DLA PIPER RUDNICK GRAY CARY

Legal Study on unfair commercial practices within B2B e-markets

Final Report

European Commission Study ENTR/04/69

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Study Team

This study has been performed by the law firm DLA Piper Rudnick Gray Cary UK LLP Belgium following the invitation to tender of DG Enterprise on the preparation of a Legal Study looking into the different national rules applicable to unfair commercial practices in Business-to-Business electronic marketplaces ("B2B e-markets").

The **Project Team** consisted of Dr Patrick Van Eecke (Belgium), Georgia Skouma (Greece), Wolfgang Freund (Austria), Michael Goeskjaer (Denmark) and Barbara Ooms (Belgium).

On top of the project team, **two renowned professors**, Professor Dr Yves Poullet, Dean of the Faculty of Law of the University of *Namur* and Professor Dr Ian Walden, Head of the IT Law Unit at the Queen Mary College, London, were asked to ensure a high-level control of the quality and accuracy of the Study's findings.

A network of **National Correspondents** from the 25 EU Member States assisted the project team to perform its tasks. These national experts principally undertook tasks related to documentation collection and research at the level of their national jurisdictions. They provided the project team the necessary input to enable the analysis and comparisons of the national legal rules as required in the contract.

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SUMMARY OF TABLE OF CONTENTS

1 Introduction

This is the Final Report of the European Commission's legal Study on "unfair commercial practices within B2B e-markets". The report provides a description and comparative assessment of the national legal rules in force that apply to unfair commercial practices in B2B e-markets, with a special view to on-line auctions and reverse auctions.

This study does not start from the hypothesis that unfair commercial practices are a *general* problem, which *often* occur in B2B e-markets. On the contrary, in the course of this study, it has turned out that unfair practices are exemptions to the rule that, in general, e-markets in the EU apply fair practices. However, concerns have been submitted by enterprises about possible unfair practices and an unknown legal situation of B2B e-markets in other Member States of the EU in the case of cross-border trade. Therefore, the European Commission has asked us to provide those enterprises with a tool to assess where to draw the line between fair and unfair practices. The aim of this study is to facilitate cross-border sales within the EU by informing enterprises about the legal situation in other Member States.

Chapter 2 of this Report initiates the reader into the concept of B2B e-marketplaces and the variety of transactional models that e-markets may support. The different categories of electronic trading platforms that emerged from e-commerce/e-business practices are discussed briefly. We summarise the major benefits of e-markets and a number of show-stoppers that seem to refrain the revolutionary uptake of e-markets today. To this end, we introduce in a succinct way the added-value and downsides of the e-market business model, from a legal and market perspective.

Chapter 3 outlines the nature and structure of contractual relations that may arise from a B2B e-marketplace. The methodological approach that we followed to structure this Report is highlighted in Chapter 4.

Chapters 5 and 6 provide a description of the national legal provisions and administrative practices (where applicable) to which unfair business conduct in B2B e-markets may be subject.

Chapter 5 illustrates the findings of the expert team from a horizontal viewpoint. The legal framework that may apply to prohibit, restrict or sanction the unfair business conduct in B2B e-markets is discussed country-by-country. A synthesis of all national findings follows at the end of this Chapter.

Chapter 6 provides an analysis of the national legal rules from a vertical viewpoint. It appears that certain business behaviours and commercial practices raise concerns amongst the e-market business actors, as to whether they comply with legal rules and fair commercial usages. We identified a

number of legal issues ("case studies") that may be qualified as "alarming" with regard to their fairness. In each situation, we identify if and to what extent the specific market practice discussed is regarded as fair or unfair in each Member State and on the basis of which regulation.

The description of the national legal rules in Chapter 6 is already structured in a comparative way, with a high-level assessment of the differences/particularities of the national legal systems relating to unfair commercial practices in B2B e-markets.

In Chapter 7 of this Final Report we bring together the overarching conclusions of this Study on the basis of the description and comparative assessment of the case-studies analysed in the Chapters 5 and 6.

Against this background, the final Section of Chapter 7 highlights the measures and initiatives that can be put forward to encourage the deployment of fair commercial practices on B2B e-markets and, hence, the trustworthiness of the e-market transactional model in e-business.

The spheres of law that have been scrutinised for the purposes of the analysis/comparative assessment in the Final Report are:

i) civil and, especially, contract law;

ii) trade law, notably regulation on unfair trade practices;

iii) consumer protection law (to the extent that the application scope of all or certain provisions cover also B2B relations);

iv) e-commerce / e-business regulation;

v) law of sales and regulation on the provision of services between business partners;

vi) penal/criminal law - for illegal behaviour amounting to criminal offences in EU Member States .

Competition rules and legislation relating exclusively to data protection and confidentiality issues, as well as to the security of electronic services and international private law, are explicitly out of the scope of this study.

Professor dr. Patrick Van Eecke

10 May 2006

2 Description and Analysis

2.1 The concept of B2B electronic marketplaces

2.1.1 B2B e-markets: basic definition and market typologies

2.1.1.1 The phenomenon of B2B e-market platforms

The Internet technology has not only introduced a revolutionary way of communication between whole-sellers, retailers and of these with consumers. More than that, it has contributed to the emergence of integrated trading models that are built upon the concept of "doing business at a distance".

On the one hand, the commercial formations based on Information and Communications Technology (ICT) may only connect one or more sellers to consumers. Generally speaking, this is the classical "e-commerce" model that basically targets the ultimate link of the trading chain, thus the relation between business and consumers (B2C).

On the other hand, the integration of ICT processes in commercial models becomes all the more valuable for transactions taking place in a business-to-business (B2B) context. In these situations, Internet-based trading models help to construe supply chains between commercial partners (e.g. whole-selling or retailing of goods); or, they may satisfy the buying needs of traders as business professionals (buying on the Internet for the purposes of a business activity or trade).

It is to these trading partnerships that **business-to-business electronic marketplaces** (herein below "B2B e-markets") refer to. According to a general definition, B2B e-markets represent electronic trading platforms that bring together businesses with the purpose of buying and selling[1].

A more comprehensive definition qualifies B2B e-marketplaces as "*virtual online markets where buyers, suppliers and sellers find and exchange information, conduct trade, and collaborate with each other via an aggregation of information portals, trading exchanges and collaboration tools*"[2].

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[1] This general definition encompasses in a way variable elementary definitions of B2B e-markets that are provided in expert reports, policy and business documents, *inter alia*: *Report of the Expert Group on B2B Internet trading platforms, final*, July 2003, p. 3 and ff.; *European Commission Staff Working Paper on B2B Internet trading platforms: opportunities and barriers for SMEs - a first assessment*, SEC (2002) 1217, November 2002, p. 4, 6; *B2B e-Marketplaces*, report of Marija Popovic, as published by European Commission's Electronic Commerce Team, June 2002, p. 2; *Putting Markets into Place: An e-Market Definition and Forecast*, by Leo J. Lipis PhD, Richard Villars, Dennis Byron and Vernon Turner; *Droit de l'informatique et des technologies de l'information, Chronique de jurisprudence*, 1995-2001, *Journal des Tribunaux*, p. 115, etc.

