE:** Strict non-performance is generally handled according to the rules of delay. If a buyer suffers strict non-performance (no goods delivered) he may rescind the contract according to Section 25 of the Sales of Goods Act, when there is a delay of *substantial* importance to the buyer and the seller realized or should have realized this (both the breach and the importance of it). If the buyer has submitted the seller a certain additional time of delivery of the goods and if this time is not unreasonably short, the buyer may rescind the purchase if the goods are not delivered within the additional time, Section 25 paragraph 2 of the Sales of Goods Act. While the additional time expires the buyer may rescind the purchase only if the seller announces that he will not fulfil the purchase within this time, Section 25 paragraph 3 of the Sales of Goods Act. The buyer need not go to justice to rescind the contract, a notice of rescission need only be sent to the Seller, for the rescission to take effect de

		will be no extension thereof, he is conclusively presumed to have withdrawn from the contract upon the expiry of the additional time limit within which the debtor fails to perform. Section 1979 If a creditor has provided a debtor with an unreasonably short additional time limit to perform and withdraws from the contract after the time limit expires, the withdrawal becomes effective only after the expiry of the reasonable additional period which should have been granted to the debtor within which the debtor fails to perform. This also applies if the creditor withdraws from the contract without providing the debtor with any additional time limit to perform. • **PL:** According to Article 491§1 of the Polish Civil Code, if one of the parties defaults on the performance of an obligation under a reciprocal contract, the other party may set an additional period for its performance, with the sanction that if the specified period passes to no effect, it will be entitled to rescind the contract. It may also, either without setting an additional period or after the set period passes with no effect, demand that the obligation be performed and that any damage resulting from the default be remedied.	jure (provided the requisites for a right of rescission are met). If either party is unwilling or unable to fulfil his obligations when liquidating the contract (e.g. the sellers obligation to reimburse the buyer for any payment he has made, when a contract is rescinded), the other party will however need to have assets seized by way of execution, according to the Swedish law of execution and insolvency. -**One MS distinguishes between the case where the delay is fundamental for the buyer** (who can terminate the contract immediately, without giving the seller an additional period), **and the case where the delay is not fundamental, and the buyer has to give the seller an additional period before terminating. It is a supplementary rule: DE** **-One MS doesn't mention such an additional period:** IE -**In a few MS the law provides that the buyer has the right, but not the duty, to give to the seller an additional period. It is a non-mandatory rule:** EL, NL, FI • **FI:** According to Sale of Goods Act Chapter 5 Section 25, the buyer can terminate the contract on account of the seller's delay in delivery if the breach of contract is of substantial importance to the buyer and the seller knew or ought to have known this. If the buyer has fixed an additional period of time for the delivery and the time is not unreasonably short, the buyer is also entitled to declare the contract avoided unless the goods are delivered within the additional period of time. During the additional time, the buyer may declare

		• **PT:** The Portuguese Code Civil does not contain provisions concerning the possibility of termination of contracts for sale of goods resulting from delay in delivery. Nevertheless, Article 808, nr. 1 CC provides that if the plaintiff loses the interest during the fulfilment of an obligation, or if the delivery is not accomplished by the deadline that was reasonably established by the plaintiff, then the obligation is considered not fulfilled for all purposes; the loss of interest is appreciated objectively (Article 808, nr. 2). The STJ has decided that the simple *mora* [delay] of the debtor does not confer *per se* the creditor with the right to terminate the contract (STJ, 29.10.1992, Proc. n° 082512). For the STJ, only in case the creditor *objectively loses, due to the delay, the interest in the performance* or if *this last does not take place within the additional deadline reasonably established by the creditor* the obligation is considered unfulfilled for all purposes. At this moment, the consequent potestative creditor's right of withdrawal (termination) for culpable impossibility (Articles 801, nr. 1 and 808, nr. 1 CC) is constituted. (STJ, 07.03.2006, n° 05A3426; 29.10.1998,, Proc. n° 99A352; 02.11.1989, B.M.J., nº 391, p. 538 ss.). These rules cannot be derogated by agreement (Article	the contract avoided only if the seller makes known that he will not perform the contract within that time. -**No provision:** DK, ES, FR, HU, UK • **UK:** There is no specific rule. The time for delivery is not normally regarded as a condition of the contract, but it is open to the parties to specific that the time of delivery is a condition (the phrase "time is of the essence" has been held to have this effect), in which case failure to deliver would entitle the buyer to terminate. Otherwise, the only claim would be for damages for late delivery.

		809 CC). • **SI:** Pursuant to Article 105 of the CO, if performance on time is not an essential component of the contract, the debtor shall retain the right to perform the debtor's obligations and the creditor shall retain the right to demand performance. A creditor that wishes to withdraw from the contract must allow the debtor a suitable additional period for performance. If the debtor fails to perform the obligations within the additional period the same consequences as if the deadline was an essential component of the contract shall arise (contract is terminated by law). **-One MS distinguishes between the case where the delay is fundamental for the buyer** (who can terminate the contract immediately, without giving the seller an additional period), **and the case where the delay is not fundamental,** and the buyer has to give the seller an additional period before terminating. It is a mandatory rule: HR **-In one MS the law provides that the buyer has the right, but not the duty, to give to the seller an additional period. It is a mandatory rule: LT** • **LT:** There is no separate regulation for termination due to delay in delivery. However in case delay of	

		delivery will be considered as fundamental breach of contract the buyer will be entitled to unilaterally terminate the contract. Besides under Article 6.319 of the Civil Code: 2. The contract shall be deemed to state a condition prescribing the performance thereof at the fixed time, if the contract explicitly indicates that the seller, who is in breach of the time limit, shall forfeit interest in the contract. Where the contract contains such a condition, the seller shall be entitled to perform the contract by the expiration of the time limit or after the expiration thereof only where the buyer grants his consent. **-In a few MS, a mandatory rule provides, in B2B contracts, the conditions to terminate a contract in a case of delay in delivery. These conditions are as follows:** AT, BG, IT, LU, LV, RO • **AT:** While §§ 918 – 921 ABGB are modifiable between professionals, agreements that lead to disproportions or arbitrary treatment, i.e. when in case of a justified withdrawal a sum must be paid (cf. *Gruber* in Kletečka/Schauer, ABGB-ON[1.02] § 918 mn. 44 ff.) will be considered as unfair and therefore relatively void. Also, the party who wants to	

		terminate the contract must be able and willing to perform as well (cf. *Gruber* in Kletečka/Schauer, ABGB-ON[1.02] § 918 mn. 19). • **BG:** Conditions are the same as provided for terminate a contract without going to court • **IT:** In compliance with the general rule on contract law (see **art. 1183 It. civil code**) the delivery of the goods must be done by the seller immediately after the passing of property through consent *(see above at Q25-4)*, unless there is a deadline agreed upon by the parties or established by local commercial practices. If this general rules is violated, the buyer can ask for the judiciary termination of the contract (**art. 1453 It. civil code**). • **LU:** The question of the termination of a contract for delay in delivery is provides for by Article 1610 of the Civil code which states that: If the seller fails to make delivery within the time agreed upon between the parties, the purchaser may, at his choice, demand the rescission of the sale, or that he is put in possession, if the delay results from an act of the seller alone. In the absence of an express stipulation of delivery time in the sales contract, delivery must be made within a reasonable time. Even delivery exceeded the conventional delivery period or a reasonable time, termination is not	

		automatically imposed by the courts: "The judge has sovereign power to determine whether the delay in delivery is serious enough to justify the resolution (Civil Law Directory, v ° Sale, Effects, No. 342)" (Trib. Arr. 16 February 2011 No. role 128899, page 6). The formal requirement depends on whether a specific delivery date was fixed. When absolute deadline was set, the purchaser is exempt to the give notice to the seller to deliver the goods on the agreed date and can declare the sale terminated solely because of failure to deliver the thing to that date. In clear, when the day of performance of the obligation was set by agreement between the parties, the debtor is put in default by the mere expiration date and the creditor will be exempted from notice duty when put in default after this date (Article 1146 para. 2 of the Civil code). But, in the presence of a purely indicative time, the purchaser may not demand termination of the sale, or even claim damages for delay in delivery if he did not give to the seller notice to comply. • **LV:** Article 2039 of the Civil Law sets: "Unilateral withdrawal from a purchase contract shall not be permitted even if the other party does not perform his or her obligations". Additionally, Article	

		2040 of the Civil Law sets: "As an exception, a purchase contract may be set aside pursuant to the claim of one party: 1) where one party has been compelled to enter into the contract through the acts of bad faith of the other party, or by fraud or duress; 2) due to the defects in the purchased property; 3) on the basis of ancillary agreements by means of which the right of withdrawal has been retained; 4) due to excessive loss suffered by one or the other party; or 5) in the circumstances specified in Section 1663, also on account of default" • **RO:** As stated in Art. 1552(1) Civil code on Unilateral termination, unilateral termination of a contract occurs by the giving of notice, in the cases in which the right to unilateral termination has been provided for by a resolution clause, or when the debtor is considered by a provision of law to be automatically in delay for performance. According to Art. 1523 Civil code on the automatically occurred time limits – (1) The debtor shall be automatically considered in delay of delivery "whenever the parties have stipulated that the mere expiring of the term fixed for delivery produces this effect.	

		(2) Likewise, the debtor shall be automatically considered in delay of delivery whenever stated as such by a provision of law, as well as in the cases in which: a) the utility of the performance ceased within a certain period of time or the immediate performance was urgently due b) the debtor intentionally made the performance impossible by his actions; c) the debtor has manifested obvious refuse to perform or when the debtor repeatedly refuses or neglects to perform for an obligation implying repetitive performance ; d) the non-performance concern the duty to pay a sum, contracted in the exercise of a business ; e) the obligation was borne by an extra contractual illicit conduct. (4) In each case, the existence of one of the above reasons for the debtor to be automatically considered in delay of delivery must be proven by the aggrieved party. Any contractual term contrary to these provisions are considered to be non-binding on the party. » These rules cannot be derogated from by agreement. Any contractual term contrary to these provisions are considered to be non-binding on the party (art. 1523(4) Civil code).	

In domestic law, is there a **rule** which cannot be derogated from by agreement and which provides, **if the professional buyer gives notice fixing an additional period of time for performance and the seller does not perform within that period, that the buyer can terminate the contract?** Should the deadline was reasonable?		-**In some MS, the contract would be considered as terminated. Such rule is mandatory:** AT, BG, CZ, IT, LT, PL, PT, RO, SI • **CZ:** Section 1977. If, by its default, a party fundamentally breaches its contractual duty, the other party may withdraw from the contract if it notifies the party in default accordingly without undue delay after learning of the default. Section 1978 (1) If a default of one of the parties constitutes a non-fundamental breach of its contractual duty, the other party may withdraw from the contract after the defaulting party fails to fulfil its duty even within a reasonable additional time limit expressly or implicitly provided by the other party. (2) If a creditor notifies the debtor that he grants him an additional time limit to perform and that there will be no extension thereof, he is conclusively presumed to have withdrawn from the contract upon the expiry of the additional time limit within which the debtor fails to perform. Section 1979 If a creditor has provided a debtor with an unreasonably short additional time limit to perform and withdraws from the contract after the time limit expires,	-**In some MS, the contract would be considered as terminated. Such rule is non-mandatory:** CY, EE, EL, DE, FI, SE, SK • **DE:** The right to terminate (revocation) according to the first alternative in § 437 No. 2 BGB in conjunction with § 323 BGB generally requires the failure of the other party to meet the time period for performance or cure. The deadline must be reasonable. If the seller allows the time period to lapse, the buyer can terminate (revoke) the contract. • **FI**: According to Sale of Goods Act Chapter 5 Section 25, the buyer can terminate the contract on account of the seller's delay in delivery if the breach of contract is of substantial importance to the buyer and the seller knew or ought to have known this. If the buyer has fixed an additional period of time for the delivery and the time is not unreasonably short, the buyer is also entitled to declare the contract avoided unless the goods are delivered within the additional period of time. During the additional time, the buyer may declare the contract avoided only if the seller makes known that he will not perform the contract within that time. • **SE:** Strict non-performance is generally handled according to the rules of delay. If a buyer suffers strict non-performance (no goods delivered) he may rescind the contract according to Section 25 of the Sales of Goods Act, when there is a delay of *substantial* importance to the buyer and the seller realized or should have realized this (both the breach and the importance of it). If the buyer has submitted the seller a certain additional time of delivery of the goods and if this time is not unreasonably short, the buyer may rescind the

		the withdrawal becomes effective only after the expiry of the reasonable additional period which should have been granted to the debtor within which the debtor fails to perform. This also applies if the creditor withdraws from the contract without providing the debtor with any additional time limit to perform. • **IT:** There are no special rules in the law of sales: if the professional buyer gives notice fixing an additional period of time for performance and the seller does not perform within that period, the buyer can terminate the contract without going to court according to a general rule of contract law. **Art. 1457 It. civil code** states that when the time of performance can be considered as fundamental in the interest of the creditor, the latter (the buyer in this case) must give notice to the debtor of his/her will to fix an additional period three days before the fixed date. Should this will not be expressed by the creditor, the contract is immediately terminated. This provision is mandatory and it cannot be derogated by the parties. • **LT:** Deadline must be reasonable. Article 6.209 (1), (2) and (3) of the Civil Code: 1. In the case of non-performance, the aggrieved party may establish in writing an additional period of time of a	purchase if the goods are not delivered within the additional time, Section 25 paragraph 2 of the Sales of Goods Act. While the additional time expires the buyer may rescind the purchase only if the seller announces that he will not fulfil the purchase within this time, Section 25 paragraph 3 of the Sales of Goods Act. The buyer need not go to justice to rescind the contract, a notice of rescission need only be sent to the Seller, for the rescission to take effect de jure (provided the requisites for a right of rescission are met). If either party is unwilling or unable to fulfil his obligations when liquidating the contract (e.g. the sellers obligation to reimburse the buyer for any payment he has made, when a contract is rescinded), the other party will however need to have assets seized by way of execution, according to the Swedish law of execution and insolvency. • **SK :** In case of fundamental breach there is non-mandatory rule CommC section 436 (2) 4th sentence according to which if the seller fails to eliminate the defects of the goods within a reasonable additional period, or if they announce before expiration of such period that they will not eliminate the defects, the buyer may withdraw from the contract or require an appropriate discount from the purchase price. In case of non-fundamental breach there is a non-mandatory rule according to which the buyer is entitled to terminate the contract for delay – in details see legislation. According to non-mandatory rule CommC section 454 last sentence, if the buyer does not secure payment of the purchase price within an additional reasonable period determined by the seller, the seller may withdraw from the contract. An additional period should be "reasonable".

			reasonable length for the performance and notify the other party about this establishment. 2. Having established an additional period for performance, the aggrieved party may suspend for this period the performance of his own obligations and claim compensation for damages, though he shall not be able to invoke any other remedy. If the aggrieved party receives notice from the other party that the latter will not perform his obligations within the additional period either, or if upon the expiry of that period the contract has not been performed, the aggrieved party shall be able to set up other remedies available to him. 3. In the event where delay in performance is not essential violation of a contract, and the aggrieved party has established an additional period of time of reasonable length for the performance, this party may dissolve the contract upon expiry of that period. If the additional period is unreasonably short, it must be extended up to a reasonable length. The aggrieved party may stipulate in his notice upon the additional period that in the case of failure on the part of the other party to perform the contract within the additional period, the contract will be unilaterally dissolved.	**No provision:** DK, FR, HU, IE, LU, LV, UK

		• **PL:** According to Article 491§1 of the Polish Civil Code, if one of the parties defaults on the performance of an obligation under a reciprocal contract, the other party may set an additional period for its performance, with the sanction that if the specified period passes to no effect, it will be entitled to rescind the contract. It may also, either without setting an additional period or after the set period passes with no effect, demand that the obligation be performed and that any damage resulting from the default be remedied. • **PT:** Through Article 808, nr. 1 CC according to which if the performance does not take place within the additional deadline reasonably established by the creditor the obligation is considered unfulfilled for all purposes. • **RO:** The notice should fix an additional time for performance, according to the nature of the obligation and the particular circumstances. Should the notice not stipulate an additional time for performance, the debtor may complete performance within a reasonable time. Art. 1522 Civil code – „(1) The non-performing debtor may be given notice either by written request of performance, either by a judicial action in a court of law.	