[2] *The Emergence and Impact of the E-marketplace on SMEs Supply Chain Efficiencies*, Prime Faraday Technology Watch, May 2001, p. 9.

This definition brings forward the basic functionalities of the B2B e-market platform. The formation of a B2B e-market pre-supposes first of all an electronic portal, being the virtual "meeting place" of different buyers and sellers.

In a second place, the scope of the relation that is built upon the e-market platform may vary. In its simplest form, the B2B e-market may merely serve as an information tool to identify interesting partners on both sides: sellers/suppliers and buyers/customers. In more advanced schemes, the B2B trading platform establishes the interface between these two categories, facilitating the contact and, sometimes, the transaction between interested participants. In these situations, parties put in contact through the platform may transact off-line and the role of the B2B e-market as intermediary ends then there. Alternatively, the whole conduct of the buyer-seller relation, and the transaction that may emerge from it, are undertaken by the platform itself (participants may then transact in the e-market platform itself)[3].

The third element of the B2B e-market concept is the dynamic "supplier-customer" relation that it propagates. It is astonishing how quickly B2B e-markets have undergone fundamental changes since the day they have been created[4]. The underlying trading concept of the B2B e-market platform (easy-to-access contact point for traders on the Internet) has been evolving to varying ways of trading. These multiple commercialisation models that proliferate around the fundamental idea of the B2B e-markets are discussed below (Sub-section 2.1.1.3).

B2B e-markets primarily aim at facilitating the establishment of new trading relationships between companies or at supporting existing relationships through Internet-based technical solutions[5]. The market reality has led to the deployment of different categories of B2B e-markets seeking to achieve these prime objectives and secondary ones.

2.1.1.2 B2B e-market categories

2.1.1.2.1 Horizontal vs. vertical e-markets

The distinction between "horizontal" and "vertical" e-marketplaces is based on the kind of supply chains that are supported through the platform, always in a B2B context.

[3] An illustration of the potential of B2B e-markets functionalities can be found in: *The Emergence and Impact of the E-marketplace on SMEs Supply Chain Efficiencies*, op. cit. footnote 2, p. 9.
[4] *B2B Internet trading platforms: from hype to reality* in *European Commission Staff Working Paper on B2B Internet trading platforms: opportunities and barriers for SMEs - a first assessment*, op. cit., footnote 1, p. 6.
[5] These objectives are also underlined in the *Report of the Expert Group on B2B Internet trading platforms, final*, op. cit. footnote 1, p. 3.

Horizontal e-markets

Commonly known as "hortals", these e-markets refer to product groups and take place around a supply market that cuts across several industries. Examples of this e-market category include the many marketplaces being set up to buy and sell MRO (materials, repair and operations) which, although necessary for the delivery of the final product, do not become part of this final product[6]. In hortals, companies mostly transact over indirect materials not constituting the very essence of their business, such as office equipment, consulting services and spare parts[7].

Vertical e-markets

Contrary to "hortals", the vertical e-markets (called also "vortals") gather together market forces from the same industry sector. The rationale behind the vortal model is to facilitate the selling and purchase flows of products being specific to a particular industry. Accordingly, vortals are popular for goods and services within the medical and chemical industries, building and constructing or the steel and textile sectors.

Unlike "hortals", companies mostly participate in vertical e-markets to buy or sell direct materials constituting the final product. For instance, a company producing hygiene articles can buy paper from one "vortal" and chemicals from another[8].

2.1.1.2.2 Neutral vs. business-driven e-markets

Considering the ownership model, we can distinguish three types of B2B e-marketplaces: neutral, consortia and private e-markets.

Neutral e-markets

Neutral or independent e-marketplaces are those established by a third party who is neither seller, nor buyer. These marketplaces are often set up by software providers or system operators which basically serve as intermediaries between suppliers and customers. Normally, these intermediaries represent the neutral third parties who establish the processing and participation rules of the e-market platform they offer[9]. From a functional viewpoint, the e-market platforms which fall within this category are independent, stand-alone websites or portals, to which access is basically free.

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[6] Example taken from article *The Emergence and Impact of the E-marketplace on SMEs Supply Chain Efficiencies*, op. cit. footnote 2, p. 10.
[7] e-hortals can be found for instance at: http://www.liquidaton.com and http://www.tramatch.com.
[8] An example of a "vortal" e-market is "Plastics net" at: http://www.plasticsnet.com.
[9] An example of a neutral B2B e-market is "Fashion United" at: http://www.fashionunited.com.

Consortia e-markets

Parties who pursue common business objectives on the supplier's or buyer's side may decide to join forces by establishing a collaborative e-market platform. To the extent that such business alliances are not caught by competition law, the e-market consortia which are then set up are either purchase-oriented or sale-oriented.

In purchase-oriented consortia, a limited number of buyers come together in order to establish an efficient purchasing process[10]. On the other hand, a sale-oriented consortium implies a limited number of suppliers brought together to extend and promote their selling activities[11].

Private e-markets

Major players are often not eager to participate in e-markets which are joined by other competitors. As an alternative, these companies offer their own e-marketplace through which they deal solely with their own suppliers and/or buyers. The afore-mentioned distinction between purchase-orientated and sale-oriented e-marketplaces is relevant to this category as well[12]. From a functional viewpoint, private e-markets reflect practically a closed transactional environment between the company having set it up and its trading partners[13].

2.1.1.3 A variety of trading models

Compared to more traditional e-commerce activities, B2B e-markets implement commercial models that are constantly evolving to translate new business needs and the experiences that the market has gained over time.

The following inventory presents in summary the B2B e-markets business models that are widely known on the EU market. Most of these models can be found back in basic literature on B2B e-marketplaces. However, the classification discussed herein does not pretend to be exhaustive in indicating all possible variations of the basic B2B e-market structure that have ever become operational. Likewise, this indicative classification does not preclude the existence of B2B e-market trading models specific to a given country or countries. If really existent, such "national models" may

[10] The former WorldWide Retail Exchange (http:www.worldwideretailexchange.org) and former GlobalNetXchange, including Sainsbury's and Carrefour (http://www.gnx.com), now merged to www.agentrics.com, are representative examples of this type of e-markets.

[11] For instance, on Transora (http://www.transora.com), more than 50 suppliers trade with a large number of retailers.

[12] Examples of such private e-markets come from Motorola, Cisco, Del, etc..

[13] Comments regarding the added-value of private e-markets and scepticisms about their genuine nature as e-marketplaces can be found at: *Les places de marché électroniques, des enchères inversées au développement de services à valeur ajoutée*, article of Pascal Roos, published by CREG (Centre de Ressources en Economie et Gestion, Académie de Versailles, France; *Why B2B e-markets*, article from W. Cepacino and R.W. Dik published in Outlook Journal, Accenture, July 2001.

not have gained sufficient popularity in an EU-wide scale to be referred to herein.

Starting from the simplest trading portraits of B2B e-marketplaces, the list evolves towards more advanced trading forms. The criterion of this classification is the transactions functionality that the given e-market supports.

2.1.1.3.1 Pinboards

Pinboards (or Bulletin Boards) represent the most basic form of communication exchanging on a B2B e-market. They provide an opportunity to announce a concrete desire to buy or to sell a good or service and to prepare for a transaction[14]. However, the basic elements of the transaction (price negotiation, terms of sales, etc.) are formed outside of the e-market, thus off-line.