		(2) Unless the provisions of law or a contractual term stipulate otherwise, the given notice shall be communicated to the debtor by an executive of the judicial authority or by any other means the content of which may be preserved. (3) The notice should fix an additional time for performance, according to the nature of the obligation and the particular circumstances. Should the notice not stipulate an additional time for performance, the debtor may complete performance within a reasonable time, from the date on which he had been put on notice." Art. 1552 of the Civil code on unilateral termination, "(1) Unilateral termination of a contract occurs by the giving of notice, in the cases in which the right to unilateral termination has been provided for by a resolution clause, or when the debtor is considered by a provision of law to be automatically in delay for performance, or when the debtor did not perform within the additional time for performance fixed in the notice. The rule is mandatory. According to Art. 1350 Civil code, „Should a specific provision of the law state otherwise, none of the parties is allowed to use contractual terms excluding or restraining its contractual liability in exchange for a	

		more favourable type of liability". • **<u>SI</u>:** Pursuant to Article 105 of the CO, if performance on time is not an essential component of the contract, the debtor shall retain the right to perform the debtor's obligations and the creditor shall retain the right to demand performance. A creditor that wishes to withdraw from the contract must allow the debtor a suitable additional period for performance. If the debtor fails to perform the obligations within the additional period the same consequences as if the deadline was an essential component of the contract shall arise (contract is terminated by law). **<u>-One MS consider that the contract is not terminated. This rule cannot be derogated from by agreement:</u>** • **<u>BE:</u> In any case, termination is only valid in case the party is at fault.** It is up to the judge to rule on this. If the deadline was not reasonable, the judge could rule that there was no fault of the seller.	
<u>Termination for anticipated non-performance</u>			

In domestic law, is there a rule which cannot be derogated from by agreement and whereby the professional buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance?		**Many MS provide that such exists (even if it is based on ordinary law). It is a mandatory provision:** AT, BG, CZ, IT, LT, PT, RO, SI • **AT:** In such a case the contract can be terminated pursuant to § 920 ABGB. In case of accidental impossibility of performance, the contract 'collapses' automatically (§ 1447 ABGB). Derogating from this would be considered as unfair since no factual reason exists for binding the other in such a situation. • **BG:** According to Art. 89 OCA, if the performance of one of the parties becomes impossible, the contract is considered terminated: "As for bilateral contracts, if an obligation of one of the parties is extinguished due to inability for performance, the contract shall be dissolved by rights. Where the inability is only partial, the other party may request proportional reduction of its obligation or dissolution of the contract by order of the court, if it has no substantial interest in its partial performance". • **CZ:** A party may withdraw from a contract without undue delay after the conduct of the other party undoubtedly indicates that the party is about to commit a fundamental breach of contract and fails to provide a reasonable security after being requested to do so by the	**-Many MS provide that such right exists (even if it is based on general law).** It is a non-mandatory provision for B2B contracts: CY, DE, EE, ES, FI, HR, HU, IE, NL, SK, UK • **CY:** Cyprus Contract Law CAP. 149 Article 54 provides a remedy regarding anticipatory breach. • **IE, UK:** It is possible to repudiate for anticipatory breach at common law. • **ES:** In general contract law, case law accepts anticipatory breach when the debtor declares that he/she will not perform (SSCJ 20.3.2010). **-Under EL Law:** Article 385 of the Greek Civil Code: It shall not be required to set a time period for the debtor placed under notice to furnish his performance: 1. if it appears from the whole attitude of the debtor that such step would serve no useful purpose. 2. if after having placed the debtor under notice to no avail the creditor has no interest in the performance of the contract **-Under SE law:** While the additional time expires the buyer may rescind the purchase only if the seller announces that he will not fulfil the purchase within this time, Section 25 paragraph 3 of the Sales of Goods Act. **-PL:** According to the Article 492^1 of the new legislation, if the seller declares that there will be a non-performance, the other party to the contract may terminate the contract without any additional period. This provision is derived from Article 18 of the 2011/83 Consumer Rights Directive. **-A few MS do not provide such right:** • **BE, LU**

		obligee. • **IT:** If – before the expiring date of performance - the seller has declared (or it is otherwise clear) that there will be a non-performance, the defensive mean of termination without going to court may be triggered by the innocent party (*see above at Q46-22*). In many cases, according to a general rule of contract law if the seller is in breach of the contract of sale, the buyer does not need to give him notice of his/her breach ('mora automatica'): **art. 1219, § 2, n. 2 It. civil code.** From the time when the breach has been declared (or it is otherwise clear that there is no performance) the effects of the lack of timely performance shall occur, that is; interests are due to the buyer, any risk of destruction of the goods passes on the seller. This provision is mandatory and it cannot be derogated by the parties. These remedies are available to both parties (**art. 1517 § 1, It. Civil code**). • **LT:** Article 6.58 (1) of the Civil Code states that "1. Where the contractual obligation is counter-performed, and the party who is the first to make actions of performance fails to perform his obligation, or where it is evident that the party will delay the performance of the obligation, the other party shall have	**No provision: DK, FR, LV, MT,**

		the right to suspend the performance of his counter-obligation, or refuse to perform it altogether, inform of this the other party, and claim damages". Article 6.219 of the Civil Code adds that "If prior to the date when performance falls due it is reasonable to think that there will be an essential non-performance by one of the parties, the other party may dissolve the contract". • **PT:** There is no specific rule on this subject. Nevertheless, this hypothesis is clearly admitted by the case-law: besides the situations typified as non-definitive fulfilment, there is another situation that the doctrine and jurisprudence equates as the permanent lack of compliance and that is reflected in the declaration, expressed or implied, of the debtor that is unwilling to or cannot meet his obligations. Thus, when the debtor's attitude or behaviour clearly reveals the intention of not fulfilling the provision which he has committed to because he does not want or cannot, the creditor does not have to wait for the deadline of performance (if not yet occurred), does not have to plead and prove the debtor's loss of interest in the performance nor has to give an additional deadline for its fulfilment, to consider the obligation as not fulfilled. Because this solution	

		results from the system organized by the Civil Code to govern the non-performance of obligations and the delay of debtor in performing the obligation due to debtor's fault, it cannot be derogated by agreement (Article 809 CC). • **RO:** As stated in Art, 1522(4) Civil code, the buyer may seek for remedies such as terminating the contract: (a) if the debtor had declared that there will be a non-performance or (b) if the additional time (fixed in the given notice) has expired without the debtor had been complying with the performance. Art. 1522 Civil code – „(1) The non-performing debtor may be given notice either by written request of performance, either by a judicial action in a court of law. (4) Until the time fixed in accordance with paragraph (3) expires, the aggrieved party may withhold performance or seek to obtain damages, but he may not seek for any other remedies of art. 1516, unless a specific provision of law should state otherwise. Nevertheless, the aggrieved party may seek for any other remedies, should the debtor declare that there will be a non-performance or should the additional time expire without the debtor had been complying with the performance."	

		The rule is mandatory. According to Art. 1350 Civil code, „Should a specific provision of the law state otherwise, none of the parties is allowed to use contractual terms excluding or restraining its contractual liability in exchange for a more favourable type of liability”. • **SI:** Article 470(2) of the CO on sales contract provides that the buyer may also withdraw from the contract without allowing an additional period if after being notified regarding a defect the seller informs the buyer that the contract will not be performed or if from the circumstances of the case in question it is clear that the seller will not be able to perform the contract in the additional period. Similarly, Article 107 of the CO provides that if before the deadline for the performance of obligations it is clear that one party will not perform her contractual obligations, the other party may withdraw from the contract and demand the reimbursement of damage	
Scope of right to terminate-partial termination			

In domestic law, is there a rule which cannot be derogated from by agreement and which provides, in B2B contracts, what are the conditions to justify partial termination and not termination of the contract as a whole in case of non-performance by the seller? Is the divisibility of the seller's obligations such a condition? **In domestic law, is there a rule which cannot be derogated from by agreement and which provides, in B2B contracts, that there are cases where the partial non-performance of a divisible obligation is such**		**-In several MS the principle provided by a mandatory rule is that termination can be partial when the non-performed obligations are divisible:** BG, CZ, HR, IT, PL, PT, RO, SI • **BG:** The law requires objective partial non-performance in order to terminate the contract partially (Art. 89, sent. 2 OCA). The contract may be terminated under that condition when the non-performance is due to the seller's fault (Art. 87, Para. 2 OCA). The rules are mandatory. Generally, the divisibility of the obligation is relevant due to the fact that the creditor is not obliged to accept partial performance (Art. 66 OCA). According to the law theory the divisibility shall be considered a condition for such termination. In case the non-performance is insignificant with respect to the creditor's interest the contract cannot be terminated. • **CZ:** Section 2004 (2) If a debtor provides a partial performance, the creditor may withdraw from the contract only in respect of the non-discharged part of the performance. However, if a partial performance is irrelevant for the creditor, the creditor may withdraw from the contract in respect of the whole performance. (3) If a contract obliges a debtor to provide continuous or recurrent activities or	**-In several MS the principle, provided by a rule which can be derogated from by agreement, is that termination can be partial when the non-performed obligations are divisible:** AT, EE, ES, FI, HU, NL, UK • **AT :** Both § 918 (2) and § 920 phrase 2 ABGB provide that partial termination is possible if the performance is divisible for both sides. This is to be judged by the parties' intent, which also means, that this is open for modifications by agreement. If no such agreement exists, it has to be asked if the parties would still have contracted given the modified or reduced content. For example, if the contract was about the delivery of four items and it turns out only three of them can still be delivered (in time) it depends on whether the contract would also have been concluded about the delivery of the three items (modifying the price of course). If not, e.g. because all four items form a functional unit (as it might be the case with an encyclopaedia), then the contract is not considered divisible. This does not necessarily lead to the same result for both parties. It remains controversial, if the creditor is able to declare termination of the whole contract even when, from the debtor's point of view, there is divisibility. § 920 phrase 2, which only addresses the creditor's interests, implies the latter (cf. *Gruber* in Kletečka/Schauer, ABGB-ON[1.02] § 918 mn. 41). § 918 ABGB: (2) If the performance is divisible for both parties, rescission may be declared with respect to both the performed and the unperformed parts of the contract. § 920 ABGB: If the performance of a contract is frustrated by the fault of a party or by an accident whose consequences must be borne

as to justify termination of the contract as a whole?		provide a progressive partial performance, the creditor may withdraw from the contract only with effect from that moment onward. This does not apply if partial performances which have already been accepted are no longer in itself relevant for the creditor. • **HR:** Pursuant to Article 365, paragraph 1 of the COA, where one of the parties to a contract with consecutive obligations fails to perform one of its obligations, the other party can terminate the contract with respect to all future obligations within a reasonable period of time, if it is evident from the circumstances that the future obligations will not be performed either. Of course, partial termination will be an option only in those situations where the performance can be divided into separate parts. However, as evident from Article 365, paragraph 1 of the COA, in order to justify partial termination of the contract, apart from divisibility of the debtor's obligation, additionally it should be established, based on the circumstances of the case, that future obligations will not be performed. Pursuant to Article 365, paragraph 2 of the COA a creditor can terminate the whole contract if partial performance is of no interest to it. • **IT:** Art. 1375 It. civil code imposes a	by a party, the other party may either claim damages for non-performance or rescind the contract. If the frustration if only partial such other party may rescind the contract provided that the nature or purpose thereof, as known by the other party, indicates clearly that a partial performance is of no interest. • **EE:** If the contract is divisible and not to be performed in parts and non-performance was committed only with the regard of performed part of the contract, the Art. 116 para 4 of the LOA applies. Conditions for the termination the contract as a whole are: 1) party is justifiably not interested in partial performance or 2) the non-performance is fundamental with regard to the contract as a whole. There is a possibility that rules on termination of long-term contracts apply which allow to terminate the contract *ex nunc* (Art. 195 of the LOA). In that case the contract will be terminated "from now" and only regard to the yet non-performed parts of the obligations • **SK:** There is non-mandatory rule CommC section 352 (1-3): "(1) An obligation shall also be deemed fulfillable if it may be fulfilled with assistance from another party. (2) An obligation shall also become non-fulfillable if the legal regulations issued after conclusion of the contract, where the effectiveness of such regulations is not limited in time, prohibit the debtor's conduct to which the debtor is obligated, or require an official permit which has not been granted to the debtor despite their due efforts to obtain one. (3) The creditor may withdraw from the contract with respect to the part of the fulfilment which has become impossible, if without provision of the

		general principle of conduct even during the termination of the contract: most of the provisions dealing with the termination of the contract represent the implementation of the general clause of good faith in performance. See in particular: - Termination for breach of contract: the innocent party cannot claim the termination unless the counterparty's breach is serious (art. 1455 It civil code) - Termination for impossibility of performance (not negligent): unless the creditor has a serious interest to the total performance of the obligations, he/she is required to accept partial performance (art. 1464 It. civil code). The same is true as regards temporary impossibility (art. 1256, § 2, It. civil code) - Termination for supervening impracticability of performance: the party who receives an advantage from the supervening imbalance of obligations is expected to offer the reduction of his/her obligation (art. 1468 It. civil code). Termination for supervening frustration of the contract: established case law admits the termination of a contract	fulfilment which has become impossible this part loses economic importance for the creditor with regards to its nature or with regards to the contract's purpose which follows from its content or which was known to the other party at the time of concluding the contract. The same shall apply to partial fulfilment." **In NL, divisibility of the seller's obligation is not a condition. Partial termination may be justified where termination of the contract as a whole is not justified given:** • the specific nature of the non-performance • or the gravity thereof • and the consequences that termination of the contract as a whole would have for the seller **Even if the exception is not exactly the same, the idea is, i.e. not to oblige the buyer to accept partial performance, if he cannot be expected to accept that, or if has no interest in the partial performance** (DE, HU), **or if he would suffer material inconvenience by being obliged to accept partial performance** (EL). **In one MS, partial termination is not recognised:** CY[986] **In Some MS, partial termination is not regulated:**

[986] *CY: Section 38 of the Sales of Goods Law prescribes the following:(2)When there is a contract for the sale of goods deliverable in agreed instalments, for which payment will be effected separately, and the seller does not proceed with delivery or proceeds with improper delivery in relation to one or more instalments, or when the buyer neglects or refuses to receive or pay the price for one or more instalments, then whether or not this violation of contract stipulates a repudiation of the whole contract or a part of it, in which case it gives rise to the right of compensation and not the right to repudiate the whole contract, depends on the terms of the contract and the circumstances of the case.*

		if the contractual interests of one party, well known to the other party, is frustrated by supervening events • **PL:** If the performances of the two parties are divisible, and one of the parties defaults only in part of the performance, the right to rescind the contract vested in the other party is limited, at its discretion, either to that part, or to the whole remaining part of the performance not made. That party may also rescind the entire contract if partial performance is meaningless due to the nature of the obligation, or due to the purpose of the contract intended by that party, which was known to the defaulting party. • **PT:** If the non-performance by the seller is attributable to him: Yes, partial termination is possible under Article 802 Civil Code, as follows: 1. If consideration/performance becomes partially impossible, the creditor may choose between unilaterally terminating the transaction or demanding provision of what is possible, in this case reducing the consideration/counter performance, if owed; in either case, the creditor retains the right to indemnification. 2. The creditor may not, however, unilaterally terminate the transaction if the partial nonfulfillment has little importance in serving his interests. The divisibility of the seller`s obligations	BE, DK, FR, IE, LU, LT, LV • **BE, FR:** partial termination is not provided in the law but it is accepted in case-law. • **IE:** Divisibility of the seller's obligation is possible in cases of instalment deliveries under s31 of the Sale of Goods Act 1893.

		is not a condition expressed in the law provision (Article 802 Civil Code uses the term "partial impossibility"), it is nevertheless recognized by legal literature: "in case of divisible obligations it is admitted that the impossibility of performance under Article 802 CC (=non-performance due to the seller) can be partial, as for example when the debtor (=seller) is obliged to deliver two pieces of china, but one of the pieces broke out" (cf. Menezes Leitão, *Direito das Obrigações*, vol. II, 4th ed., Coimbra 2006, p. 272). It cannot be derogated by agreement (Article 809 CC). As stated under Article 802 nr. 1 Civil Code there is an alternative for the creditor "to choose between unilaterally terminating the transaction or demanding provision of what is possible". It cannot be derogated by agreement (Article 809 Civil Code). • **RO:** (a) The divisibility of the seller's obligations represents a fundamental condition for the partial termination of the contract, as stated in art. 1549(2) of the Civil code, according to which the termination of the contract for non-performance may be partial, provided that the performance of the obligation is divisible. (b) Partial termination for minor yet repetitive non-performance	

		In the case of contractual duties implying progressive or continuous performance, the aggrieved party may seek for total or partial termination of the contract, provided that the minor non-performance has repeatedly occurred. The rule is mandatory. There are two different cases in which the partial non-performance of a divisible obligation is such as to justify termination of the contract as a whole: (a) the partial non-performance is regarded as essential by the interested party, rendering the entire contract distorted from what it should have amounted to pursuant to the original contractual agreement of the parties; In this case, the total completion of the performance within a the period of time fixed by an express contractual term was stipulated as essential for the purpose of the contract and thus a partial performance does not meet the essential requirements stipulated in favour of the buyer. Additionally, as mentioned in art. 1523(2) Civil code, the debtor is automatically considered in delay of delivery in the cases in which: "a) the utility of the performance ceased within a certain period of time or the immediate performance was urgently due".	

		According to Art. 1417(3) Civil code, "(3) The aggrieved party may request that the additional time for the performance of the other party has no effect against him, when the debtor deliberately refuses to perform in accordance with an essential contractual term stipulated in favour of the aggrieved party. Should this be the case, the contractual term must expressly mention the essential character, as well as the sanction of forfeit of the additional time, and the aggrieved party should have a legitimate interest in stipulating such an essential term." In this case, the buyer may consider that the partial non-performance of a divisible obligation is such as to justify termination of the contract as a whole, provided that: (i) the seller deliberately refuses to perform in accordance with an essential contractual term stipulated in favour of the buyer; (ii) the contractual term expressly mentioned the essential character of a totally complete performance within a fixed period of time; (iii) the aggrieved party has a legitimate interest in stipulating such an	

		essential term. • **SI:** Article 474 of the CO provides that if several goods or a group of goods are sold through a single contract and for a single price and only some of the goods have defects the buyer may only withdraw from the contract in respect to the goods with a defect; the seller may afterwards withdraw from the seller's side of the contract in respect of other goods. It further provides that if the goods constitute a whole such that it would be damaging to separate them the buyer may withdraw from the entire contract; if the buyer nevertheless only withdraws from the contract in respect of the goods with a defect the seller may also withdraw from the seller's side of the contract in respect of the other goods. Article 472(1) of the CO provides that if only a part of the delivered thing has defects or if only a part of the thing or a smaller quantity of the thing than was agreed was delivered the buyer may withdraw from the contract only with respect to the part that has the defects or the part or quantity that is missing.	