2.1.1.3.2 Catalogues

In its simplest version, the e-catalogue is the electronic version of a company's paper catalogue. Instead of uploading this inventory of offers on its own website, a company may decide to join an e-marketplace whereby its offers will appear together with identical, similar or complementary offers of other suppliers. The e-market solution of e-catalogues enables interested sellers to build their own catalogues and then to have it transposed on the website of the e-marketplace. Alternatively, companies joining the e-market can build their catalogues with the help of the e-market itself.

Quite often, e-catalogues include thorough detailed description of the products offered for sale (accompanied by pictures, sound, 3D images, etc.). These products may be linked to a fixed price appearing on the online catalogue or maybe not. In certain cases, the e-catalogue marketplace enables selling negotiations and transactions to be performed on-line through an integrated e-commerce solution. In other cases, potential buyers may only see the goods (and probably their pre-determined prices) on the trading platform, being invited to take up next steps with the sellers concerned off-line.

E-catalogues are mostly beneficial for buyers looking for very specific and not-easily substitutable products, such as chemicals, electronic components or particular pieces of medical equipment. In these situations, the cost and effort to search possible supply sources on the Internet in order to compare quality and prices can be high. Additionally, it may not be easy for potential buyers to detect such material through general and not product-specific business directories.

[14] As described in *Report of the Expert Group on B2B Internet trading platforms, final*, p. 4; *European Commission Staff Working Paper on B2B Internet trading platforms: opportunities and barriers for SMEs - a first assessment*, p. 7.

2.1.1.3.3 Buyer aggregation models

This type of B2B e-market is the opposite model to (aggregation) catalogues. Under this model, buyers - especially small ones - join forces to put forward a large purchase offer in order to receive volume discounts from sellers.

The benefit of such a model is evident for companies which, because of their size and market power, would be unable to get the same price discounts from sellers as large buyers.

2.1.1.3.4 Exchanges

Exchanges function similarly to pinboards with the major difference that negotiations between sellers and buyers take place on the e-market itself.

In principle, suppliers and customers do not negotiate the parameters of the sale they are interested in through direct communication but they use the "exchanges" platform as an intermediary. Let us suppose that a good is put up for sale (usually, with an indicative price) and this is openly communicated through the e-market website. The potential buyer will not send its offer directly to the seller but it will forward it only to the operator of the e-market. After collecting and processing all offers relevant to the product, the operator of the e-exchanges will pass the most suitable bids to the seller, who can decide whether to accept a submitted bid or not.

A specific type of exchanges is the commodity exchange model. Like in the stock market, on the e-marketplace supporting commodity exchanges, the availability of the same products is guaranteed but the prices are subject to changes (increasing or decreasing).

2.1.1.3.5 Auctions

The standard type of auction ("English auction")

Auctions are one of the most known one-to-many transactional mechanisms, besides catalogues and exchanges. The classical auction mechanism can also be adapted well in a virtual environment through the introduction of automated procedures.

Normally, when talking about "auctions", the so-called "English" type of auction comes in mind.

In a standard (English) auction, an initiating party[15] puts up a good or service for selling and invites interested parties[16] to submit price ascending bids in order to get it. Auctions are basically negotiation

[15] The terms "offeror", "(auction) invitor", "(auction) initiator", "auctioneer" may be used in an invariable way to qualify the seller.
[16] The terms "potential buyers", "bidders", "candidate buyers" may be used in an invariable way to define the party interested in buying.

mechanisms stretching the purchasing prices upwards. In other terms, the auctioneer expects that potential buyers will compete with one another by gradually increasing the price of their bids so that the product or service is finally attributed to the bidder having submitted the highest bid. It may happen that the offeror sets by himself a first price beyond which he can consider bids (minimum price). It is also often that auction initiators have already fixed a price below which they do not intend to sell the product/service on offer (reserve price).

Regardless of the specific parameters of the e-auction process, the e-auction model does imply that the object of the offer is described in clear and precise terms, so that the determination of the price shall suffice to "close the deal" (agree to sell to a specific bidder). The duration of auctions should in principle be limited in time. However, the e-auction mechanism allows the submission of asynchronous bids (bidding may take place at different times until the deadline of closing the auction is reached).

On the other hand, the role of the e-market platform supporting auctions may differ from one transaction model to another. For instance, in an e-auction, market operators may simply upload their own network of private bidders with which the offeror wishes to transact (closed e-auction network). Alternatively, the e-auction operator may undertake a much more decisive role; it can determine, for instance, the criteria that bidders need to fulfil to join the platform or the rules according to which the auction process will be conducted ("rules of the game").

The "Dutch" auction

As the standard (English) auction, the Dutch model of auction is based on the same philosophy of selling a product or service through the submission of bids. But contrary to English auctions, this type of auctioning is based on price descending bids.

In practice, the auctioneer puts up for sale a product or service at a high price which it reduces over time. Potential buyers follow the price decreasing process and when an acceptable price for them is reached they make a bid that fixes the price.

Unlike the English model, Dutch auctions typically last a short period of time, thus requiring bid synchronisation.

Other formats of auctions

A great variety of other auction models have emerged from market practices (sealed-bid auctions, the "Japanese" auction, "cherry picking" auctions, etc). Some models are easily adapted in the Internet environment, some others not. It may happen that these models combine features from the typical English auction or the Dutch auction with their own particular processes.

A detailed overview of such models is however out of the scope of this Study[17].

2.1.1.3.6 Reverse auctions

This type of auction falls within the one-to-many models of e-markets but, contrary to classical auctions, it is initiated by buyers.

In this model, persons wishing to buy a specific product or service invite sellers to submit their price proposals (bids). Sellers compete with each other by submitting concurrent bids that follow a dynamic downward pricing. The rationale behind the price-descending mechanism is that the product/service will be bought at the lowest price proposed.

However, this does not mean that the price is the only criterion in an online auction. Usually, sellers can participate in reverse auctions once they are qualified against specific criteria set by the reverse auction initiator or the e-market operator. This pre-qualification of bidders enables buyers to purchase products and services at low prices, while assuring that the bids originate from sellers which have adhered to certain conditions.

Reverse auctions can be organised as an open or closed process (public vs. private reverse auctions). In the first situation, any seller satisfying the criteria for bidding as fixed by the e-market or the buyer may take part in the e-marketplace. In the second case, buyers invite to the process only the companies with which they are prepared to do business. In the last situation, the price of the auction bid becomes a core deciding factor[18].

2.1.1.3.7 Variations of e-market types

The business literature on e-markets sometimes extends the list of the trading models discussed above to other categories. The inventory presented herein is not limitative given that e-market models are subject to the rules of the market and the purposes sought through the set-up of a given e-market platform.

Indicatively, other transactional types that are often commented as distinct e-markets models are: Negotiations, Request for Quotes (RFQ) and Request for Proposals (RFP), e-markets combining more than one types of facilities (e.g. catalogues and exchanges, or catalogues and auctions, etc.), collaborations[19], etc.

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[17] A thorough description of the English and Dutch auction and of their variations can be found at: *Internet Marketplaces: The Law of Auctions and Exchanges Online*, Christina Ramberg (consultant editor Ch. Kuner), Oxford University Press, 2002, p. 36 and ff.

[18] The distinction between "public" and "private" reverse auctions can be found in the report *B2B e-Marketplaces* of Marija Popovic, op. cit. footnote 1, p. 25.

[19] Descriptions of these models may be found, *inter alia*, in report *B2B e-Marketplaces* of Marija Popovic, op. cit. footnote 1; *The Emergence and Impact of the E-marketplace on SMEs Supply Chain Efficiencies*, op. cit.,

2.1.2 B2B e-markets as vehicles of e-business evolution: strengths and show-stoppers

2.1.2.1 The state of play of e-markets trading today

Pessimistic forecasts about a major decline of B2B e-markets in the beginning of the new millennium have not actually been confirmed by the business reality[20]. Although the uptake of the e-markets structures may not have attained the high records that were initially expected, statistical data demonstrate that this new form of trading is gradually becoming an integral part of B2B e-business[21].

Rather than representing at present a booming phenomenon, B2B trading platforms are nevertheless undergoing a consolidation phase. At a global level, predicting figures about the B2B e-markets growth from 2004 to 2006 that have been reported by various sources are quite positive[22].

The sectors in which transactions over e-markets are increasingly frequent are, in particular, the procurement of ICT services and of certain manufacturing activities, such as electronics and transport equipment[23].

2.1.2.2 The benefits of the B2B e-markets deployment

Since the beginning of their creation, e-marketplaces have been perceived as a key driver of the e-business evolution. The reasons of the market interest in this structure are indeed numerous.

The following categorisation provides only a short outline of the core advantages that this business module can bring to its participants in the B2B context:

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footnote 2; the website of eMarketServices, at: http://www.emarketservices.com.

[20] *The Emergence and Impact of the E-marketplace on SMEs Supply Chain Efficiencies*, op. cit., footnote 2, p. 11.

[21] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Enhancing Trust and Confidence in B2B Electronic Markets*, July 14, 2004, see Annex 1, p. 4.

[22] Article *E-marketplace development* by Vineet Singh, August 2004, published in eMarketServices at: http://www.emarketservices.com, p. 2 and 3, and relevant references. According to the latest figures issued by e-Business W@tch, 50% of the European firms are purchasing supply goods and/or MRO goods online, amongst others, through Internet trading platforms, in *European e-business report 2004*, summary, p. 13.

[23] Detailed figures for these and other sectors can be found in e-Business W@tch reports (2002-2003) as quoted in Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Enhancing Trust and Confidence in B2B Electronic Markets*, Annex I, table 3; *European e-business report 2004*, summary, p. 13.

(a) the "network effect" of e-markets:

A host of benefits may derive for participants thanks to the interaction scheme enabled by the platform. Both suppliers and customers may take up realistic opportunities to reach their counter-parties through the continuous information flow and the automated procedures that an e-market can offer. It is expected that, progressively, the e-marketplace will consolidate a new business model for inter-enterprise communication. Innovative formats of business transactions, such as e-auctions and catalogues, can contribute to the dynamic exchange of goods and services under very competitive terms which can be equally interesting for both buyers and sellers. In the advanced models of e-markets, not also only information may be exchanged, but a great part of the transaction itself can be handled on the platform. More importantly, e-markets are quite flexible platforms and evolutionary over time, thus easy to be adapted to the level of transparency and automation desired by the business actors.

(b) the advantages in terms of business costs:

Many of the benefits of the e-market structure can have an immediate or indirect effect on the cost-cutting and financial plans of a business. By participating in an e-market, most enterprises think of the savings that can be secured in terms of sourcing, communication and administrative costs. Many prospective sellers or many candidate buyers may be reached in an efficient and direct way through an e-market, reducing significantly employment time and effort. On the other hand, the transactions performed over an e-marketplace when terms and conditions and steps of processing are clear and transparent can save the time, money and effort that would be spent in negotiations and paper exchanges. Finally, e-market structures offer unprecedented opportunities to companies for a more efficient management of their supply and purchase chains, which have, in all probability, a financial impact.

(c) the "adds-on" in business profitability:

The e-market business model offers unique opportunities to enterprises to expand their existing activities, extend their client portfolio or create new business. The e-market itself, especially if it is well-known, represents a strong marketing tool for all companies participating in it. The business opportunities opened up to participants are in principle equal, irrespective of the companies' size and market power. Thanks to the structure of e-marketplaces, suppliers may set far-reaching objectives in terms of business opening that it would be unthinkable to realise otherwise. Furthermore, e-trading platforms represent a dynamic source of creation of new markets. Business segments which normally would be of no market value for an enterprise (perishable goods, residues and rejects of principal products) can be sourced through an e-market trading these parts. At the same time, e-marketplaces can help the emergence of aggregated markets on which, for instance, principal products together

with accessories, spare parts or repair materials may be made available.

(d) the third-party intermediary:

E-marketplaces, especially in their advanced forms enabling transactions, are often set up and run by neutral third parties, the e-market operators. The role of the latter may vary. Accordingly, an e-market platform can facilitate the contact between counter-parties but it can also undertake a more active role in the operation and conclusion of the transactions made in the platform. If the e-market operator is responsible for establishing the exchanges process ("rules of the game") its intermediation may enhance the participants' trust in the operations conducted on the trading platform. Terms and conditions drawn up by a neutral "middle-man" appear less likely to discriminate or disadvantage certain e-market participants or a certain category of e-market participants (sellers / buyers). In this regard, the involvement of the e-market operator can enhance the equality and transparency on the trading platform.

This list of benefits described above does not exhaust all arguments that have been exchanged on the topic in policy and business literature[24].

2.1.2.3 Barriers to the widespread adoption of B2B e-marketplaces

Despite the unique commercial opportunities that are inherent to e-marketplaces, there has been a general hesitation on the side of European business to invest into the "e-market" trading model.

This scepticism stems from a combination of reasons, notably:

2.1.2.3.1 Market-related weaknesses

(a) A lack of awareness around the "e-market" phenomenon as such:

The integration of information technologies within the business environment was a great challenge a few years ago for both SMEs and multinationals. If, on an average basis, European companies feel now at ease with the implementation of IT mechanisms which have been gaining in popularity (e-

[24] See a non-exhaustive list of relevant studies and articles: *B2B e-Marketplaces* of Marija Popovic, op. cit. footnote 1, pp. 31-36; *The Emergence and Impact of the E-marketplace on SMEs Supply Chain Efficiencies*, op. cit., footnote 2, pp. 24 and below; the website of eMarketServices, at: http://www.emarketservices.com; *European Commission Staff Working Paper on B2B Internet trading platforms: opportunities and barriers for SMEs - a first assessment*, op. cit. footnote 1, esp. p. 7. On the views of the market: *Summary of the Workshop on B2B Internet trading platforms, Brussels, June 10, 2003*, Thorsten Wichmann, Bercelon Research; *E-business: export en electronisch zakendoen*, 22 December 2003 at: http://www.evd.nl/zoeken/ShowBouwsteen.asp?bstnum=97812#emarktplaatsen; *Why B2B e-markets*, article from W. Cepacino and R.W. Dik published in Outlook Journal, Accenture, July 2001; *Business-to-Business Ecommerce*, Ken Walsh, Center for Virtual Organisation and Commerce, ISDS, Louisiana State University, 2000-2001 at: http://projects.bus.lsu.edu/independent_study/vdhing1/b2b; *E-markets: realism not pessimism - addressing the challenges of the e-markets*, PriceWaterhouseCoopers report on the website of PriceWaterhouseCoopers, at: http://www.pwcglobal.com/fr/pwc_pdf/pwc_e-markets.pdf.

mail communication, paperless integration of many "back-office" services - archiving, logistics, etc.), they are not yet familiar with more complicated e-business structures, such as e-marketplaces. Quite often, a small or medium business has neither the knowledge nor the necessary resources (in terms of time, qualified personnel and budget) to explore innovative business strategies when the picture about its pros and cons is not clear.