In domestic law, is there a rule which cannot be derogated from by agreement and which provides, in B2B contracts, what are the conditions to justify termination of the contract as a whole, in case of non-performance breach of an indivisible obligation of the seller?		**-In several MS the conditions provided by a mandatory rule are as follows:** BG, CZ, HR, IT, LU, PL, PT, RO, SI • **BG:** The creditor could terminate the contract without a notice if the performance became impossible or worthless or the obligation should have been performed at a very certain moment • **CZ:** Section 2004 (2) If a debtor provides a partial performance, the creditor may withdraw from the contract only in respect of the non-discharged part of the performance. However, if a partial performance is irrelevant for the creditor, the creditor may withdraw from the contract in respect of the whole performance. (3) If a contract obliges a debtor to provide continuous or recurrent activities or provide a progressive partial performance, the creditor may withdraw from the contract only with effect from that moment onward. This does not apply if partial performances which have already been accepted are no longer in itself relevant for the creditor. • **HR:** Pursuant to Article 360 of the COA, in case of non-performance of the obligation of one contracting party, the other party is entitled, among others, to terminate the contract. If the obligation of a debtor is indivisible, the contract can be	**-In several MS the conditions provided by a rule which can be derogated from by agreement are as follows:** AT, EE, FI • **AT:** Where there is no agreement, termination of the whole contract is possible if both parties or (controversial, appears to be the prevailing opinion, though) the creditor regard the performance as indivisible • **EE** : If there is a non-performance of the obligations of an indivisible obligation, the other party may terminate the whole contract only if: 1) the party is justifiably not interested in partial performance or 2) the non-performance is fundamental with regard to the contract as a whole • **FI:** If the partial breach of contract amounts to a substantial breach with regard to the whole of the contract, the buyer may declare the contract avoided in its entirety. **-In one MS, i**f the obligation is indivisible, the buyer may terminate the contract as a whole if partial termination is unjustified, given the specific nature of the non-performance, or the gravity thereof **,** and the consequences that termination of the contract as a whole would have for the seller: NL **In several MS it depends on whether the non-performance is significant:** EE, HR, SE **-In several MS it depends on whether the creditor (here the buyer) has an interest in partial performance:** DE, HU, EL

		terminated only as a whole. However, as already explained, pursuant to Article 367 of the COA, a contract cannot be terminated for non-performance of an insignificant part of obligation. Hence, in order for a contract to be terminated due to non-performance of an indivisible obligation, it must be established that this non-performance was significant. • **IT:** Art. 1480 - Sale of a good partially owned by a third party: If the good that the buyer thought belonged to the seller was partially owned by third parties, the buyer may terminate the contract and claim damages under the previous article, when it is reasonable to believe that, under the circumstances, the buyer would not have bought the good without that part of which the buyer did not become the owner. Otherwise the buyer can claim a price reduction, in addition to damages. • **PL:** If the performances of the two parties are divisible, and one of the parties defaults only in part of the performance, the right to rescind the contract vested in the other party is limited, at its discretion, either to that part, or to the whole remaining part of the performance not made. That party may also rescind the entire contract if partial performance is meaningless due to the nature of	**-Such a rule is not provided:** BE, DK, ES, FR, LT, LV

		the obligation, or due to the purpose of the contract intended by that party, which was known to the defaulting party. • **LU:** Article 1184 of the Civil Code and the case law on the resolution of the contract do not distinguish between divisible or indivisible obligation. The judge pronounces the termination of a contract in the event that the breach of contract of the contracting party is serious enough to justify such a penalty. Indeed the judge will terminate the contract if the alteration of the contractual relationship is such that the victim other party would not have contracted if he had planned. A partial breach of contract may nevertheless justify the termination of the contract. (O. Poelmans, Droit des obligations au Luxembourg, Larcier 2013, No. 215). The judge will assess based on the importance of the obligation that has been breached, if it is appropriate to rescind the contract. • **PT :** As stated under Article 802 nr. 1 CC there is an alternative for the creditor "to choose between unilaterally terminating the transaction or demanding provision of what is possible". However, the option to terminate the transaction is not provided if the partial nonfulfillment has little importance in serving his interests (Article 802	

		nr. 2 CC). It cannot be derogated by agreement (Article 809 CC). • **RO:** In Romanian law, there are general provisions (not particularly using the term "indivisible obligations" of the seller), that enumerate the cases in which the termination of the contract as a whole is justified by the seller's conduct in breach of an contractual obligation: a) whenever the utility of the performance ceased within a certain period of time or the immediate performance was urgently due ; b) whenever the debtor intentionally made the performance impossible by his actions; c) whenever the debtor has manifested obvious refuse to perform or when the debtor repeatedly refuses or neglects to perform for an obligation implying repetitive performance ; d) whenever the non-performance concern the duty to pay a sum, contracted in the exercise of a business ; e) whenever the obligation was borne from an extra contractual illicit conduct. Art. 1523 Civil code – « (1) The debtor shall be automatically considered in delay of delivery whenever the parties have stipulated that the mere expiring of the term fixed for delivery produces this	

		effect. (2) Likewise, the debtor shall be automatically considered in delay of delivery whenever stated as such by a provision of law, as well as in the cases in which: a) the utility of the performance ceased within a certain period of time or the immediate performance was urgently due b) the debtor intentionally made the performance impossible by his actions; c) the debtor has manifested obvious refuse to perform or when the debtor repeatedly refuses or neglects to perform for an obligation implying repetitive performance ; d) the non-performance concern the duty to pay a sum, contracted in the exercise of a business ; e) the obligation was borne by an extra contractual illicit conduct. (4) In each case, the existence of one of the above reasons for the debtor to be automatically considered in delay of delivery must be proven by the aggrieved party. Any contractual term contrary to these provisions are considered to be non-binding on the party. » This is a mandatory rule. Any contractual term contrary to these provisions are considered to be non-binding on the party (art. 1523(4) Civil code). • **SI:** Pursuant to Article 472(2) of the	

		CO, the buyer may only withdraw from the entire contract if the agreed quantity or agreed thing constitutes a whole or if the buyer has a justifiable interest in accepting the agreed thing or the quantity in whole.	
Termination means			
In domestic law, is there a **rule** which cannot be derogated from by agreement and **whereby the professional buyer can terminate a contract, without having to go to court?**		**In many MS, a mandatory rule considers that the buyer can terminate the contract by notice, without having to refer to a court:** AT, BE, BG, CZ, EE, GR, HR, IT, LT, LV, LU, PT, RO, SI • **AT:** In the case where there has been delay or subsequent frustration, not in case of warranty. • **BE:** Termination of the contract without judicial intervention is possible in Belgian common law in bilateral contracts when: Serious breach of contract; Judicial intervention has no sense because of the urgency or the loss of trust and; The debtor is notified and he knows about the fact that the creditor wants to terminate the contract (and has given the reasons why). The termination without judicial intervention needs to be considered as an exception • **BG:** Art. 87. When a debtor under a bilateral contract fails to perform his	**In many MS, the buyer can terminate the contract by notice, without having to refer to a court. It is a non-mandatory rule:** DE, EL, FI, HU, IE, NL, PL, SE, SI, SK UK • **DE:** As a rule, according to § 349 BGB, termination (revocation) is effected by declaration to the other party, thus the right of termination (revocation) is framed as right allowing the parties to alter the legal relationship by declaration (*Gestaltungsrecht*; "formative right"). The nature of the right of termination (revocation) cannot be changed by agreement. • **EL (it is not indicated if it is mandatory):** Article 390 of the Greek Civil Code: Rescission shall be operated by means of a declaration addressed by the party entitled thereto to the other party. • **SK:** There is no rule that would oblige any contract party to go to court if contract party wants to terminate a contract **-In one MS,** it depends from the agreement. Article 1811 of the Civil Law sets: "Each obligation right terminates in and of itself when the relevant obligation of the debtor has been performed, i.e., by settling the debt. If the

			obligation due to a reason for which he is liable, the creditor may terminate the contract by providing the debtor with an appropriate period of time for the performance thereof with a warning that after the expiration of the relevant term the contract shall be considered terminated. The warning must be in writing if the contract is concluded in writing. Art. 201. states that in case of sale of movable property the seller may cancel the contract without observation of the requirements under Art. 87: a) if the buyer does not pay the price within the time limit, when according to the contract the transfer of the property must be effected at the time of payment or after the payment of the price; b) if the buyer towards whom the term of payment of the price has not expired yet, does not appear or does not accept within the time limit the property offered to him according to the contract. In both cases he must notify the buyer about the cancellation of the contract within 7 days as of the day of expiration of the term. Art. 202 states that if a time limit for payment of the price is not indicated and the buyer obtains the property without paying, the seller may request return of the property within 15 days as of the day of transfer, if it is still held by the buyer and is in	subject-matter of the obligation is money, then the obligation is performed by payment": LV **<u>Some domestic law do not contain such mandatory rule</u>:** DK, ES

		the same state as it was on the date of transfer. This right may not be exercised to the prejudice of the buyer's creditors who have imposed a restraint upon the property or have received the latter as a pledge, without knowing that the price is not paid. • **CZ:** (1) If a party fundamentally breaches a contract, the other party may withdraw from the contract without undue delay. A fundamental breach means such a breach of which the breaching party, at the conclusion of the contract, knew or should have known that the other party would not have concluded the contract had it foreseen such a breach; in other cases, a breach is presumed not to be of a fundamental nature. (2) A party may withdraw from a contract without undue delay after the conduct of the other party undoubtedly indicates that the party is about to commit a fundamental breach of contract and fails to provide a reasonable security after being requested to do so by the oblige. • **EE: There is a mandatory rule in Estonian law** that the professional buyer can terminate a contract, without having to go to court. • **FR:** Currently there is no legal rule whereby the creditor may terminate the contract without the intervention	

		of the judge, but **case law** admits that right. In the contract law reform applicable from 1er October 2016, it will be a mandatory rule, art. 1224 and 1226. • **HR:** In case of non-performance creditor can terminate the contract, by unilateral statement. • **IT**:Art. 1517 It. civil code provides special rules and procedures (in derogation to the general rules imposed by arts. 1454, 1456, 1457 It. Civil code and dealing with the termination of the contract out of courts: 'risoluzione di diritto') for the sales of goods, aiming at terminating the contract of sale without going to justice. According to this provision, the innocent party must first propose his/her performance before the expiring date for performance, and then notify the party in breach his/her will to terminate the contract within 8 days from the expiring date. The provisions aim at protecting both parties (art. 1517, § 1, It. civil code) or the seller only (art. 1517, § 2, It. civil code). Art. 1517 It. civil code does not provide special conditions of non-performance, although it can be inferred that the general rule on the fundamental breach (art. 1453 It. Civil code) should apply. Another special remedy that may terminate the contract without going to court is regulated by arts. 1515, 1516 It.	

		civil code. According to these special rules, in case of breach of contract by the seller the buyer can buy the same fungible goods from third parties, and debit the difference of the price to the (former) seller. Damages can also be claimed by the buyer. It is a special form of non-judicial defence against non-performance, or it may be considered as a form of specific performance. Please note that a comparable rule is stated in favour of the seller (art. 1515 It. civil code). • **LT:** Article 6.218 of the Civil Code: 1. On the grounds set out in Article 6.217 of this Code, the aggrieved party may dissolve the contract unilaterally without going to a court. The party shall be bound to give the other party a prior notice of dissolution within the time limit set in the contract or, if none set in the contract, within thirty days before the effective date. • **LU:** Termination must be judicially demanded. Case law allows unilateral termination of a contract by one party**.** In that case, such unilateral termination is subject to certain conditions. It is indeed necessary for the party seeking performance to serve the other one with a formal notice ("mise en demeure") to perform before making a judicial claim. Although case law	

		admits unilateral termination without notice in case of emergency (Court of Appeal, November 9, 2005, No. 27581). In addition, case law requires the alleged breach to be serious enough to proceed to termination (Court of Appeal, 19 October 2011, JTL, 2012, p. 114) Otherwise, the party who terminated unilaterally the contract may be liable for abusive termination. When the contracting part is facing a breach of contract by the debtor, and terminates the contract unilaterally out of a judicial claim he or she does so at his/her own risk and is liable if it turns out that the termination was not justified. (G. Ravarani, *La responsabilité civile des personnes privées et publiques*, No. 2006, No. 487). Appreciation of the importance of the non-performance is for the judge to make. • **LV:** Article 2039 of the Civil Law sets: "Unilateral withdrawal from a purchase contract shall not be permitted even if the other party does not perform his or her obligations". Additionally, Article 2040 of the Civil Law sets: "As an exception, a purchase contract may be set aside pursuant to the claim of one party: 1) where one party has been compelled to enter into the contract through the acts of bad faith of the other party, or by fraud or duress;	

		2) due to the defects in the purchased property; 3) on the basis of ancillary agreements by means of which the right of withdrawal has been retained; 4) due to excessive loss suffered by one or the other party; or 5) in the circumstances specified in Section 1663, also on account of default" • **PT:** According to Article 436, nr. 1 CC, the contracting parties may terminate the contract without going to justice. • **RO:** The buyer can **unilaterally terminate a contract, without having to go to court,** in three different types of hypotheses:1) the right to unilateral termination has been provided for by a resolution clause; 2)whenever the debtor is considered by a provision of law to be automatically in delay for performance;3) when the debtor did not perform within the additional time for performance fixed in the notice. Art. 1552 of the Civil code on Unilateral termination, "(1) Unilateral termination of a contract occurs by the giving of notice, in the cases in which the right to unilateral termination has been provided for by a resolution clause, or when the debtor is considered by a provision of law to be automatically in delay for performance, or when the debtor	

		did not perform within the additional time for performance fixed in the notice. (2) The notice of unilateral termination shall be given during the period fixed by law for the prescription of the action in the judicial termination of the contract." In addition, **unilateral termination of contract based on a resolution clause.** Resolution clauses are contractual terms authorising one party to unilaterally put an end to the contract based on the other party's non-performance of contractual duties. Art. 1553 Civil code holds that „Resolution clauses must expressly indicate the obligations, the non-performance of which will result in the termination of the contract. (2) In the cases concerned by the provisions of paragraph (1), the termination is subject to the defaulting party being put on formal notice, if it has not been agreed that termination would result from the mere fact of non-performance.(3) The formal notice is only effective if it restates in clear terms the resolution clause." Art. 1523 Civil code enumerates the cases in which the unilateral termination of the contract as a whole is justified by the fact that the seller is automatically in breach of the additional time set for performance: "a) whenever the utility of the performance ceased	

		within a certain period of time or the immediate performance was urgently due ; b) whenever the debtor intentionally made the performance impossible by his actions; c) whenever the debtor has manifested obvious refuse to perform or when the debtor repeatedly refuses or neglects to perform for an obligation implying repetitive performance ;d) whenever the non-performance concern the duty to pay a sum, contracted in the exercise of a business ;e) whenever the obligation was borne from an extra contractual illicit conduct.” The buyer may also terminate the contract in cases in which the seller or supplier did not perform within the additional time fixed in the notice, according to Art. 1522 Civil code – „(1) The non-performing debtor may be given notice either by written request of performance, either by a judicial action in a court of law.(3) The notice should fix an additional time for performance, according to the nature of the obligation and the particular circumstances. Should the notice not stipulate an additional time for performance, the debtor may complete performance within a reasonable time, from the date on which he had been put on notice.” Art. 1417(3) Civil code, “(3) The aggrieved party may request that	

		the additional time for the performance of the other party has no effect against him, when the debtor deliberately refuses to perform in accordance with an essential contractual term stipulated in favour of the aggrieved party. Should this be the case, the contractual term must expressly mention the essential character, as well as the sanction of forfeit of the additional time, and the aggrieved party should have a legitimate interest in stipulating such an essential term." This is a mandatory rule. Any contractual term contrary to these provisions are considered to be non-binding on the party. • **SI:** Art. 468 of the CO governs termination as one of alternative remedies for material defect. Art. 470 of the CO provides that the buyer may only terminate the contract if an appropriate additional period for performing the contract was allowed for the seller. In that case the termination is governed by the rules laid down for termination of a bilateral because of non-performance (Art. 477 of the CO).	