(b) A lack of practical, neutral information around "e-markets":

Conducting B2B electronic transactions can follow many different forms in an e-market platform. Enterprises are usually uncertain about: i) which marketplaces are really active and trustworthy in their business domain and where they can be found; (ii) which operational model - catalogues, e-auctions, etc. - are best suited for their activities; (iii) how specific transactional models work - e.g. rules about e-auctions can be quite complicated for the non-initiated companies; and - (iv) where to find the right partners, products and services, and all related questions to these topics.

(c) A lack of trust in the e-markets business phenomenon:

To a considerable extent, business actors hesitate to engage into e-market activities because they feel unsafe about: i) if and to what extent new partners introduced through the e-market platform at a distance can be trustworthy; ii) if and to what extent the transaction will be executed without problems; iii) if and to what extent, the IT system supporting technically the platform is secure; and iv) if and to what extent, failures in the execution of transactions can be remedied or compensated.

The above categorisation attempts to regroup a number of *market-related* risks as they have been identified in expert surveys and market reports over the last three years[25].

2.1.2.3.2 Perceptions of a legal nature

Apart from the market-related barriers, a number of perceptions of a legal nature have gradually gained room amongst e-market trading actors.

Such perceptions reflect actually *the uncertainty* of the trading partners, in particular about the following issues:

(a) the applicability of specific rules/administrative practices in e-marketplaces:

As in many other areas of e-commerce and e-business, it is not sufficiently clear which legal rules cover the organisation and operational procedures of e-markets, being a relatively new phenomenon.

[25] For an extensive overview of the major weaknesses of the e-markets phenomenon see: *Report of the Expert Group on B2B Internet trading platforms, final,* op. cit. footnote 1, p. 13; *European Commission Staff Working Paper on B2B Internet trading platforms: opportunities and barriers for SMEs - a first assessment*, op. cit. footnote 1, p. 14 and ff..

The e-market model introduces a revolutionary inter-enterprise functional model going beyond the traditional e-commerce relation. This requires the adoption of an integrated approach also with respect to the laws that shall govern e-markets.

Many operating elements of the e-marketplace concur to create confusion about whether legal rules exist and what they regulate, on issues such as: i) the intermediation of the e-market operator; ii) the potential to engage into multi-party transactions; iii) the way transactions can be agreed on and how to execute them; and iv) how legal problems can be resolved if they occur.

(b) the lawfulness of the operating procedures:

E-markets invite interested parties to be involved in a variety of trade modules (catalogues, e-auctions, etc.). However, it is generally admitted today that European business do not have sufficient knowledge about the trading rules to which an e-market type is subject. It may happen that, electronic auctions are governed by different legal provisions than the ones applying to traditional, off-line auctions. For instance, the electronic conduct of auctions on an e-marketplace will forcibly introduce new elements in the bidding process that may not reflect entirely the way the auction is conducted in the physical environment. Market players are uncertain or unaware about whether the processes they are urged to try on an e-market trading platform can indeed end to lawful transactions. They seem also to ignore what their rights are with regard to these processes.

To these issues should be added the lack of clear information about a number of items, such as: the contractual terms governing a transaction, the different steps of the contract conclusion, the parties' identities or the characteristics of the goods and services put on the e-marketplace, and so on.

European regulation on e-commerce and distance selling addresses these issues to a certain extent. Nevertheless Internet platforms introduce innovative forms of business transaction much larger than the traditional relation between buyers and sellers on a communication at a distance. Besides the phase of distance-selling, the market platform implies rules of participation on a common platform and an evolving relation of making offers, negotiating and concluding contracts, at real-time or not.

It has also been reported that, although the solution of potential conflicts (letter a, above) may be already covered by national regulation, a harmonised legal framework to increase the trust in cross-border transactions is still missing[26]. This lack is more relevant to e-marketplaces than to other trading forms, since e-markets are most often expanded at a cross-border level. But, even if EU legislation can probably address common solutions to some legal problems, at least to some extent, market players are not aware of these solutions and they do not reflect them in their market

[26] *European Commission Staff Working Paper on B2B Internet trading platforms: opportunities and barriers for SMEs - a first assessment*, op. cit. footnote 1, p. 14 and ff.

practices[27,28].

It is one of the objectives of this study to cast some light as to whether the above-mentioned perceptions can indeed be confirmed by the actual status of EU and national regulations governing unfair practices in B2B e-markets.

2.1.2.3.3 Confusion about the fairness of trading rules in B2B e-markets

Market players involved in a B2B transactional model need to be sure about the degree of fairness governing the Internet trading platform. The fair conduct in an e-marketplace may relate to:

a) the organisational model introduced by the e-marketplace, and/or;

b) the rules governing the buyers or sellers' participation in the e-marketplace, and/or

c) the terms and conditions governing the transactions being the "material" object of participants' interaction in the e-market.

In the policy and business literature looking into the e-market phenomenon and its chances of growth, it has been concluded that "…*trust and confidence matters for B2B electronic transactions on the e-marketplace at least as much as for sales to consumers. All market players need to be reassured that the transaction will be completed in a fair and transparent manner*"[29]. This extract focuses mostly on fair rules for the completion of the transaction. However, a market survey has shown, in addition, that the fair conduct in a B2B e-market covers also the way in which the entire trading model is organised on the common platform. Accordingly, an important trust barrier seems to be the lack of information about: (i) the beginning and/or closure of an on-line auction, (ii) the operational rules governing online auctions, and (iii) the criteria for participation in e-markets, with special emphasis on on-line auctions[30].

Indeed, market players are quite concerned about the "fairness" and "unfairness" of introducing on-line trading practices that have been used off-line. Although it is felt that this issue is not so critical for quite traditional types of commerce, like e-catalogues or tendering on the Internet, it remains a burning issue for more complicated participatory trading forms, such as e-auctions.

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[27] See in this regard, *Report of the Expert Group on B2B Internet trading platforms, final,* July 2003, op. cit. footnote 1, p. 20.

[28] A general overview of the legal barriers to the uptake of B2B e-market practices can be found in literature mentioned op. cit, footnote 25.

[29] *European Commission Staff Working Paper on B2B Internet trading platforms: opportunities and barriers for SMEs - a first assessment*, op. cit. footnote 1, p. 25.

[30] See, accordingly, the results of the open consultation on "trust barriers for B2B e-marketplaces" that took place in March 2002 under the conduct of the European Commission, Directorate General Enterprise, comment in *European Commission Staff Working Paper on B2B Internet trading platforms: opportunities and barriers for SMEs - a first assessment*, op. cit. footnote 1, pp. 30 and ff.

With respect to the latter trading model, buyers and sellers have expressed reserves regarding the abusive character or not of certain practices related to the process of selecting bidders or awarding the winning bid[31]. What it is also meant by "unfair practice" seems not so clear to users of e-marketplaces[32].

Another cause of frustration is the identification of the party or parties being the most vulnerable to such abusive behaviours. Unlike in the B2C context whereby roles are quite clear with the consumer being considered as the "weak" party, B2B relations bring together in principle trading partners with an equivalent business force. However, certain transactional practices in B2B e-markets seem to favour by definition a particular market category (e.g. reverse auctions are mostly considered to the advantage of buyers than sellers). In fact it appears that e-markets introduce business models in which "the level playing field" between the trading participants is not so obvious and create market anxieties as to its fairness.

In the following chapters, we examine more closely the link between the law on fair trade and the e-market phenomenon in B2B relations. Moreover, we introduce briefly a set of trading practices which, on an average level, appear to raise serious concerns regarding their (un)fair deployment.

[31] Such practices are discussed in detail below, Chapters 6 to 12.

[32] These worries were expressed during an open Workshop on B2B trading platforms that took place in Brussels on 10 June 2003, *Workshop Report*, Th. Wichmann, Bercelon Research.

3 Unfair practices in B2B e-marketplaces

3.1 The commercial model of the B2B e-marketplace

The establishment of an e-market platform is not an end in itself. The ultimate objective of the setting-up of an e-market is to support and facilitate transactions between trading partners. Ultimately, the e-marketplace provides the interface for end-to-end business relations, from meeting the trading partners to delivering the required products or services.

In the e-market commercial model, we can therefore distinguish two transactional levels:

1. The relation between the e-marketplace itself ("e-market operator") and the trading partners interested in participating in the e-marketplace ("e-market participants"):

The e-market operator may be a neutral party which undertakes to bring together the trading partners without any further active involvement. Sometimes, e-market operators are interested in taking part in the transactions by themselves, either by inviting other parties to transactions they initiate or to participate in transactions initiated by other market participants. Basically, the functions and responsibilities of the e-market operator may vary from one e-market type to another. The content of the relation between the e-market operator and e-market participants is primarily determined in rules prepared by the e-market operator.

These rules actually refer to a conventional relation (contract) that is formed between the e-market operator and e-market participants. Such contract is either express, i.e. in written form, requiring completion of a membership form and acceptance of terms and conditions. But, the contractual relation may also be formed implicitly, i.e. resulting from the mere participation of the e-market participant in the activities of the e-marketplace.

2. The relation between the e-market participants:

"E-market participants" are the business partners which interact on the e-market platform. Their objective is to identify interesting for them business partners with a view to concluding transactions. These transactions can be concluded either outside of the e-marketplace or in the e-marketplace itself. Thus, apart from the contractual relation between the e-market operator and e-market participants, there are also the contracts that participants aim at concluding with each other (e.g. sales contract, service agreements, etc.). The transactions made between e-market participants represent actually the material object of the e-marketplace.

Certain types of e-markets (e.g. auctions and reverse auctions) may encourage the interaction between e-market participants even before the conclusion of a contract. At the stage of bidding in an auction for instance, e-market participants have not yet necessarily taken the decision to contract with a specific partner; they just seek to identify business partners which can offer interesting terms for them to conclude a contract.

3.2 B2B e-marketplaces and the concept of "fairness"

To fulfil their objectives, B2B e-marketplaces are subject to specific rules relating to their organisation and the operation of transactions they support. Normally, such operational rules are prepared by the e-market itself (e-market operator). In this document, the expression "Terms and Conditions - "T&C" - is used in its wide meaning covering any kind of rules governing the function of an e-marketplace and the relations between: a) the e-market operator and the e-market participants; and/or b) the e-market participants (as the case may be).

Such rules may, for example, address: a) the conditions of membership to the e-marketplace; b) the obligations of the e-market operator with regard to the e-market platform; c) the engagements of e-market participants taking place in the e-market trading model (e.g. e-auctions); d) payment terms; e) conditions of sales of the goods traded through the platform, and so on.

However, apart from its own contractual framework, an e-market is subject to general rules of fairness enshrined in national laws and commercial practices. The legal concept of fairness in commercial relations may be defined and understood with variations in the EU Member States[33]. Yet, it appears that, on an average level, a fair behaviour in a B2B context must be understood as a honest professional behaviour that complies with the legal rules and generally-accepted commercial practices in the given sector of business.

It should be emphasised that, for the purposes of this study, the notion of "unfair business practices" in relation to B2B e-markets shall be understood in a twofold sense. In a number of countries, specific regulation governs expressly fair commercial practices. Such rules are within the object of the study at hand. In addition, a commercial behaviour may be considered as "unfair" when contravening specific rules of coercive domestic legislation or of soft-law instruments. In the latter case, the "unfair commercial conduct" becomes actually synonymous to what should be considered as an "illegal" behaviour in the given country.

[33] See also Section 5.2.2 below.

Thus, in the scope of the study, an **"unfair commercial practice"** refers actually to:

Any commercial behaviour that affects or risks to negatively affect the interests of trading partners (be they the e-market operator and/or the e-market participants) or of the e-market itself, which:

a) violates the national legislation, clear administrative and court practices on fair commercial conduct ("fair commercial practices rules" in the strict sense of the term);

b) infringes soft-law regulation, ethical rules and commercial usages as being recognised in a specific country ("fair commercial practices rules" in the wide sense of the term).

3.3 Unfair commercial practices in B2B e-markets: the case-studies

The (un)fair commercial behaviour in B2B e-markets may concern both transactional levels described above: the relation between the e-market operator and e-market participants and/or the relations between e-market participants.

However, a number of practices occurring quite often in the B2B e-market business seem to raise particular concerns as to their "fairness"[34].

For the sake of simplicity, we structure these practices upon three major themes:

1] The preparation, communication and content of Terms and Conditions (T&C)

It is usual that T&C are prepared by the e-market operators themselves or on their behalf. The balanced and fair character of T&C may not be respected in all cases. The insertion of clauses favouring e-market operators in an unjustified manner to the detriment of e-market participants may not constitute isolated and exceptional phenomena in the e-market practices but rather the overwhelming rule.

[34] To see, in this regard, *Summary of the workshop on B2B Internet trading platforms* held in Brussels on June 10, 2003, Thorsten Wichmann, Berlecon Research; Christina Ramberg, *Internet Marketplaces. The Law of Auctions and Exchanges Online*, Consultant Editor, Christopher Kuner Hunton & Williams, Oxford University Press, 2002; *Final report of the Expert Group on B2B Internet trading platforms*, July 2003; *Specifications of the general invitation to tender No. ENTR/04/69; Legal Study on unfair commercial practices within B2B e-markets*, European *Commission*, Enterprise Directorate-General; *European Commission Staff Working Paper on B2B Internet trading platforms: opportunities and barriers for SMEs - a first assessment*, Brussels, November 11, 2002.