What are the **means of the professional buyer to terminate the contract?** Can some of these means be excluded by contract? In domestic law, is there a **rule** which cannot be derogated from by agreement and **whereby the seller cannot fix formal requirements to be met, in B2B contract?**		**-In one MS, where termination without going to court is possible, no form must be kept:** AT **-In some MS, a mandatory provision provides means as follows:** • **A notice:** BG, CZ • **a declaration:** EE • **Unilateral statement**: HR • **Prior notice of dissolution: LT**: Article 6.218 of the Civil Code: On the grounds set out in Article 6.217 of this Code, the aggrieved party may dissolve the contract unilaterally without going to a court. The party shall be bound to give the other party a prior notice of dissolution within the time limit set in the contract or, if none set in the contract, within thirty days before the effective date • **extrajudicial notice to the other party: PT**. According to Article 22, nr. 1, lit. *o* General Contract Terms Act, general contractual clauses that impose formalities for acts not required by law during the duration of the contract or require the parties to carry out superfluous acts in order to exercise their contractual rights are *prohibited in certain circumstances*.	**In some MS, a non-mandatory provision provides means as follows:** • **A declaration to terminate: DE[987], SI** • the buyer is not entitled to terminate the contract on account of the delay unless **he/she notifies the seller of the termination within a reasonable time after he learned of the delivery**: FI • **a clear notice of the intention to terminate:** HU, UK • **The professional buyer has the choice between judicial resolution and the unilateral resolution or even *mutuus dissensus*.** None of them is obligatory: FR, LU • **Written declaration**: NL • **a notice of rescission need only be sent to the seller:** SE • **Formal requirements are set by law or upon agreement if parties:** SK **-No specific provision:** PL **In all the MS whereby rules are non-mandatory, there is no specific provision which provides that the seller cannot fix formal requirements to be met: However:** • **DE:** With regard to individual agreements, there is no specific rule excluding the possibility for the seller to fix formal requirements for termination. However, the general rules of § 242 BGB (good faith) and § 138 BGB (public policy) may hinder abuse. Furthermore, in the provisions on standard terms, a term may be ineffective according to §

[987] *DE: declaration to the other party (§ 349 BGB) which generally requires receipt to become effective (§ 130 BGB). The nature of the right to terminate cannot be changed by agreement. However, § 130 BGB can be derogated from by agreement.*

		-<u>Under RO law, 3 means</u>: ○ a given notice of unilateral termination <u>without an additional time</u> for performance, based on a <u>resolution clause</u> ○ a given notice of unilateral termination <u>setting an additional time</u> for performance ○ <u>judicial termination</u> based on an action in a court of law. **The first two means (given notice of unilateral termination without an additional time for performance, based on a resolution clause and given notice of unilateral termination setting an additional time for performance) <u>may be excluded by contract,</u> while the latter (judicial action in court) represents an inalienable right of the aggrieved party which <u>may not be excluded by agreement:</u>** <u>a) given notice of unilateral termination without an additional time for performance, based on a resolution clause</u> Whenever the parties to a contract had stipulated a resolution clause, authorising one party to unilaterally put an end to the contract based on the other party's non-performance of contractual duties, without an	307 BGB.

		additional time for performance (Art. 1553 Civil code), the buyer may terminate the contract based on his unilateral option or request for specific performance, thus renouncing to the benefit of the resolution clause. (b) a given notice of unilateral termination setting an additional time for performance is also possible in terms of art. 1522 Civil code – „(1) The non-performing debtor may be given notice either by written request of performance, either by a judicial action in a court of law. (3) The notice should fix an additional time for performance, according to the nature of the obligation and the particular circumstances. Should the notice not stipulate an additional time for performance, the debtor may complete performance within a reasonable time, from the date on which he had been put on notice." Should the seller deliberately ignore the additional term set for performance, the buyer may unilaterally terminate the contract; (c) judicial termination based on an action in a court of law represents the buyer's means of action whenever there is no unilateral resolution clause stipulated in the contract or the non-performing seller is not automatically considered to be	

		in delay for its performance. **<u>In all the MS where rules are mandatory, there is no specific provision whereby the seller cannot fix formal requirements to be met:</u>** **However:** • **<u>PT:</u>** If the question is posed, general principles of law concerning good faith (Article 762 nr. 2 CC) and abuse of rights (Article 334 CC) can be taken into consideration by courts.	
<u>Right to reduce price</u>			
In domestic law, is there a rule which cannot be derogated from by agreement and whereby the professional buyer who suffers a partial non-performance, may reduce the price if he accepts this performance?		**<u>-In several MS, the buyer has the right to reduce the price, when accepting non-performance. It is a mandatory provision:</u>** AT, BG, CZ, IT, LT, LU, PT • **<u>AT</u>:** Derogating from this outside the limits of § 879 (3) ABGB, is impossible. The limits mentioned above, which have been explained before (46-23)), i.e. disproportions must be avoided. • **<u>CZ:</u>** There is such rule but only in connection with the rights of buyer when defective performance is delivered. Section 2107 (3) If the seller fails to remove a defect of a thing in time or refuses to remove	**<u>-In most of MS the buyer has the right to reduce the price, when accepting non-performance. It is a non-mandatory provision:</u>** CY, DE, EE, EL, ES, FI, FR, HU, NL, PL, RO, SE, SI, SK, UK • **<u>SI:</u>** No explicit provision, this is implied. • **<u>RO</u>:** In Romanian law, <u>there is no mandatory rule specifically providing</u> that the buyer who suffers a partial non-performance, may reduce the price if he accepts this performance. The unilateral reduction of his own performance by the buyer remains possible <u>as a form of the aggrieved party's active conduct</u>, in terms of art. 1528 Civil code, which specifies that the aggrieved party may proceed itself to the performing of the obligation, on the debtor's expense or having the obligation performed by a third party, also on the

		the defect, the buyer may request a reduction of the purchase price or withdraw from the contract. The buyer may not change his choice without the consent of the seller. • **LT:** Article 6.334 (1) of the Civil Code: 1. Where the things sold do not correspond to the quality requirements and the seller did not discuss the defects with the buyer, upon buying things of unsatisfactory quality the buyer shall be entitled to demand, at his own choice; 1) to replace the thing which is characterised in the contract by its kind by the thing of satisfactory quality unless the defects are minor or appeared due to the fault of the buyer; 2) to reduce the purchasing price; 3) that the seller eliminates the defects within a reasonable time without any additional payment or reimburses the buyer's expenses for the elimination of defects if these may be eliminated; 4) to restore the price and repudiate the contract, where the sale of things of unsatisfactory quality is an essential breach of contract. Article 6.341 (1) (1) of Civil Code: In case of delivery by the seller of incomplete things, the buyer has the right to demand, at his choice: reduction of the price of the thing; • **LU:** The possibility of obtaining a reduction in price - often called the	debtor's expense. In these cases, the buyer may reduce the price to the payment of which the seller would be entitled. Art. 1528 Civil code – "(1) Whenever a contractual obligation other than the payment of a sum, has not been performed, the aggrieved party may proceed itself to the performing of the obligation, on the debtor's expense or to have the obligation performed by a third party, also on the debtor's expense. (2) Except from the cases in which the debtor is automatically considered by law to be in delay for performance, the aggrieved party may use the above mentioned right only after the giving of a notice to the debtor simultaneously or after he puts the debtor on a notice for non-performing on time." **-In some MS, there is not such a rule:** • **BE, DK, HR, IE, LV**

		contract allowance - is admitted by a number of special texts. Are known in the Civil code, an important application with estimatory action that allows the buyer victim of a hidden defect of the thing to ask, rather than the termination of the sale (redhibitory action), the reduction in price (C. Civ. art. 1644). Similarly, Article 1616 of the Civil code provides that, if the seller does not deliver the capacity specified in the contract, the buyer may request a price reduction. Furthermore, in terms of commercial sales, jurisprudence, in the three countries of the Civil Code admits traditionally, as usual, the possibility for the judge, in case of small non-conformity of the goods supplied, refuse the resolution and to make a price reduction (See already: Court of Appeal April 30, 1926, No. 11, p. 249). • **PT:** Reduction in price is possible in different situations. 1°) Partial impossibility to fulfil the performance through some fault of the debtor: If the consideration becomes partially impossible through some fault of the debtor, the creditor may choose between unilaterally terminating the transaction or demanding provision of what is possible, in this case reducing the consideration, if owed (Article 802, nr. 1 CC).	

			2°) Partial nullity/avoidance of the contract: if the sale is limited to part of the object, pursuant to Article 292 ("reduction" in the event of nullity of legal acts) or based on other legal precepts, the price relating to the valid part of the contract is the one that figures therein, if it has been listed as a part of the overall price. If it has not been listed, the reduction is made by means of an appraisal (Article 884 CC). It cannot be derogated by agreement (*in contrario* Article 886 CC allows the agreement, according to which the seller may terminate the contract if the buyer fails to pay the price). 3°) Sale of things subject to counting, weighing or measurement: - *Specific things. Price set per unit*: for the sale of specific things, with the price set at a certain amount per unit, the price is owed proportionally to the actual number, weight or measurement of the things sold, *despite the contract declaring a different amount* (Article 887 CC). - *Specific things. Price not set per unit*: if in the sale of specific things, the price is not set at a certain amount per unit, the buyer owes the declared price, even if in the contract a number, weight, or measurement of the things sold is indicated and the indication does not correspond to reality. If, however, in	

			the sale of specific things, the actual quantity differs from that declared by more than one twentieth, the price will be reduced or increased proportionally (Article 888 CC). In both cases: - *Lapsing of the right to a difference in price*: the right to receive a difference in price lapses within six months or one year after delivery of the thing, depending upon whether it is a chattel or real property; but if the difference only becomes demandable at some time after delivery, the timeframe shall be counted as of that point in time. For the sale of things that need to be transported from one place to another, the timeframe counted from the date of delivery only begins to elapse on the day on which the buyer receives them (Article 890 CC). - *Termination of the contract*: if the price owed based on applying Article 887 or Article 888, nr. 2, exceeds a price proportional to the amount declared by more than one twentieth, and the seller demands that difference, the buyer has the right to terminate the contract, unless he or she has acted fraudulently. The right to terminate lapses in three months as of the date on which the seller demands payment of the excess, in writing (Article 891 CC).	

		This rule cannot be derogated by agreement (Article 903 CC). 4°) Partial non-performance qualified as a lack of conformity: in this case, Article 911, CC applies, in accordance with Article 913, nr. CC. Pursuant to Article 911, nr. 1 CC, if the circumstances show that, without error or fraud, the buyer would have likewise acquired the assets, but at a lower price, he shall be entitled only to a reduction in the price in keeping with the devaluation resulting from the encumbrances or limitations, in addition to the indemnification that is applicable under the circumstances. These rules cannot be derogated by agreement (Article 912 CC).	
In domestic law, is there a **rule** which cannot be derogated from by agreement and **whereby, if the professional buyer may reduce the price,**		**-In many MS, when the buyer reduces the price he is entitled to recover the excess already paid to the seller. It is a mandatory provision:** AT, CY, PT **-In many MS, when the buyer reduces the price he is entitled to recover the excess already paid to the seller:** BE[988], BG (art. 55 OCA), IT (arts. 2041, 2042 It.	**-In many MS, when the buyer reduces the price he is entitled to recover the excess already paid to the seller. It is a rule which can be derogated from by agreement:** CY, DE, EE, EL, ES, FI, NL[990], SK **-This will fall under the general rule of unjust enrichment and/or undue payment:** LU, SE, UK • **LU:** There are no specific rules concerning

[988] *BE : But there is no right to reduce price in Belgian law. But, when the buyer choose to hold the good but with a compensation for the suffered damage, this compensation can be a reduction of the price.*

[990] *NL: In the case of price reduction, the seller is required to pay back the excess already paid by the buyer (Article 6:271 BW). In a B2B-contract the parties may derogate from this rule and even exclude the right to termination altogether; cf. Asser-Hijma 7-I*, no. 499.*

he is entitled to recover from the seller the excess already paid? In domestic law, is there a rule which cannot be derogated from by agreement and which provides, **if the professional buyer may reduce the price, how much is the reduction?**		civil code), RO (Art. 1341(1) Civil code) -In one MS, the price can be reduced **in proportion to the difference in value between the good in defect-free condition and the real value at the time of the conclusion of the contract:** • **IT:** The percentage measure of the defect affecting the actual market value of the original intact good: the price shall be reduced of such percentage measure. **-In some MS, it should be a reasonable amount, with a special method of calculation (AT[989]), or it should be proportionate to the decrease in the value of the good (HR, SI) or to the lack of conformity (RO)** **-Under PT law:** If the sale is limited to part of the object, (…) the price relating to the valid part of the contract is the one that figures therein, if it has been listed as a part of the overall price. 2. If it has not been listed, the reduction is made by means of an appraisal. The appraisal or evaluation can be extrajudicial or judicial, in the sense that if the parties do not agree with an extrajudicial evaluation it will be evaluated	this possibility. The theory of unjust enrichment may be used. It is not mandatory rules. • **SE:** There is no such express statutory provision, but the same result should follow from application of general principles of the Swedish law of debt. The parties are likely free to derogate from this. • **UK:** This would be the case applying general principles, but there is no statutory rule to that effect **-A few MS do not specify that the buyer is entitled to recover the excess already paid from the seller:** CZ, HR, PL, SI **-Several MS do not specify the amount of the reduction:** BG, EL **-The price can be reduced in proportion to the difference in value between the good in defect-free condition and the real value at the time of the conclusion of the contract:** DE, SE **-In some MS, a non-mandatory rule provides that it should be proportionate to the decrease in the value of the good (FI, HU, PL) or to the lack of conformity (NL)** **-EE:** A party which is entitled to reduce the price but has already paid a sum exceeding the reduced price may, in the case of a price reduction, claim a refund of the sum paid in excess. The party may claim also interest and

[989] *AT: There is a special method of calculation called 'relative calculation method', by which the ratio between reduced price and reduced value must equal the ratio between original price and original value (of the performance if it were flawless)*

		in the court. This rule cannot be derogated by agreement	gains obtained: **-No provision: DK, FR, IE, LT, LV**
In domestic law, is there a rule which cannot be derogated from by agreement and which provides, **if the professional buyer has the right to reduce the price, if he is also entitled to recover damages for the loss thereby compensated?**		**-The buyer cannot also claim damages for the loss thereby compensated:** • **AT, CY** **-The buyer can claim damages for any further loss suffered**: **AT, BG, HR, RO, SI** • **RO:** No specific rules, but generally the buyer who reduces the price cannot simultaneously recover damages for reduction in the value of the partial non-performance of the seller's obligation, as these damages have already been covered by the reduction of the price; remains entitled to damages for any further loss he had suffered and which are recoverable under a specific provision of the law **-PT:** The response seems to depend on the	**-The buyer can not also claim damages for the loss thereby compensated but is a non-mandatory provision:** CY, FI, FR **-The buyer can claim for damages which are not covered by price reduction:** DE[991], EE, EL[992] **-ES:** Price reduction could be encompassed in the remedy that consists on damages. In any case, art. 117.2 RCPA expressly states that damages can always be combined with other remedies. **-The buyer can claim damages for any further loss suffered:** SE, SK **-NL:** Where the buyer sustains a loss which is not remedied by the fact that the seller has returned a part of the sales price, the buyer is entitled to recover that loss by way of a claim for damages under Article 6:74 BW. In a B2B-contract the parties may derogate from this rule and even exclude the right to termination altogether. **-BE:** The buyer is entitled to a full compensation for the suffered damage caused by the non-conformity. In case of discovery of hidden effects, the trader cannot limit its

[991] *DE: the price can be reduced in proportion to the difference in value between the good in defect-free condition and the real value at the time of the conclusion of the contract. To the extent necessary, the price reduction is to be established by appraisal.*

[992] *EL: article 543 of the Greek Civil Code: "If at the time the risk passes to the buyer the agreed quality is lacking, the buyer has the right, instead of the rights of article 540, to demand compensation for non-performance of the contract or accumulative with these rights, to demand compensation for the damage not covered from their action. The same applies also in case of provision of defected product due to the seller's fault.".*

		situation envisaged. As a general rule, a debtor that negligently fails to fulfil an obligation becomes liable for the damages caused to the creditor (Art. 798 CC). Thus, in the event of partial impossibility to fulfil the performance through some fault of the debtor the creditor (=the buyer) is entitled to compensation for damages, regardless if he has demanded/obtained the reduction of the price (Article 802, nr. 1, *in fine*). However, with regard to lack of conformity, the case law seems not fixed about the possibility of cumulating of both remedies. In 2012, the 2nd Section of the Supreme Tribunal of Justice has decided that on the sale of a defective thing there is a logical and subsidiary sequence of moments or phases in the buyer's protection by virtue of the defects in the goods sold: elimination of defects or replacement of the thing, price reduction or termination of the contract; the buyer only can claim damages in the lack of alternative possibilities that are able to satisfy, within an objective perspective, the interests of the buyer (STJ, 25.10.2012, Proc. n° 3362/05.TBVCT.G1.S1). In 2013, the 7th Section of the same Tribunal has decided that regardless of his demand to reduce the price, the buyer has right to be compensate from damages he has suffered for lack of conformity. (STJ, 08.05.2013, 1079/06.7TBMTS.P1.S1). This last solution was recently reaffirmed by the 7th Section of the Supreme Tribunal de Justice (STJ 17.12.2014, Proc. n°	responsibility. **-IT:** As said above *at Q46-1*, the discipline of the guarantees is in the Italian civil code is very fragmented: for each guarantee there are different sets of remedies. A. As for material defects: *i.* termination of the contract, as special remedy disciplined by art. 1497 It. civil code (action '*redibitoria*'); alternatively: *ii.* reduction of price (action '*quanti minoris*'): art. 1492 It. civil code; and *iii.* damages, if the seller's negligence is pleaded by the buyer and the seller is not able to rebut the presumption (art. 1494 It. civil code). Damages can be claimed in addition to both termination of the contract and reduction of the price, or even autonomously and in alternative to the first two remedies. B. As for lack of expected and/or fundamental qualities: *i.* termination of the contract (action 'redibitoria': see above at A. *i.:* art. 1497 It. civil code*);* and *ii.* damages (see above, at A.*iii*) Although they are very similar to the general regime concerning contractual liability, these sets of remedies provided for the guarantees suffer of certain limitations. First of all, they are subject to a period of notice and a shorter limitation period *(see hereunder at Q53-1);* they may be excluded by local commercial practices and by the parties (*see above at Q46-1*); they admit a higher level of tolerance, as compared to the general standard provided for at art. 1453 It. civil code, that admits the claim of termination when the breach is *substantial*. C. As for *aliud pro alio*: case law would usually admit the same remedies as for the guarantee for lack of expected and/or fundamental qualities (B.), though their discipline follows the general rules of contract law (art. 1453 It. Civil code), especially as concerns the absence of a duty to give notice and the ordinary (and longer) limitation