Another problem may be that e-market participants are not always able to get full information about the existence of T&C governing their relation with e-market operators or of the content of such rules. Further, a number of clauses of the T&C may be significantly burdensome for e-market participants or surprisingly unusual for them, taking into account the business usages of the particular sector. National regulation may prohibit the insertion of such clauses in T&C as abusive or unfair.

Also, it may happen that operational rules explaining how transactions take place in the e-market ("rules of the game", i.e. rules of the auction process) are not disclosed to all parties, under the same conditions or in the appropriate manner. In some circumstances, it may be allowed that certain information is not equally shared between e-market participants. Such practices may be considered as unfair in certain jurisdictions, although they can be accepted according to the laws or market practices of other countries.

It is quite usual that liability clauses contained in T&C limit to the minimum or exclude entirely the responsibility of e-market operators about core elements of the services they offer through the e-market (the "hardcore" of their business). In certain legal systems it may be considered as an unfair practice if, notably, the e-market operator excludes/limits its liability about:

a) the occurrence of technical problems on the e-market (i.e. break-down of services, no proper functioning of the system supporting the e-auction process, unavailability of services, etc.);

b) the legal/illegal nature and/or the legal/illegal origins of the goods being traded on the e-market platform;

c) the illegal behaviour of participants which primarily aim at influencing the price-setting mechanisms (i.e. puffing, bid shielding, bidders collusions taking other forms, etc.).

All the above issues are actually relevant to all types of e-markets, but they seem to appear with more intensity in advanced participatory forms of e-markets, such as e-auctions (reverse auctions).

2] The legal implications of initiatives, signs and actions of trading partners (e-market participants or operators) in B2B e-markets

Participants may ignore whether and to what extent specific "actions" or "signs" exchanged in the e-market between the e-market operator and participants or between participants may have legal effects on them. Such "actions" or "signs" may be, for example: a) the submission of a membership form for participation in the e-market or the withdrawal of a bid that a participant has previously submitted to an e-auction.

In this respect, a lot of confusion and misunderstandings may be caused between e-market operators and participants as to whether such "signs" or "actions" are binding upon one party (and who). It also has to be examined whether it is fair and legally acceptable to bind e-market participants on the basis of such initiatives, "reactions" or "signs".

Actions of e-market participants that may raise questions as to their fairness are:

a) The binding nature of submission of electronic membership forms.

b) The withdrawals of items placed on e-auctions or the withdrawals of bids put up on e-auctions.

c) The consequences of errors of e-market participants (e.g. erroneous manoeuvres during the electronic submission of a bid).

Although such actions may take place in any type of e-market, they are primarily relevant to e-auctions (reverse auctions).

3] Price-setting mechanisms

It is possible that e-market participants may try to influence the final price of the transaction taking place on the e-marketplace (e.g. the sale of the product put up on auction). Some examples of quite alarming behaviour prominent to influence in an unfair way the final price may notably be:

- *Minimum reserve prices*: An invitor to an e-auction (or the e-market operator acting on its behalf) sets itself a minimum price below which it does not intend to sell the item put up on auction (*reserve price*). Alternatively, the invitor may announce that there is a minimum reserve price but without disclosing its exact amount. The practice of setting reserve prices and/or of not disclosing them to e-market participants may be considered as an unfair market practice on e-auctions in certain countries, but not in others.

This practice, if it appears, is mostly relevant to e-auctions (reverse auctions).

- *Puffing***:** This is a mechanism to drive the prices up (in e-actions) or down (in reverse auctions). The idea behind this practice is that the invitor to an auction, the seller itself or the e-market operator provide artificial bids themselves or via a proxy during a bidding procedure. In this way, the "puffer" expects to urge bidders to bid high (in e-auctions) or low (in reverse auctions), in order to compete with the fictitious price it has submitted. Another practice closely related to puffing is the introduction of non qualified suppliers, which are likely not able to deliver the requested order, in order to influence the final price of the transaction taken place.

Such behaviour, if reported, is mostly relevant to e-auctions and reverse e-auctions.

- *Auction rings***:** E-market participants may make arrangements between themselves (through a formal agreement or *de facto*) about prices or offers they are going to make on an e-marketplace. In auctions (reverse auctions), for instance, bidders may agree not to exceed a certain price by bidding. In exchanges, they may agree to bid up the price of each other's items put up for sale in order to increase artificially the final price.

Such a behaviour would be primarily relevant to e-auctions (reverse auctions) and exchanges.

- *Bid shielding*: This practice concerns arrangements between bidders, in which a bidder agrees with a second party to put up an excessively high price through an auction process. At the same time, the second party makes a bid lower to the usual price of the said item on the market. At the very last moment of the bidding process, the bidder of the excessively high bid withdraws its bid. If no other bid has been submitted by other participants in the meantime (which is highly likely), the winner has as only choice to conclude the transaction with the second bidder. In this way, the product is finally sold at a lower price than its normal market value.

This behaviour could be primarily relevant to e-auctions (or reverse e-auctions by submission of excessively low bids).

- *Identity Theft:* A risk of price manipulation may occur through the theft of a participant's real or pseudo-identity (e.g. abuse of the identity of a participant by other participants). For instance, an invitor in an auction submits a bid in the name and on behalf of another participant/member in the e-market to encourage higher bids from other participants. Finally, the invitor concludes the deal with the bidder who has submitted a higher bid in good faith.

4 Methodological approach

The national legal rules and administrative practices that govern unfair trade practices in B2B e-markets are analysed and compared in this Report according to the following methodology:

- **Analysis from a horizontal perspective**: In this regard, the national legislation is described on a country-by-country basis for all the 25 EU Member States. **Chapter 4** provides an overview of each national legal framework which may prohibit, restrict or subject to specific conditions the commercial conduct in B2B relations and, more particularly, in e-markets.

The objective of Chapter 4 is to provide an objective outline of all kind of rules to which unfair commercial behaviour in B2B e-markets may be subject. Thus, according to the scope of the Study, the legal areas scrutinised in the countries' legal systems are:

i) civil and, especially, contract law;

ii) trade law, notably regulation on unfair trade practices;

iii) consumer protection law (to the extent that the application scope of all or certain provisions cover also B2B relations);

iv) e-commerce / e-business regulation;

v) law of sales and regulation on the provision of services between business partners;

vi) penal/criminal law - for illegal behaviour amounting to criminal offences in a given country.

A synthesis of findings at this horizontal level is provided at the end of Chapter 4.

- **Analysis and comparative assessment from a vertical perspective**: In this regard, the Member States' regulation is discussed through the analysis of specific "case-studies". Accordingly, in **Chapters 5 to 11,** the national findings are presented against a set of legal issues that appear to raise concerns as to their fairness (the "case studies"). These "alarming" issues have been outlined in Section 3.3. above. They are presented in detail in the Chapters in question. For the sake of completeness, they are once more described at the beginning of each Chapter.

The chapters dealing with the "case studies" are structured as follows:

1. "The issue": The section highlights the core legal question that is analysed in the Chapter.