		10514/11.1T2SNT.L1.S1). In any case, this incertitude is paradoxical vis-à-vis the opposite solution that prevails for contracts under which one of the parties is obligated to carry out certain work for the other, for a determined price. (Article 1223 CC and STJ, 28.11.2013, Proc. n° 844/04.4TBCTX.E1.S1). These rules cannot be derogated by agreement.	period. There is no hierarchy in the remedies listed hereabove. The buyer has therefore the choice within the three different set s of remedies corresponding to the three different species of guarantees. Nevertheless, once the buyer has chosen a remedy he/she has to stick to it in the course of the judgment. According to the prevailing scholarship and case law, the general contractual remedies aiming at obtaining the specific performance of the obligations promised in the contract (see art. 1453 It. civil code), as well as the right to withhold performance (art. 1460 It. civil code) are not available to the buyer, who cannot therefore require the seller neither to repair the defective goods nor to replace them. The repair or replacement of the goods is nevertheless possible (within a period imposed by the judge) through a supplementary and conventional guarantee, that covers the malfunctioning of the goods sold within a fixed period of time (usually 2 years: 'garanzia di buon funzionamento', art. 1512 It. civil code). This conventional guarantee is subject to a period of notice of 30 days from the discovery of the malfunctioning, and the claim must be filed within 6 months from the discovery of the malfunctioning. This provision is not mandatory, and can be derogated by the parties. **-In PL**, all relevant rules in B2B contracts are not mandatory. Nevertheless if nothing is stated by the parties, the buyer (also professional one) may claim 1. reduction of price on the basis of implied warranty for physical defects (art.560 CC If a thing sold has defects, the buyer may (…) reduce a price). 2. And recovery of damages in the sphere of so

			called the **negative interest of contract** – still in the frame of liability for implied warranty for physical defects. According to Art.566 CC - **If, due to a physical defect in a thing sold, the buyer reduces the price, he may claim any damage suffered as a result of conclusion of the contract,** without knowing that the defect existed, even if the damage is due to circumstances for which the seller is not liable. Inter alia the buyer may demand reimbursement of the contract execution costs, the costs of collecting, transporting, storing and insuring the thing and reimbursement of outlays made to the extent to which he did not derive any benefits from those outlays. **3.** Recovery of any other damages on the basis of general rules of a contractual liability (art.471 CC A debtor is obliged to remedy any damage arising from non-performance or improper performance of an obligation unless the non-performance or improper performance is due to circumstances for which the debtor is not liable. **-No provision:** CZ, DK, IE, HU, LT, LU, LV, MT
Other mandatory rules?			
In domestic law, are there **other rules** which cannot be derogated from by agreemen**t concerning the rights of the professional buyer when there**		**-BE:** In case of urgency, the buyer is entitled to get the goods by a third-party trader but only when the goods are considered to be fungible. **-BG:** Art. 195. The professional buyer has another option – to repair the goods at seller's account.	

is a lack of conformity?		**-EE:** There are following rules which are mandatory (sometimes partly) in B2B contracts: • **a penalty for late payment shall not be required for a delay in the payment of interest**. Agreements which derogate from such requirement to the detriment of the obligor are void (Art. 113 para 6 of the LOA). However, this rule shall not preclude or restrict the right of the obligee to claim compensation for damage caused by a delay in the payment of interest (Art. 113 para 7 of the LOA). • professional buyer may not rely on an agreement which restricts the right to claim penalty for late payment provided for in the Art. 113 para 1 of the LOA, if this agreement is grossly unfair with regard to the obligee due to the circumstances (based on the directive 2011/7/EU) (Art. 113 para 9 of the LOA). An agreement which precludes charging of penalty for late payment from a person engaged in economic or professional activities or pursuant to which the person specified in Art. 10 para 1 or para 2 of the Public Procurement Act is obliged to pay penalty for late payment at a rate lower than provided for in the Art. 94 of the LOA plus 8 % per year shall be void (Art. 113 para 10 of the LOA). • agreements which derogate from the	

		provisions providing the right to request from the court reducing the amount of contractual penalty (Art. 162 para 1 of the LOA) to the detriment of the party obligated to pay a contractual penalty are void (Art. 162 para 2 of the LOA). • parties may not agree that trader may use legal remedies even if the non-performance was caused by an act of the trader himself or by circumstances dependent on him or by an event the risk of which is borne by the trader (Art. 101 para 3 of the LOA). • trader may not rely on an agreement which precludes compensation for collection costs or which restricts the right of claim of compensation for collections costs if such agreement is grossly unfair with regard to the other party due to the circumstances (Art. § 113^1 para 3 of the LOA). • agreements under which liability is precluded or restricted in the case of intentional non-performance or which allow the obligor to perform an obligation in a manner materially different from that which could be reasonably expected by the obligee or which unreasonably exclude or restrict liability in some other manner are void (Art. 106 para 2 of the LOA). an obligee shall not require performance of an obligation if, at	

		the request thereof, the obligee has in lieu of performance received compensation for the damage incurred due to non-performance (Art. 108 para 8 of the LOA). **-PT:** If the lack of conformity is due to the debtor, arts. 798 till 808 apply (see text of the articles below). According to Art. 809 these rules cannot be derogated by agreement, with the exception of Art. 800 nr. 2 CC, in the sense that the "liability [for acts of legal representatives or assistants] may, by mutual consent, be excluded or limited, by means of prior agreement of the interested parties, provided the exclusion or limitation does not encompass acts that represent a violation of the duties imposed by the rules of law and order." If the lack of conformity is not due to the debtor, Article 795 CC applies 1. When in a bilateral agreement one of the considerations becomes impossible, the creditor is released from the counter-consideration and has the right, if the consideration has already occurred, to demand restitution subject to the rules on unjustified enrichment. 2. If consideration becomes impossible through some fault of the creditor, the latter is not released from the counter-consideration, but if the debtor benefits in some way from the exoneration, the value of the benefit shall be offset in the counter-consideration.	

		-RO: There is a mandatory rule providing that the buyer's right to request for the remedies regulated by art. 1710(1) is not restrained in the case of the loss or partial destruction of the goods, even when caused by an unforeseen event. Art. 1713 Civil code, **„**In the case of the loss or partial destruction of the goods, even when caused by an unforeseen event, the buyer's right to request for the remedies regulated by art. 1710(1) is not restrained."	

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
Q 47 - Time limit in B2B sales			
Time of conformity and Presumption of lack of conformity			
In domestic laws, is there a **rule** which cannot be derogated from by agreement and which provides **who bears the burden of proof of the lack of conformity at the required moment?** Is there in B2B		**-In one MS, there is a rule about the time of conformity, which cannot be derogated from by agreement in a B2B contracts**: EL • **EL**: according to article 537 par. 1 of the Greek Civil	**-In many MS, the buyer bears the burden of proof**: AT, BE, BG, CZ, EE, ES, FI[993], FR, HR, LU, MT, NL, PL, PT, SE, SK, UK • **FI**: The seller is liable for any defect that existed at that time

[993] *FI: the requirements regarding the sufficiency of the proof are not high. See Thomas Wilhelmsson & Leif Sevón & Pauliine Koskelo, Kauppalain pääkohdat 2006 p. 116.*

contracts **<u>presumptions</u>** as those provided for in B2C contracts (see above)?		Code, "The seller is liable, despite of his culpability, if the subject-matter **at the time the risk passes to the buyer**, has real defects or lacks of the agreed qualities. "Real defect or absence of agreed qualities which become apparent within six months of the delivery of the subject-matter, is **presumed** to have existed at that time, unless this is incompatible with the nature of the subject-matter sold or with the nature of the defect or the lack [of agreed qualities. This text applies as well in B2C and B2B contracts.	even if it appeared only later. **<u>-In one MS, the seller bears the burden of proof:</u>** LT -**<u>In most MS, there is no presumption of lack of conformity in B2B contracts</u>**: BE, BG, CY, CZ, DE, DK, ES, FR, HU, IE, LU, LV, MT, NL, PL, RO, SE, SI, SK, UK -**<u>In several MS, the rules about the presumption of lack of conformity can be derogated from, in B2B contracts</u>**: AT, HR, LT • **<u>AT</u>**: The assumption provided by § 924 ABGB that any lack of conformity was already present at the time of the handover/passing of risk also applies in B2B, however, it is not mandatory. • **<u>HR:</u>** the purchaser bears the burden of proof regarding the existence of non-conformity at the moment of passing the risk. Pursuant to Article 404, paragraph 2 of the COA, the seller in B2B contracts will be liable if non-conformity becomes apparent within six months as of delivery. And paragraph 4 of the same text provides that this time limit may be extended by contract.

			-**In IT, there is no guarantee of conformity in the Italian sales law system** (except for B2C contracts). So these questions are not relevant
In domestic laws, is there a **rule** which cannot be derogated from by agreement and **which provides, in B2B contracts, if the incorrect installation by the seller is considered as a lack of conformity, when must this lack exist** in case of incorrect installation by the seller?		-**In some MS, there is such a rule and it cannot be derogated from by agreement**: EL • In **EL**, incorrect installation by the seller is considered as a lack of conformity. So the lack of conformity must exist "at the time the risk passes to the buyer".	**-In many MS, there is no such a rule**: BG, CY, CZ, DK, ES, FR, HU, IE, LT[994], LV, NL, PL, PT, RO, SE, SI[995], SK, UK -**In some MS, there is a rule which determine when must exist the lack of conformity when (if) the incorrect installation by the seller is considered as a lack of conformity, but it can be derogated from by agreement:** AT, BE, DE, EE, FI, HR • **AT**: In such contracts, usually an examination period is agreed upon to determine conformity. For such periods, § 457 UGB provides that they must not be longer than 30 days from the time the service was provided or the ware was received. This can only be prolonged if the parties expressly agree on this and only if it is not grossly detrimental to the creditor. • **BE**: it must exists at the

[994] *LT: However it should be presumed that this lack of conformity should exist after installation of device made by the seller.*

[995] *SI: Pursuant to the case law, incorrect installation is not considered as a lack of conformity if the goods have all the attributes needed for proper use and the problem is only in the lack of professional knowledge to install it correctly (see judgement I Cp 285/2003, 14 April 2004).*

			moment of installation: (even if the buyer only notices later) • **DE**: An installation by the seller can take place before or after transfer of the goods. In the case of installation before transfer, the general rule on passing of risk at the time of transfer remains applicable without any adaption. A lack of conformity in terms of an incorrect installation is, however, particularly relevant in cases **when the good itself is not defective at the time of transfer and the installation is carried out afterwards**. Thus, in the latter case, passing of risk does not occur **until the (incorrect) installation has been completed**. • **EE**: the incorrect installation by the seller is considered as a lack of conformity. Art. 217 para 5 sentence 1 of the LOA provides that the lack of conformity of a purchased thing arising from the incorrect installation of the thing is deemed to be equal to the lack of conformity arising from the thing if the installation was carried out by the seller or at the responsibility of the seller • **FI**: The defectiveness of the goods is determined at the time when the risk passes to the buyer. The seller is liable for any

			defect that existed at that time even if it did not appear until later. • **HR**: Pursuant to Article 400, paragraph 1 of the COA, any lack of conformity, thus including incorrect installation, must exist at the moment of passing the risk to a purchaser -**In IT**, the incorrect installation by the seller does not represent a lack of conformity. **Because the Italian law on sales of goods is not founded on the notion of conformity, the installation follows the same discipline**.
Information of the seller of the lack of conformity			
In domestic laws, is there a rule which cannot be derogated from by agreement and whereby **the professional buyer has a duty to give notice of the lack of compliance in a determined period**?		**In one MS, there is a rule which cannot be derogated from by agreement**: LT • **LT**: The buyer is bound to notify the seller of the breach of any condition of the contract specifying the quality, quantity, range, completeness, containers and packaging of the things within the time period fixed by law or contract or where the time period is not fixed - **within a reasonable time**	**-In some MS, there is no such a special rule**: BE, DK, EL, HU, IE, MT, SE **-In many MS, the notice must be given in due time, or immediately but it can be derogated from by agreement**: AT, BG, CY, CZ, DE, EE, ES, FI, FR, LV, NL, PL, PT, RO, SI, SK, UK • **AT**: "**in due time**". • **BG**: "**immediately**". • **CY**: "**after the passing of**

		after the breach of a certain condition was discovered or, in view of the type and purpose of the things, ought to have been discovered	**reasonable time**" • **CZ**: "**without undue delay**" • **DE**: If the purchase is a bilateral mercantile transaction within the meaning of the German Commercial Code (§ 343 HGB) the buyer is to inspect the goods **immediately (as far as this is practicable in the ordinary course of business)** after delivery pursuant to § 377 German Commercial Code and he is to report an evident defect to the seller immediately (§ 377 (1) HGB). If a defect was not discoverable by such examination, but becomes apparent subsequently, notice thereof must be given immediately upon its discovery (§ 377 (3) HGB). • **EE**: **after he or she becomes or should become aware of the lack of conformity**. • **ES**: **at the time of receipt** • **FI**: **within a reasonable time** after he discovered or ought to have discovered it. A professional buyer has a duty to give notice within a **relatively short period** of time. However, the "reasonable time" mentioned in the Act cannot be determined inconclusively beforehand, as the assessment must take into consideration the circumstances of each individual

			case. • **FR**: **on a short deadline** • **LV**: **as soon as possible** • **HR**: **without delay** • **NL**: **within a reasonable period of time** • **PL**: **immediately** • **PT**: **within thirty days**. • **RO**: **the buyer must notify the seller** on the lack of conformity: during a period fixed in the contract or, in lack of a fixed contractual period; during a period of 3 months for real estate or a period of **two months** in the case of other type of goods. No time limits for the notice are binding on the buyer in the case of deficiencies maliciously hidden by the seller. • **SI**: **immediately** in the case of a commercial contract • **SK**: "without **undue delay**". • **UK**: There is no exactly such a rule, although the right to terminate is curtailed by the rules on "acceptance" in s.35 Sale of Goods Act 1979, which generally has the effect that the right to terminate is lost if action is not taken within a reasonable period of time. -**In IT, for materiel defects (which is not exactly a lack of conformity)**, the term to give notice is eight days.

In domestic laws, are there other rules which cannot be derogated from by agreement about **the time of lack of conformity, in B2B contracts?**	-**In LV,** article 411, Part 2 of the Commercial Law sets: "If the purchaser fails to notify the seller regarding the deficiencies of the received goods pursuant to the provisions of Paragraph one of this Section, it shall be considered that the purchaser has accepted the goods and he or she loses the right provided for in Section 1620, Paragraph two of the Civil Law to request the cancellation of the purchase agreement or reduction of the price for goods, except the case when the goods have hidden deficiencies which were impossible to determine during checking of goods"	**In two MS, there are general rules about the time of lack of conformity, which cannot be derogated from:** EE, LT • **In EE**, there is an important mandatory rule about the limits to derogate from the law by agreement. The seller shall not rely on an agreement which precludes or restricts the rights of the buyer in connection with the lack of conformity of a thing if the seller is aware or ought to be aware that the thing does not conform to the contract and fails to notify the buyer thereof (Art. 221 para 2 of the LOA). • **In LT,** Article 6.348 of the Civil Code states that in case of failure by the buyer to perform his obligation, the seller shall have the right to refuse to fully or in part meet the buyer's demands to replace the things, to deliver the missing things, to eliminate the defects of the things, to complete the things, to pack the things or deliver them in containers or to replace the containers or packaging, provided that he proves that following the breach of the obligation by	**-In many MS, there is no rule about the time of lack of conformity in B2B contracts**: AT, BE, BG, CY, DE, DK, ES, FI, FR, HR, HU, IE, IT, LU, MT, NL, PL, RO, SE, SI, SK, UK **In one MS, there is such a rule**: CZ • **CZ:** Section 2100 of the civil code provides that the right of the buyer arising from a defective performance is established by a defect which a thing has **upon the passage of the risk of damage to the buyer, even if it reveals later**. The right of the buyer is also established by a defect which occurs later and which is caused by the seller's breach of duty.

		the buyer his demands can no longer be met or that meeting of the demands would cause the seller unreasonable expenses compared to those the seller would have incurred if the buyer duly notified the seller of the breach of the contract.	

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
Q 48 – Commercial and legal guarantees in B2B sales			
In domestic laws, is there a rule which cannot be derogated from by agreement and whereby **a commercial guarantee <u>shall be legally binding</u> on the offeror <u>under the conditions laid down in the guarantee statement and the associated advertising</u>, in B2B contracts?**		**<u>-In many MS, the guarantee is binding under these conditions:</u>** AT, CZ, DE, EL, ES, FI, HR, IE, LT, RO, SI • **<u>CZ</u>**: Section 1919 of the civil code states that if a guarantee is not stipulated in a contract, **the transferor may assume it by a declaration in the <u>guarantee statement</u> or by indicating the guarantee period** or its "use by" or "best before" dates on the packaging. If a contract stipulates a guarantee period different from that indicated on the packaging, the stipulated guarantee period applies. If a guarantee statement specifies a	**<u>-In many MS, there is no rule providing that the guarantee is binding under these conditions</u>:** BE, BG, CY, DK, FR, HU, LU, LV, MT, NL, PL, SE, SK, UK • **<u>CY</u>**: Section 15 of the Sale of Goods Law (1994) states that in a contract of sale of goods by description, there is an implied condition that the goods must meet the description. And section 16 adds that "except as provided under this section and section 17 and subject to the provisions of any

		guarantee period longer than the period which is stipulated or indicated on the packaging, the longer guarantee period applies. • **EL**: Article 559 of the Greek Civil Code states that If the seller or a third party has provided guarantee for the thing sold, the buyer has, over the offeror who guaranteed, the rights arising from the guarantee statement in accordance with the terms contained therein or the associated advertising without impairing his rights which stem from the law. • **FI**: there is no special rule. However, according to the Contracts Act Section 1, an offer is binding on the offeror.	other law, **there is no implied condition or implied warranty regarding the quality or fitness** for any particular purpose of the goods supplied under the sales contract. • **SK**: But there is a mandatory rule according to which false statement made by the seller in advertisement is considered to be a misleading advertising. **-In one MS, such a rule exists but it is not mandatory:** EE • **EE:** There is a non-mandatory rule that guarantee offer shall be legally binding to the seller under the conditions laid down in the guarantee statement and associated advertising (Art. 230 para 1 of the LOA) also in B2B contracts.
In domestic laws, are there rules which cannot be derogated from by agreement about the guarantee, that **offer a protection to the weak professional party?**	**-In some MS, the prohibition or the restriction of the derogation by agreement of terms which concern the conformity of the goods, is made especially to protect the weak professional party:** FR • **FR:** Case law admits that	**-In several MS, the prohibition or the restriction of the derogation by agreement of terms which concern the conformity of the goods, is made to protect the weak party**: CY, DE, EL • **DE**: If the weak professional party is the buyer, he is	**-In many MS, there is no rule which assure a protection to the weal party in guarantee in B2B sales:** AT, BE, BG, CZ, DK, EE, ES,FI, HR, HU, IT, LT, LV, LU, MT, NL, PL, RO, SE, SI, SK, UK • **IT:** In the logic of the Italian civil code, all the

	the professional sellers has got a presumption of knowledge of the vices, and he's not allows to claim the exclusion of the guarantee agreements in front of a professional buyer which is from a different speciality of the seller[996]. In addition, according to the Chronopost case (2006) if an agreement restrains the liability of a professional and infringes the essence of the contract, it is void. The reform of contract law, applicable from 1er October 2016, mentions this rule (art. 1170 civil code). (In addition, article L 442-6 I 2° of the commercial code prohibits the unfair terms in B2B contracts. And such a term could be unfair)	protected by § 444 BGB whereby the seller may not invoke an agreement that excludes or restricts the rights of the buyer with regard to a defect (§ 437 BGB) insofar as the seller gave a *guarantee* of the quality of the good. **<u>In one MS, there are rules which protect the weak party with regard to general contractual terms</u>**: PT • **<u>PT</u>**: a general contractual term that excludes or limits, directly or indirectly, liability for non-compliance, delay or defective performance in the event of *intentional fault* or *gross negligence* is *strictly prohibited* pursuant Article 18, lit. *c* General Contract Terms Act. Moreover, according to Article 19, lit. *b* General Contract Terms Act, a general contractual term lays down, in favour of the party proposing the contract, excessive time limits for compliance with obligations with no penalty. Finally, pursuant to Article 19, lit. *e* General Contract Terms Act, a general contractual term that unjustifiably makes the guarantee of the quality of the goods or services provided	parties have equal contractual power

[996] *FR: Civ. 1e 20 February 1996, Bull. Civ. I, n° 86*

		dependent on no recourse to third parties is *prohibited in certain circumstances*. **-Other rules can protect the weak professional**: IE • **IE**: The concept of the weak professional party is not known. However s18(2) of the 1980 Act provides that a provision in a guarantee which purports to make the guarantor or any person acting on his behalf the sole authority to decide whether goods are defective or whether the buyer is otherwise entitled to present a claim shall be void.	
In domestic laws, **if it is possible** in certain cases **to conclude with the professional buyer any contractual terms or agreements which** directly or indirectly **waive or restrict the rights of the buyer, is there a difference between agreements concluded before the lack of conformity is brought to the seller's attention, and agreements concluded after that?**		**-In some MS, the law makes a difference between the agreement concluded after the lack of conformity (which are not limited) and the agreement concluded before the lack of conformity (which are restraint):** AT, CZ, FR, HR, RO, SK • **AT**: An agreement by which the rights of the buyer waives or restricts his rights, before the discovery of the lack of conformity, concerning non-conformity/warranty does not cover every case (brand new wares, concealed defects or defects that are significant and not repairable).	**-In some MS, there is no difference between the agreement concluded before or after, and any agreement is possible**: BE, DE, DK, EE, HU, NL, PL, PT • **DE:** A restriction or exclusion of the right arising from § 437 BGB is possible before, at the time of or after the conclusion of the contract within the boundaries of §§ 134, 138, 242 BGB if the seller did not fraudulently conceal the defect and did not give a guarantee of the quality

		• **CZ**: Agreement which **in advance** directly or indirectly waives or restricts the rights of the buyer is admitted in B2B contracts but the written form is required. Agreement concluded after the lack of conformity is brought to the seller's attention might occur in any form without any restriction. • **FR**: Even, if it is not in the text, there is a difference. Before the discovery of the lack of conformity, it's possible to conclude this sort of agreements (art. 1643 of the civil code) for the redhibitory action, but only between professionals of the same speciality. For the lack of conformity, it's also possible independently of the specialities of the parties. But after the discovery of the lack of conformity, it is possible to waive the guarantee • **HR**: Indirectly, such contractual provision agreed between the parties before the lack of conformity is brought to the seller's attention may be considered as unfair whereas such result would not be realistic in situations where such agreement is reached after lack of conformity is brought to the seller's attention. • **RO**: contractual terms	of the good (§ 444 BGB). However, the seller cannot exclude or restrict liability for *intention* in advance, § 276 (3) BGB • **EE: There are no restrictions to conclude** an agreement between professional buyer and professional seller **which directly or indirectly waive or restrict the rights of the buyer in the limits of the Art. 106 para 2 of the LOA.** • **ES**: Both, agreements concluded before the lack of conformity is brought to the seller's attention and agreements concluded after that, are possible in our law, with the only limits of art. 6.2 SpCC. • **LU**: In principle, contractual terms or agreements which directly or indirectly waive or restrict the rights of the buyer are valid. The guarantee against hidden defects may be excluded in a B2B contract according to Article 1645. (But article 1628 states that "Although it be stated that the seller will not be bound by any warranty, he nevertheless

		restraining or excluding the seller's duty to guarantee against the deficiencies of the goods, which was agreed **before the lack of conformity is brought to the seller's attention,** is void in the cases in which the seller knew or should have known the existence of the deficiencies at the time the contract was concluded. • **SK**: According to mandatory provision CommC section 386 (1) "A claim to compensation of damage may not be waived before breach of the obligation from which damage may arise." **-In some MS, all the agreements are prohibited, regardless of whether they are concluded before or after the lack of conformity is brought to seller's attention**: BE, BG, CY, FI, IE, SI • **BG**: Bulgarian legal practice considers the waiver of future claims as null and void. • **CY**: Section 63 of the Sale of Goods Law 1994 as cited above prohibits all the derogation by agreement of terms which concern the conformity of the goods • **FI**: It is not possible to conclude such an agreement.	remains bound to warrant against his personal acts or facts; any agreement to the contrary is null.") **-In some MS, there is no such a regulation:** LT, MT, NL, SE

		• **IE**: article 18 of Sales of Goods and Supply of Services Act 1980: Rights under a guarantee shall not in any way exclude or limit the rights of the buyer at common law or pursuant to statute and every provision in a guarantee which imposes obligations on the buyer which are additional to his obligations under the contract shall be void. • **SI**: This is not possible in a case of a guarantee **-In one MS, the agreements can be subject to a control under unfair terms, neither they are concluded before the lack of conformity, nor they are concluded after**: UK	
In domestic law, are there **other rules** which cannot be derogated from by agreement about the guarantees in B2B contracts?		**-In one MS, there are rules concerning the hidden defects, which cannot be derogated from by agreement**: BE • **BE**: there is a presumption of bad faith of the seller **-In some MS there are other rules:** CZ, EL, LT, PT, SI • **CZ**: Section 2116 states that a buyer does not have the right arising from guarantee if the defect was caused by an external event after the risk of damage to the thing passed to him. This does not apply if the defect was	

		caused by the seller. • **EL**: Article 5 par. 4 subsections e, f, g of Law 2251/1994: … The guarantee must be in compliance with the rules of good faith and cannot be retracted by the excessive exceptions covenants. The duration of the guarantee must be reasonable compared to the possible duration of the life of the product. In particular, for peak technology products, the duration of the guarantee must be reasonable compared to the period for which these products are expected to remain modern from a technology point of view, if this period is shorter than the estimated duration of their life. • **LT**: Article 6.338 of Civil Code (5) states that where the period of warranty of quality fixed for a thing in the contract is less than two years and the defects of the thing are discovered after the expiration of the time period but not after the lapse of two years from the day of delivery of the thing, the seller shall be liable for the defects of the thing if the buyer proves that the defect appeared before the delivery of the thing or due to the reasons which appeared before the delivery and for which the seller is liable. • **PT**: With regard to goods that	

		must be transported from one place to another, the time periods where Articles 916 and 921 CC prescribe counting as of the delivery only begin to elapse on the day on which the creditor receives them (Article 922 CC). • **SI**: Art. 485 provides that the seller or the manufacturer shall be obliged at such person's own expense to move the thing to the place where it is to be repaired or replaced, and to return the repaired or replaced thing to the buyer. During this time the seller or manufacturer shall bear the risk.	

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
Q49 - Third party rights or claims in B2B sales			
Does domestic law require that the goods are sold free	**For one MS domestic law requires eviction**	In a few MS there are **mandatory rules which require that the goods are sold**	-For some MS, **goods dot not necessarily have to be sold free of**

of any rights, in B2B contracts? Are the rules different in B2B contracts from those you described in B2C contracts?	**guarantee, and it is a mandatory rule to protect the professional weak party.** If the professional seller took advantage of the state of necessity or the buyer's ignorance the derogation terms may be declared void in a court. **RO,**	**free of any rights, they are not different than those described to B2C contracts**: LT[997], BG, IE[998]	**any right**: AT, DK, ES, FI, LV, MT, SE • **AT:** It is only required that **they conform to what has been agreed in the contract**[999]. • **DK**: a **principle of vindication of property rights will apply**. • **ES:** the **sale of the thing which is not free is valid**, but the buyer who is deprived of the legal possession of the thing by the actual owner may claim the restitution of the price, interests and judicial and contract expenses (plus damages if the seller sold the thing in bad faith). **This rule is only mandatory if the seller acts in bad faith**[1000]; **if not, the seller's obligation can be augmented, reduced or excluded by agreement**[1001] • **FI:** the existence of third party rights or claims constitutes **a non-conformity of contract** with respect to the object of the sale. Remedies are thus the remedies for non-conformity. The

[997] *LT: Art. 6.317 of the Civil Code.*
[998] *IE: Section 55 of the Sale of Goods Acts.*
[999] *AT: § 922 (1) ABGB. However, pursuant to § 928 phrase 2 ABGB, a warranty for debts and arrears exists unless the parties have deviated from this. This also applies if the recipient of the object knew about the debts/arrears*
[1000] *ES: art. 1476 SpCC*
[1001] *ES: art. 1475.3 SpCC*

			rule is the same for B2C and B2B contracts. -For some MS there are **rules which require that the goods are sold free of any rights, but they are not mandatory and they are not different than those described to B2C contracts**: BE[1002], CY, CZ, DE, EE[1003], EL[1004],FR, HR, HU[1005], IT, LU, NL, PL, PT, SI, SK, UK[1006] • **CY:** In the contract of sale, unless the circumstances of the contract are such which show a different intention, there is an implicit guarantee that the buyer will peacefully enjoy the possession of the goods, and an implicit guarantee that the goods are free from any charge or any encumbrance in the benefit of any third party who has not been included or of whom the buyer is not aware at the time when the contract is concluded[1007]. • **CZ:** The Czech law states that is duty of seller to allow the buyer

[1002] *BE: Art. 1626 of the Civil Code.*
[1003] *EE: a thing does not conform to the contract if third parties have claims or other rights which they may submit with respect to the thing Art. 217 para 2 subparagraph 4 of the LOA.*
[1004] *EL: Art. 514 of the Greek Civil Code.*
[1005] *HU: Art. 6:175-176 of the Civil Code.*
[1006] *UK: S. 12 of the Sale of goods Act 1979.*
[1007] *CY: Section 14 of Sale of Goods Act 10(1)/1994.*

			to acquire the right of ownership in the thing in accordance with the contract[1008] (). If not, it is a (legal) defect in performance with all consequences. • **DE:** the seller is obliged to deliver the good free from material and legal defects[1009]. It could be derogated from by agreement unless the seller fraudulently concealed the defect or gave a guarantee of the quality of the good. • **FR:** The freedom of the parties to derogate to the legal guaranty is, nevertheless, limited by the personal guaranty of the seller[1010], which is a public order provision, and the seller is bound to return the price unless in case of knowledge by the buyer of the risk of eviction[1011]. There is no difference between B2B and B2C for the guarantee of eviction. • **NL:** it is not a mandatory rule in B2B contracts.
In B2B contracts, are there cases where eviction guarantee does not apply? It is the guarantee offers by	**For one M,** derogation to the eviction guarantee in the case of lease contract is not	**-For many MS, in a B2B contracts, there are cases where eviction guarantee does not apply and it could not be derogated from by agreement:**	**-For few, MS, in a B2B contracts, there are no cases where eviction guarantee does not apply:** IE, IT, LT

[1008] *CZ: Section 2087 of the Civil Code*
[1009] *DE: § 433 and 435 of the BGB.*
[1010] *FR: Art. 1628 of the Civil Code.*
[1011] *FR: Art. 1629 of the Civil Code.*

the seller that the buyer could not be disturbing in his possession of is new property by a claim of a third party for example. It is called also guarantee against the legal defects, or guarantee as to peaceful possession	possible[1012]. Leading to the lessee having to pay less/no rent if the object becomes (partially) unusable, e.g. due to eviction. **AT** **Derogation would have to be considered as unfair in the sense of § 879 (3) ABGB**.	• **In case of knowledge by the buyer of the threats of eviction and buy at his own risk**: CZ[1013], FR, HU, RO, SK • **BG:** There are two cases: ○ when the seller has not been associated by the buyer to a case initiated by a third party against the buyer. ○ When the seller had sufficient grounds for rejection of the claim of the third party. • **EE**: In cases where the ownership is transferred to the third party in good faith the thing will evicted despite the guarantee. • **PT**: in the case of commercial sale of somebody else's assets, as the seller is subject to the validation of the sale contract, if the validation does not occur.	**For some MS, parties can only stipulate that the eviction guarantee does not apply:** BE, CY, DE, ES, HR, LU, PL, UK, -For one MS**, NL,** the guarantee of eviction does not apply **if the seller is not joined to the action brought against the buyer. It can be derogated from by agreement in B2B contracts only.** **-It's not a relevant question in some MS:** DK, FI, LV, MT, SE, SI
In the domestic law **is it possible to exclude, to the detriment of the professional weak party, eviction guarantee?**	-**In AT**, in case of lease contract, it is not possible to exclude the eviction guarantee for a professional weak party, derogation will be considered as unfair term.	In a few MS, **it is not possible to exclude the eviction guarantee**: BG, IE, LT	**-In most MS, it is possible to exclude the eviction guarantee by agreement:** BE, CY, DK, EE, HR, HU, IT, NL, PL, SI, SK, UK • **EE,** derogation are possible in a B2B contract, only in BTC the eviction guarantee is mandatory.

[1012] *AT: §1096 of the ABGB.*
[1013] *CZ: Section 1920/1*

	-**In RO**, if the exoneration terms had been imposed to the professional weak party by the seller who took advantage of the state of necessity or the buyer's ignorance, the **unconscionable terms** may be declared void in a court of law.		• **only under conditions:** ○ **CZ**[1014]**,** ○ **FR-LU:** The seller remains responsible to his personal acts and to return price[1015]. ○ **DE:** respecting statutory prohibition, public policy, good faith principle ○ **ES:** if the seller is acting in good faith. **-It's not a relevant question in several MS:** FI, LV, MT, SE

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
Q50 - Passing of risks in B2B contracts			
In the domestic law **when does the risk of the goods pass in a B2B contract? Are the rules the same in B2B contracts as those you described in B2C contracts?**		-For one MS**, the risk is transferred with property** and it cannot be derogate from this rule by agreement, as the same as B2C contracts: IT -For one MS, **the risk is transferred to the buyer upon the delivery of the**	**-In a few MS the risk is transferred at the time handover is supposed to take place, but it can be derogated from this rule by agreement:** AT, PL • **AT**[1016]**:** as the same than B2C contracts

[1014] *CZ: Conditions are describe in §1916/2*
[1015] *FR: Art. 1628 and 1629 of the Civil Code.*
[1016] *AT: In case the ware is delivered however, i.e. sent/shipped to the buyer, § 429 ABGB (instead of § 7b KSchG) applies which specifies that risk passes when the object is handed over to the conveyor, if this delivery conforms to the agreement or to business practice.*

		thing, it cannot be derogated from this rule applicable as the same for B2C contract by agreement: SI	• **PL:** At the time the thing is handed over. It's a different rule for B2C contract. **-For some MS the risk is transferred with property but it can be derogated from this rule by agreement:** BE, CY, IE, FR, LU, PT, UK • **BE**[1017]**, IE, PT**[1018]**:** this rule is different than the one applies to B2C contracts. • The rule is the same than the one applies on B2C contracts ○ **CY**[1019]**, UK**[1020] ○ **FR, LU:** The risks is passed at the moment of the consent is given, moment of the conclusion of the contract. **-For one MS, the risk is transferred from the moment the goods are specified by agreement of the parties or are delivered to the buyer,** but it can be derogated from this rule by agreement**.** This is a different rule than the one which applies to B2C contracts: **BG**[1021]

[1017] *BE: Art. 1138 of the Civil Code*
[1018] *PT: There are exceptions in cases describe in Art. 796, nr2 and 3*
[1019] *CY: Section 26 of the Sale of Goods Act.*
[1020] *UK: Section 20(1) Sale of Goods Act 1979.*
[1021] *BG: Art. 186a Obligations and Contracts Act.*

			-In most MS, the risk is transferred to the buyer upon take over (delivery), it can be derogated from this rule by agreement: • **CZ, FI, HR, SE, SK:** it is a different rule than the one applies to B2C contract[1022]. • **DE, DK, EE[1023], EL, ES[1024], HU, LT, NL, RO[1025]**: it is the same rule as B2C contracts.

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all

[1022] *CZ: there are also different rules in Section 2121, 2122, 2123, 2124, 2125 of the Civil code, in case of takeover by a third person, handover by a carrier, Fungible things not even enough separated.*
[1023] *EE: there is one singularity for B2B contracts, that the transfer of the risk of accidental loss or of damage to the thing may be agreed for an earlier date. Art. 106 §6 of the LOA.*
[1024] *ES: there is a doubt on the fact that there is some particular rules to the passing of risk to the B2C contract than the one describe here, based on an interpretation of the art. 66 of the RCPA to the light of Art. 333 SpCCom.*
[1025] *RO: Art. 1274 of the Civil Code*

Q51 - Performance by a third party in B2B contracts			
When the seller entrusts performance to another person does he remain responsible for the performance?		**-For many MS the seller remains responsible even he entrusts performance to a third person. It's a general mandatory rule:** AT[1026], BG[1027], EE, ES, HR, HU, IT, NL, SI • **NL**: Derogation would be deems as unfair term in the contract[1028]	**-In most MS the seller remains responsible even he entrusts performance to a third person, but it can be derogated from that rule by agreement:** CZ, DE, DK, EL, FI, FR[1029], IE, MT, SE, UK • **BE:** derogations are possible with the consent of the third person. • **LU:** derogations are possible unless in *intuitu personae* contracts. • **PL:** derogations are possible unless for intentional damages caused by the seller[1030]. • **PT**[1031]**, RO**: Derogations are possible unless for intentional fault or gross negligence **-In a few MS there is a rule which provide individual liability for the person who's in charge of the performance of the contract:** CY, SK[1032]

[1026] *AT: §1313a, 879 (3) and 1405 of the ABGB.*
[1027] *BG: Art. 49 Obligations and Contracts Act.*
[1028] *NL: Art. 6:236 under e) and f) BW. It must notices that the buyer can the seller transfer his obligation to a third party. But such consent cannot be given in advance in standard terms (ART ; 6:156(1) BW).*
[1029] *FR: there is two special provisions which states the seller liability even he entrusts performance to a third party, one in case of defective product (13867 of the Civil Code), one other in case of electronic commerce (art. 15 of the LCEN).*
[1030] *PL: Art. 473 of the Polish Civil Code.*
[1031] *PT: Art. 800 of the Civil Code and 18 of the General Contractual Clauses Act.*
[1032] *SK: Section 375 of the Commercial Code*

			• **CY**[1033]**:** there is a statutory duty where performance of an act is entrusted to another person such person shall be liable for the performance of such an act. **-For one MS, there is no express rule about responsibility for performance by a third-party.** • **LV:** the responsibility depends from the agreement[1034].

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
Q52 - Time of delivery in B2B sales			
Are there rules which cannot be derogated from by agreement about the time of delivery, which can be applicable to a B2B contracts, especially when it is contract at a distance (or online)?			**-In most MS, general rules provide that the time to delivery is determined by agreement between the parties. Otherwise any agreement delivery must be executed without unnecessary delay or in a reasonable time:** AT, BE, CY, CZ, DE, EE[1035], EL, FI, IE, IT, LT, LU, LV,

[1033] *CY: Section 142 CAP 149/*
[1034] *LV: Art. 1516 and 1519 of the Civil Code.*
[1035] *EE: Art. 82 of the LOA*

			RO, SE, SI • **DE**[1036]**, EL**[1037]**, RO**: performance must be realised "*immediately*" **-For many MS there is no such specific rule for B2B contract, especially when it is contract at a distance:** BG, DK, ES, FR, HR, HU, MT, NL, PL, PT, SK, UK

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
Q53 - Interest when the debtor is a professional			
Are the **rules about interest for delay in payment different for professional debtor than those you have described when the debtor is a consumer?**		**-For several MS, provisions about interest when the debtor is a professional are the same as the rules applicable when the debtor is a consumer and they're mandatory:** BG, CY[1038], DK, LV, PT • **DK:** the derogation would be possible in principle but would be	**-In most MS, rules about interest when the debtor is a professional are the same as the rules applicable when the debtor is a consumer, and they can be derogated from by agreement:** CZ, EL, FI, HU, MT, NL, PL, RO, SE • **CZ:** This general rule applicable to

[1036] *DE: §271 BGB.*
[1037] *EL: Art. 323 of the Greek Civil Code.*
[1038] *CY: Section 74 of the Contract Law CAP 149 prescribes "that a clause in an agreement to pay increased by default, can be regarded as a penalty".*

		subject to the provision on inform terms[1039]. **-For some MS there are some different mandatory rules for B2B contracts:** EE, FR, IE, IT, LU, SK • **EE:** Professional buyer may not rely on an agreement which restricts the right to claim penalty for late payment[1040], if this agreement is grossly unfair with regard to the obligee due to the circumstances[1041]. An agreement which precludes charging of penalty for late payment from a person engaged in economic or professional activities or pursuant to which the person specified in the texts[1042] is obliged to pay penalty for late payment at a rate lower than provided by law[1043] plus 8 % per year shall be void[1044]. • **FR:** there is a specific provision about interest which states about in particular the starting point, the	all contracts gives the possibility to invoke ineffectiveness of a provision on (contractual) default interest which, without a just cause, derogates from a statute in a way that, having regard to all the circumstances and conditions of the case, deteriorates the position of debtor. If a court declares the stipulation to be ineffective, statutory provisions are used in its place unless otherwise decided by a court in the interest of a fair solution[1053]. **-For many MS, rules about interest are different in B2B contract, but they can be derogated from by agreement:** AT, BE, DE, ES, LT, HR, SI, UK • **AT:** In general rules are quite similar, but interest can be higher in B2B contracts, ie 9,2% above the base rate of the relevant half-

[1039] *DK: Section 36.1 of the Act on contracts.*
[1040] *EE: Art. 113 para 1 of the LOA*
[1041] *EE: based on the directive 2011/7/EU, Art. 113 para 9 of the LOA).*
[1042] *EE: Persons specified in Art. 10 para 1 or para 2 of the Public Procurement Act*
[1043] *EE: Art. 94 of the LOA.*
[1044] *EE: Art. 113 para 10 of the LOA.*
[1053] *CZ: Section 1972/1 of the Civil Code.*

		way to determine the interest rate[1045]. Parties can determine the interest rate by agreement but, the provision is a mandatory rule. • **IE:** Interest may be awarded at court's discretion under the Courts Acts, and may also be awarded where proved as a consequential loss. The European Communities Regulations 2002 imply a term into every commercial contract that, where the purchaser does not pay for the goods or services concerned by the relevant payment date, the **supplier is entitled to late payment interest on the amount outstanding at a rate of interest specified in the Regulations. Nothing shall affect the right to recover interest**[1046]**.** • **IT:** interests for the use of the goods are due by the buyer from	year. The total exclusion of interest for delay is always grossly detrimental and therefore relatively void [1054]. • **BE:** The law concerning commercial transaction applies[1055]. • **DE:** Rules are different when the party is not a consumer: • Interest can be higher (9% above the basic rate of interest)[1056] ; • The trader (inter-se) can charge interest from the date of the maturity of such claim[1057]; • This interest cannot be capitalized[1058]. • **ES**: There are some specific rules about starting point[1059] of interest and capitalisation[1060]. They're non-mandatory but there is a bottom interest rate given by law and the clause which stipulates an interest rate under this bottom is

[1045] *FR: Art. L. 441-6 of the Commercial Code.*
[1046] *IE: The European Communities (Late Payment in Commercial Transactions) Regulations 2002 (S.I. No. 388 of 2002).*
[1054] *AT: It can be derogated from by agreement but § 459 UGb provides that this may not lead to grossly detrimental legal positions. As a guideline, there should be factual reasons for deviations (§ 459 (4) UGB).*
[1055] *BE: Art. 4 §1 of the law concerning commercial transactions.*
[1056] *DE: §288 of the BGB.*
[1057] *DE: §353 (1) HGB*
[1058] *DE: §353 (2) HGB*
[1059] *ES: Art. 63 and 341 of the SpCCom.*
[1060] *ES: Art. 317 and 319 of the SpCCom.*

		the time of delivery, provided that the goods delivered actually produce fruits[1047]. In case of formal delay in payment the general discipline on pecuniary obligations shall apply[1048]. Therefore, the buyer has a duty to pay the late payment interests (whether legal or conventional), unless the seller gives evidence of supplementary damages. Such interests do not include the compensatory interests due by the buyer[1049]. • **LU:** there are some different rules about the starting of interest[1050]. • **SK**: In B2B contracts there is a special non-mandatory regulation of interest for delay[1051]. Rules about interest are mandatory in such sense that parties may not agree on lower interest than regulated by law[1052].	abusive[1061]. • **HR:** The same Article permits that in B2B relations the parties agree on default interest rate which is different from the one provided for in the COA. Finally, in B2B relations contractual interest rate may exceed default interest rate, which is not the case in B2C relations[1062]. • **LT: the only difference is the amount of the interest[1063].** • **SI:** There is just a difference about the case of usurious interest, there is no presumption of usurious interest in commercial contract[1064]. • **UK**: Unless otherwise agreed, interest becomes due after 30 days and is fixed at 8% above the Bank of England's base rate[1065].

[1047] *IT: Art. 1499 of the Civil Code.*
[1048] *IT: Art. 1224 It. civil code*
[1049] *IT: Art. 1499 It. civil code.*
[1050] *LU: In B2B contracts, for obligations limited to payment of a certain sum of money, damages resulting from delay in the performance shall consist only in a judgment for the payment of interest at the statutory rate, except for the special rules concerning commerce and suretyship. Such damages are due without the creditor having to prove any loss. They are due only from the day of the formal demand to pay or of another equivalent act such as a personal letter clearly stating a demand, except in those instances where the law causes them to accrue as a matter of right. A creditor, to whom his debtor in delay have caused by his bad faith a loss independent of the loss due to the delay, may obtain damages distinct from the moratory damages owed on the debt. Under article 1153 al. 1 al. 3: The default interest run as a matter of right from the court's decision or summons to pay, until paid.*
[1051] *SK: CommC section 369.*
[1052] *SK: It results from the implementation of Directive 2011/7/EU of the European Parliament and the council of 16 February 2011 on combating late payment in commercial transactions.*
[1061] *ES: Art. 17.5 ART and Art.9.1 Act 3/2004.*
[1062] *HR: Article 26 of the COA.*
[1063] *LT: Art. 6.210 and 6.344 of the Civil Code*
[1064] *SL: Art. 377 of the CO*
[1065] *UK: The Late Payments of Commercial Debts (Interest) Act 1998.*

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
Q54 - Others mandatory rules in B2B sales			
Are there **other rules** which cannot be derogated from by agreement **concerning the period of performance of the contract based on the general law that can concern B2B sale at a distance?**		**-For many MS, there are some general mandatory rules concerning the period of performance of the contract that can concern B2B sales at a distance:** AT, CZ, DE, LT, PT, RO, SE, SK • **AT:** There are specific rules for B2B which provide a right of retention on movables and security papers of a debtor[1066]. One week after a warning was given and if there is an enforceable title, the creditor is allowed to sell the items he has a right of retention on. • **CZ:** there are some rules regarding the time to performance (30 days, with exception 60 if not grossly	**-Most of the MS do not have other rules regarding performance based on the ordinary law, that can concern B2B sale at a distance:** BE, BG, CY, DK, EE, EL, ES[1078],FI, FR, HR, HU, IE, IT, LU, LV, NL, PL, SI, UK

[1066] *AT: §§369ff UGB. There is also another rule, § 373 (1) UGB which is only non-mandatory, which provide an extension for traders of the rule of deposition contained in § 1425 ABGB: if the buyer is in default of acceptance, the ware may be deposited in a secure place, e.g. a public warehouse. § 373 (2) UGB further provides, that the ware may be auctioned off or sold after a warning.*

[1078] *ES: Beside the general principle of good faith,, art. 57 SpCCom.*

		unfair for the creditor)[1067]. • **DE:** Usually rules about B2B sales at a distance are not mandatory, unless one provisions which concerns transfer of a monetary claim which cannot be derogated from by agreement[1068]. • **LT:** there are some: ○ A contract must be performed by the parties in a proper way and in good faith[1069]; ○ The parties shall be bound to use the most economical means in the performance of the contract[1070]. ○ The parties shall be bound to perform the contract simultaneously unless otherwise provided for by laws or the contract, or determined by its nature or circumstances[1071]. ○ And some rules about the reasonable time to perform when there is no time agreed between the parties[1072]. • **PT:** There are two kinds of rules: ○ The first one concerns the	

[1067] *CZ: Section 1963 -1967.*
[1068] *DE: §354aHGB. All the others rules are non-mandatory as the one which provides for a temporary safe keeping, §379 HGB.*
[1069] *LT: Art. 6.200 (1) of the Civil Code.*
[1070] *LT: Art. 6.200 (3) of the Civil Code.*
[1071] *LT: Art. 6.201 of the Civil Code.*
[1072] *LT: Art. 6.319 of the Civil Code.*

		presumption on concurrent performances or in other words the *exceptio non adimpleti contractus*[1073], ○ The second one provides the strictly prohibition of any general contractual term that exclude exception for non-performance[1074]. • **RO:** they're the same than the rules mentioned for B2C contacts and they concern: ○ Obligations to use best efforts and obligations to achieve a particular result[1075], ○ Determination of the quality of performance[1076] • **SE:** There is a rule which provides the possibility of adjustment or setting aside unconscionable contract terms[1077]. • **SK:** There are various others mandatory rules in section 263 f. of the Commercial Code.	
Are there **other rules** which cannot be derogated from by agreement **concerning the period of performance of the B2B contract based on the special law on electronic contract that can**		**For one MS, there are other rules based on special law on electronic contract concerning the period of the performance of the B2B contract:** LV	**-In most MS there are no other rules based on special law on electronic contract:** AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, LT, LU, NL, PL, PT, RO, SE, SI, SK, UK **-For one MS there are other rules**

[1073] *PT: Article 428 nr. 1 CC.*
[1074] *PT: Article 18, lit. f General Contract Terms Act*
[1075] *RO: Art. 1481 of the Civil Code.*
[1076] *RO: Art. 1486 of the Civil Code.*
[1077] *SE: Section 36 of the Contract Act.*

concern sale at a distance?			**<u>based on special law on electronic contract that can concern sales at a distance, but they are non-mandatory :</u>** • **<u>IT:</u>** there is a rule which provides a specific duty of the seller in electronic contract to acknowledge the receipt of the buyer's order without undue delay and by electronic means[1079].

D/ Termination and after termination

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
<u>Q55 - Mandatory rules about termination in B2B contracts</u>			

[1079] *IT: Art. 13§2, d.l.gs 2003/70*

Are there **rules** which cannot be derogated from by agreement**, concerning the period of termination of the contract based on the general law that can concern B2B sales at a distance?**		**For many MS there are some general mandatory rules that can concern B2B sales at a distance concerning the period of termination of the contract**: AT, BG, CZ, IE, IT, NL, PT, RO, SI, SK • **AT:** there is a rule which provides **a right to immediately terminate the contract for very important reason**. Such a reason requires the interest of the respective party to be so seriously impaired that, from an objective point of view, keeping the contractual bond up would be unacceptable which e.g. can be the case if other goods of the party are damaged during performance. In continuous performance contract termination is also possible for this reason after giving a reasonable period of notice. • **BG:** To a certain extent the rules regarding eviction guarantee[1080], rules regarding termination of a contract for tangible goods under special conditions[1081], rules regarding lien[1082] may concern sales at a distance.	**-In most MS there are no other general mandatory rules about the period of termination of the contract that can concern B2B sales at a distance:** • **BE, CY, DE, DK, EE, EL, FI, FR[1094], HR, HU, MT, PL, SE, UK** **-For several MS there are some general non-mandatory rules that can concern B2B sales at a distance concerning the period of termination of the contract:** ES, LT, LU, LV • **ES:** the only rule fixing a period of termination of the contract for sales is a provision which provides a 6 month period from the moment of delivery of the goods[1095]. It can be derogated from this provision only if the seller acts in good faith. • **LT:** there are general rules which apply for protection of the parties and they concern the right to terminate the contract in

[1080] *BG: Art. 189 to Art. 192 OCA*
[1081] *BG: Art. 201 and Art. 202 OCA*
[1082] *BG: Art. 90 and Art. 91 OCA*
[1094] *FR: In the Draft of the reform of the civil code there is a new provision which allows the creditor to terminate the contract by notice.*
[1095] *ES : 1490 SpCC*

		• **CZ:** there are some rules regarding the right to withdraw from a contract and the consequences of the withdrawal[1083]. • **IE:** The buyer cannot terminate after he has accepted the goods[1084]. • **IT:** the rules about termination of the contract are general so they're applicable to B2B sales at a distance: The first one is regarding termination of the contract for non-performance[1085].The second one is concerning the substantial breach of contract[1086]. • **NL**: Termination of long-term contracts (e.g. for the supply of energy) may also be possible outside non-performance cases. Apart from serious reasons justifying the immediate termination of the contract, the terminating party must give the other party a reasonable	case of non-performance. However the parties are free to agree on the terms acceptable to them[1096]. • **LU:** Termination can be judicial or not. • **LV:** Termination occurred when the relevant obligation is fulfilled[1097]

[1083] *CZ: Section 2001-2005*
[1084] *IE: Section 11(3) of the Sale of Goods Act 1890.*
[1085] *IT: Art. 1453 it Civil Code – Termination of the contract for non-performance:*
"In bilateral contracts, if one party does not fulfil his/her obligations, the other party may at his discretion claim the performance or the termination of the contract; in both cases he/she can also claim damages.
The termination of the contract can be claimed when the judgment has been filed to claim the performance of the contract; on the other side, the performance of the contract cannot be claimed when the termination was filed first.
From the date when the termination is filed the party in breach can no longer fulfil his/her obligations".
[1086] *IT: Art. 1455 it Civil Code – Substantial breach of contract:*
"The contract cannot be terminated if the breach of contract of one of the parties is of minor importance, having regard to the other party's interest to the performance".
[1096] *LT: art. 6.199, 6.217 (3), 6.218 (1) of the Civil Code.*
[1097] *LV: Article 1811 of the Civil Law sets: "Each obligation right terminates in and of itself when the relevant obligation of the debtor has been performed, i.e., by settling the debt. If the subject-matter of the obligation is money, then the obligation is performed by payment"*

		notice period. • **PT**: there are 4 kinds of mandatory rules about termination. They specifically concern: The definitive supervening impossibility of fulfilment note attributable to the debtor[1087]; the negligent impossibility of fulfilment[1088]; the prohibition of general clauses that exclude right to termination for non-fulfilment of the contract[1089]; the right to terminate the contract for unexpected change of circumstances[1090]. • **RO:** there are two kinds of mandatory rule regarding the termination period. They concern: The reasonable period of notification[1091]; the indeterminate duration contracts and the unilaterally termination[1092]. • **SI**, **SK**[1093]**:** There are rules on termination for non-performance	
Especially, is there in your law, a rule which cannot be derogated from by agreement and which provides that the		**In most MS there is no express rule but good faith is a general principle that parties must respect even for termination of the contract:** AT, BG, CZ,	**For many MS there is no mandatory rule which provides that the termination of the contract has to be done in good faith:** BE, CY, DK, EL,

[1087] *PT: art. 790 of the Civil Code.*
[1088] *PT: art. 801 nr 2 of the Civil Code.*
[1089] *PT: Art. 18 lit f General Contract Terms act.*
[1090] *PT: art. 437 of the Civil Code.*
[1091] *RO: Art. 1276 (2) of the Civil Code.*
[1092] *RO: Art. 1277 of the Civil Code.*
[1093] *SK: section 267, 268, 311 (1), 324, 365, 369-369 (d), 370, 371 of the Commercial Code.*

termination of the contract has to be done in good faith?		DE, EE, ES, FR, HR, HU, LT, LU, LV, NL, PT, SI • **ES**: breach of the duty of good faith would give rise to an impossibility of exercising the right of termination; every legal right has to be exercised in accordance with good faith[1098]. Furthermore, in order to terminate the contract non-performance must be essential. • **IT:** According to scholars and case law, art. 1455 It. civil code dealing with the substantial breach of contract contains an implied reference to the general clause of goods faith, whose essential content consists of taking care of the other party's interests within the limits of a sustainable detriment. • **RO:** the reference to the reasonable character of the period of notification applicable to the termination could be interpreted as a good faith reference. • **SK:** there is a common institute principle of honest business relations on the commercial code[1099].	FI, IE, MT, PL, SE, UK
Are there **rules** which cannot be derogated from by agreement, **concerning the period of termination of the**			**For all the MS there is no rule based on special law on electronic contract that can concern the termination of the B2B sale at a distance:** AT, BE,

[1098] *ES: Art. 7 of the SpCC.*
[1099] *SK: Section 265 of the Commercial Code.*

B2B contract based on the special law on electronic contract, that can concern sale at a distance?			BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK
Are there rules which cannot be derogated from by agreement**, concerning the period of termination of the B2B contract, which take into account not the last sale, but all the relationship between the trader and the professional buyer,** and which impose to the party who wants to terminate not the contract but the relationships, **to respect a notice period?**		**Some MS laws take into account all the relationship between the trader and the professional buyer to appreciate the reasonable notice period before termination**: AT, CZ, FR, IT, LT, SI **FR:** it is an express rule, article L. 442-6 I 5° of the Commercial code, which takes into account all the commercial relationship between the parties and obliges the party who wants to break the relation to respect a notice reasonable period, which can be different of the contractual period of termination of the last contract. For instance, if the parties have concluded successively 5 contracts of two years, the provision imposes to the Court to determine the reasonable period before termination, by taking into account that the relationship exists since 10 years. The provision takes in account not only the contract which is terminated but also all the relationship between the two parties. And if the contractual period of termination is shorter than the reasonable period of termination of the relationship, the party who bears the termination can entitle to damage. • • **SI:** There is a rule[1100] which provides termination of the contract with series of obligations. It	**In most MS there is no rule which takes into account all the relationship between the trader and the professional buyer to appreciate the notice period before termination:** BE, BG, CY, DE, DK, ES, FI, HR, IE, LU, LV, MT, NL, PL, PT, RO, SE, SK **In a few MS, there is a rule which provides the way to appreciate the notice period to termination but it's a non-mandatory rule:** EE, UK • **EE:** Case law elaborates a principle that the notice period cannot be longer than the prescription period. • **UK:** this would depend on the nature of the relationship.

[1100] *SI: Art. 108 of the CO.*

		provides, inter alia, that the party may withdraw from the contract in respect of not only the future obligations but also obligations already performed if the performance thereof without the missing obligations has no significance for the party**.** • It's not an express rule but it is implied: ○ **AT**[1101]**, CZ**[1102] ○ **IT:** In B2B franchising contracts a provision[1103] imposes to the franchisor a special content of a fixed term contract that is its duration (at least three years). No notice period is imposed. In B2B contract of subcontracting a provision[1104] imposes to both parties a term that establishes the obligation to give notice of the termination of the contract within a reasonable period of time, under penalty of voidness of the term. ○ **LT:** similar rule exists only in respect of interpretation of the terms of the contract[1105].	

[1101] *AT: art. 346 UGB.*
[1102] *CZ: Section 1998-2000 which provides the conditions of termination.*
[1103] *IT: art. 3, § 3, L. 6 May 2004, n. 129*
[1104] *IT: art. 6, § 2, L. 18 June 1998, n. 192*
[1105] *LT: art. 6.193 (5) of the Civil Code*

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
Q56 - Periods of prescription in B2B contracts			
In domestic law, are the rules about **prescription** different in B2B contracts than those you have described when the debtor is a consumer?		**-In a few MS the rules about prescription are different in B2B contracts:** • Rules about the condition of prescription are common **except that / the periods are different:** ○ **PL: 10 years in B2C and 3 years in B2B.** ○ **SE: 10 years in B2B relations.** The period shall run separately for each supply of goods, performance of work and provision of services.	-In most MS **rules about prescription are the same in B2B contracts than those described for B2C contracts**: AT, BE, BG, CY, CZ, DE[1107], DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, SK, UK • **EE**: Rules are the same, but they're non-mandatory for B2B contracts within a limit to 10 years for the prolongation and the respect of the good faith principle[1108].

[1107] *DE: There is a specific rule concerning recourse claim according §478 and 479 of the BGB.*
[1108] *EE: Art. 145 §2 of the GPCCA.*

		○ **SI: 3 years in B2B contracts.** • **PT:** Rule about periods are the same: 20 years, but certain conditions are different: ○ Parties on a B2B contract cannot benefit from the presumptive prescription deadlines as the consumers can. ○ with regard to right of redress in a consumer supply chain, the professional must exercise the right to redress within two months from the date of the buyer rights satisfaction, within five years from the delivery of the thing by the respondent professional[1106].	• **FR:** In domestic law, there is a commercial prescription prescribes in a specific provision[1109] but it is the same rule now than the one which is provides for B2C contracts[1110]. The actions are time-barred by five years. • **LU:** Rules are the same, except that there is no application of the unfair term regulation. That means the clause which shortens the prescription to the detriment of the weak professional party shall be valid. • **NL**: The remedies arising from a lack of conformity also prescribed by the lapse of two years from the notification of the lack of conformity to the seller[1111]. However, the seller's right to demand the payment of the price prescribes only when five years after payment has become due have elapsed[1112]. **-For one MS, rules are different but not mandatory:** • **RO:** agreements modifying the period of prescription are only valid in B2B contracts subject to the condition that they are

[1106] *PT: Article 7 and 8 Sale of Consumer Goods Act*
[1109] *FR: Article L. 110-4 of the commercial code.*
[1110] *FR: Article 2224 of the Civil code.*
[1111] *NL: Article 7:23(2) BW*
[1112] *NL: Article 3:307(1) BW*

			negotiated terms and not unilaterally drafted by one party.
Is the weak professional party protected against agreements concluded to his detriment?	-**In** F**R**, for the moment, there is no case law which has declared void such a term. **But pursuant Article L 442-6 I 2° of the commercial code, such a term could be unfair.**	**-For many MS the weak professional party is protected against agreements concluded to his detriment:** AT, CY, CZ, DE, DK, EL, FI, LT, PL, PT, RO, SE, SI • **AT:** There is a provision which declares that **agreements** is void, if **that are grossly detrimental to one party** (§ 879 (3) ABGB) • **CY:** the weak professional party is protected as the other **party against fraud (**Section 17 of the Contract law CAP 149 and Section 14 of the limitation of actions law n°66(1)/2102.) • **DK**: regulation about **unfair terms** might apply in case of a weak professional party. • **RO:** The weak party is protected **against unconscionable practices**. • **Rules about prescription are mandatory in all spheres**: ○ **PL, PT, SE, SI** ○ **CZ:** If a shorter or longer limitation period is stipulated to the detriment of the weaker party, such a stipulation is disregarded[1113]. ○ **EL:** As all the party, the weak	**In most MS there is no particular protection of the weak professional party against agreements concluded to his detriment:** BE[1116], BG, EE, ES, HR, HU, IE, IT, LU, LV, MT, NL, SK, UK.

[1113] *CZ: §630/2 of the Civil Code.*
[1116] *BE: Unless good faith effect.*

		professional party is protected against agreements which excluding prescription or providing for a term shorter or longer than the term laid down in the law or generally aggravating or attenuating the conditions of prescription[1114] ○ **DE**: it is not possible to derogate from the rules about limitation period in case of liability for intention unless some specific conditions provided by law and never in case of standard terms[1115]. ○ **LT**: General prescription periods cannot be changed, however it is possible to agree in a contract on different prescription terms for the filling of claims regarding the defects of the things sold and claims connected with defects in the results of the work. In case the weak professional party will prove that it was weak professional party and that such condition unjustifiably gives the other party excessive advantage. ○ **FI**: According to Act on the Statute of Limitations on Debt (728/2003) Section 3, the provisions of the said Act	

[1114] *EL: Art. 275 of the Civil Code.*
[1115] *DE: §§ 134, 138, 242, 305 et seq. BGB.*

		cannot be derogated from by agreement to the detriment of a debtor.	

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
<u>Q57 - Restitution in B2B contracts</u>			
In domestic law, are the rules about **restitution** different in B2B contracts than those you have described when the debtor is a consumer?		-In most MS the rules about restitution are **<u>the same</u>** as the rules applicable to B2C contract and **<u>they are mandatory rules</u>**: AT, DK, BG, CY, CZ, ES, HR, HU, IT, LT, PT[1117], RO, SI • **<u>AT</u>**: Derogations agreements are void if they're grossly detrimental to one party. • **<u>DK</u>**: derogations can be deemed as unfair terms. • **<u>RO:</u>** Derogations are not deemed as unfair terms, but the weak	-For many MS the rules about restitution are **<u>the same</u>** as the rules applicable to B2C contract and they are **<u>non-mandatory rules</u>**: BE, EL, FI, FR, IE, LU, LV, MT, NL, PL, UK -In a few MS the rules about restitution are **<u>different</u>** than the rules applicable to B2C contract and they're **<u>rules which can be derogated from by agreement</u>**: EE, SE, SK

[1117] *PT: They're all mentioned in the Civil Code*

		professional party is protected against unconscionable acts. Terms which excluding the restitution could be unconscionable and source of the avoidance of the contract. -For one MS the rules about restitution are **different** than the rules applicable to B2C contract and they're **mandatory rules:** • **DE:** the principles are quite the same, but there is a provision excluding the consumer's obligation to compensate the obligee for the value is not applicable in B2B contracts[1118]. The rule can be derogated within the limits of legal condition and they're mandatory in standard terms.	• **EE:** there is one difference that the rule which provides that consumers have limited compensation obligations in cases of off-premises and digital contracts is not applicable in case of B2B contract. • **SE: Particular rules for consumers do not apply for weak professional party.** • **SK:** there is a specific non-mandatory rule about the restitution after the withdrawal from contract.

	Mandatory rules made to protect weak professional parties	Mandatory rules which apply to the weak professional party, but which are not made especially to protect him or her	No mandatory rule, or no rule at all
Q58 - Time during which the professional will have spare parts or consumables			
In domestic law, is there **rules**		**In a few MS there is a specific**	-In most MS there is **no specific**

[1118] *DE: §474 BGB.*

which cannot be derogated from by agreement, **concerning the period during which the professional buyer can find spare parts or consumables,** that are necessary to use the good he has bought?		**mandatory rule** concerning the period during which the professional buyer can find spare parts or consumables, that are necessary to use the good he has bought: HR, IE • **HR:** A trader must store spare parts for the duration of a guarantee period[1119] • **IE:** A trader must store spare parts for a reasonable period[1120].	**mandatory rule** concerning the period during which the professional buyer can find spare parts or consumables, that are necessary to use the good he has bought: AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK • **AT:** The seller is under **no obligation to provide spare parts or consumables if this was not part of the contract**. The trader could be obliged to **inform about there not being any spare parts or consumables available anymore,** when this is of major importance to the recipient. • **DE:** there is no specific rule, but in the context of **warranty promises and in the case a warranty was provided**, spare parts generally have to be available during this time as duties arising could otherwise not be met, at least not in form of repair[1121]. • **ES:** the only rule applicable is for **consumers only**. • **PT:** However, if the contract integrates a consumer supply

[1119] *HR: Art. 16a of the Trade Act.*
[1120] *IE: Section 12 of Sale of goods and Supply Services Act 1980.*
[1121] *DE: Apart from this, a post-contractual (secondary) duty arises from the principle of good faith according to § 242 BGB and § 241 (2) BGB, which requires spare parts to be available for a certain period of time. The nature and scope of this duty depend on the circumstances of the individual case and especially the sold good (durable and expensive products).*

			chain, it is reasonable to consider **as applicable to a B2B relationship the requirements provided for B2C contracts** to the extent necessary to ensure all rights resulting from the Sale Consumer Goods Act, either to consumer or to professionals. Article 6 Sale of Consumer Goods Act gives consumers the **right to a direct claim against the producer and his representatives for a lack of conformity**. Nevertheless, the producer is **not directly liable if more than ten years** have passed since he put the product into circulation.

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