2. "Summary of national findings": The section outlines the high-level findings from all the 25 Member States on the issue discussed. The sections that follow the "summary of findings" section discuss in-depth these findings.

3. "The e-market practices": The aim of this section is to show how the current e-market practices in each country deal with the specific legal issue(s) or situation(s) being the subject matter of each Chapter. The findings summarised in these sections were collected from currently up-and-running e-markets that the expert group has scrutinised in the EU Member States for the purposes of the study.

The aim of the "e-market practices" section is merely to give an insight into the e-market practices on the specific legal problem or issue discussed in each Chapter; it does not have as objective to measure the compliance of the real e-market examples having been selected with the legal rules.

- **An appendix** to this report provides a description of the regulatory framework on unfair trade practices on a country basis - in a more detailed way than Chapter 4 -. To a certain extent, this appendix is a synthesis of the regulation on unfair trade practices in light of the findings of the horizontal and vertical analysis. This appendix is therefore composed by 25 separate national reports, all of them structured in a uniform way.

5 THE LEGAL FRAMEWORK OF UNFAIR TRADE PRACTICES IN B2B e-MARKETS

5.1 The EU legal framework

The e-markets phenomenon is not expressly tackled as such within a specific EU legislative act. However, the B2B e-marketplace as an on-line commercial activity is subject to a variety of legal provisions addressing different aspects of the commercial behaviour (on-line advertising, information duties of service providers, distance selling, etc.).

The overriding fundamental legislation governing business activities through ICT means is the European Directive on e-commerce (Directive 2000/31/EC, herein under also "the e-commerce Directive"). This Directive may be relevant to the (un)fair conduct on B2B e-markets, at least to the extent that it sets out rules on applicable law and imposes transparency requirements on service providers in relation to the pre-contractual phase, the conclusion of contracts and post-order obligations. Several provisions of the Directive may however not apply if the parties to the contract are not consumers (as in a B2B e-market) and agree to deviate from the Directive's stringent rules.

Member States were required to transpose the e-commerce Directive into their national legal systems before January 17, 2002. A first report on the progress of application of the Directive's rules was published on 21 November 2003[35].

Promotional and advertising practices by e-merchants are also subject to the rules of the EC Directive on misleading and comparative advertising (Directive 97/55/EC amending Directive 84/450/EC). The purpose of this act is to protect consumers but also *persons carrying on a trade or business or practising a craft* against the unfair consequences of the misleading advertising and to lay down the conditions under which comparative advertising is allowed. The Directive should be implemented by Member States by 23 April 1999.

A number of other EU legal acts sanction the "unfair" commercial conduct in the B2C area. Although these acts do not cover in principle B2B commercial relations, they provide valuable indications on how the "unfairness" and unfair trade practices can be interpreted also in the B2B context. These Directives are namely:

(i) Directive 97/7/EC on the protection of consumers in respect of distance contracts.

[35] *First Report on the application of Directive 2000/31/EC on the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*, COM(2003) 702 final.

(ii) Directive 93/13/EC on unfair terms in consumer contracts.

(iii) The very recent Directive 2005/29/EC on unfair commercial practices.

5.2 Per country description

5.2.1 Austria

The main source of law dealing with unfair practices in a B2B context is the Federal Unfair Competition Act 1984[36]. Given that this act prohibits any unfair conduct in an economic context, it can apply to cover abusive practices in the framework of e-markets as well. This law is also technology-neutral and, thus, it addresses unfair trade practices regardless of the medium through which they are committed.

The Unfair Competition Act undermines any illegal act committed in the course of business which has an implication on competition between businesses. The prime objective of the law is to protect the individual interests of competitors.

Section 1 of the Act states that: "*any person who acts contra bonos mores in business dealings for a competitive purpose shall be liable to proceedings for a restraining injunction and damages*". Accordingly, the Austrian legal system establishes as illegal any anti-competitive act contravening "good morals".

The notion of "good morals" has been subject to varying interpretations by the Austrian courts. It is noteworthy that the *Oberster Gerichtshof* [37] has interpreted differently this notion over time. Earlier judgments held that it should be assessed in accordance with the decent customs in the field of trade and industry based on the average competitors' moral sense of propriety. This view has been criticised by scholars as being an empty formula since it refers to moral rather than legal principles.

This interpretation of "good morals" is no longer upheld by the Court. Instead, it is now held that the guidelines for the assessment of the notion "*contra bonos mores*" have to be drawn from the legal requirements for the functioning of markets and competition. Thus, the "unfair practice" shall be evaluated with regard to the purposes of competition law, taking into consideration the interests of business, consumers and the public in general[38].

[36] *Bundesgesetz gegen den unlauteren Wettbewerb* (UWG), 1984/448.
[37] Being the highest court in civil and criminal proceedings in Austria.
[38] On the notion of "good morals", see *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, co-ordinated by Prof. Dr. Reiner Schulze and Prof. Dr. Hans Schulte-Nölke, June 2003, Annex, Austrian Report, p. 3.

The main categories of offences that have been found to be covered by the scope of Section 1 of the Act comprise, *inter alia*,:

- the breach of contract and inducement to breach of contract;
- unfair solicitation of consumers: It is, for example, unlawful to exercise "a psychological pressure to buy";
- boycott;
- etc.

The generic prohibition of Section 1 is supplemented by a number of more specific clauses on unfair commercial practices, such as "deception". In this regard, Section 2 of the Unfair Competition Act addresses misleading statements about business circumstances made in the course of business for competition purposes. The statements need not necessarily be verbal. A misleading statement may also be found, for example, on a website. False or misleading statements may concern, for instance, the quality or the origin of products, the price of goods, the possession of awards, the protection by patents, the reason and purpose of a special sale, and so on.

5.2.2 Belgium

There is a core legal instrument in Belgium regulating commercial practices - the Belgian Act on Commercial Practices and Consumer Protection[39].

The most protective clauses of this regulation envisages explicitly consumers. However, a few provisions regulate fair competition in B2B relations. This statute seeks to satisfy two objectives. On the one hand, it aims at promoting fairness in the relations between traders. On the other hand, it envisages to ensure that consumers are protected and adequately informed in commercial relations.

The rationale behind the enactment of the Commercial Practices Act was to provide sufficient protection to the weakest party in a commercial negotiation or transaction, being in principle the consumers. Within B2B e-markets, however, commercial partners involved in business exchanges may not always negotiate or transact on equal terms. In these cases, commercial practices demonstrate that a trader may actually be placed in a weaker position than its counter-parties for several reasons. In these situations, it shall be examined on a case by case basis if the specific precautions of the Commercial Practices Act may be justified in B2B e-market relations in order to protect the weakest party, being this time the less-favoured business partner.

[39] Act of 14 July 1991 as amended, *sur les pratiques du commerce et sur l'information et la protection du consommateur.*

On the other hand, one landmark provision of the Commercial Practices Act addresses by definition business relations. This is art. 93 which provides that:

> "*Any act contrary to fair commercial practice by which a seller harms or may harm professional interests of one or several other sellers is prohibited*".

To note that, the notion of "seller" in the Act is defined in wide terms to include any natural or legal person engaged in economic activities, and not only in sales transactions strictly speaking[40].

The scope and importance of this provision should not be underestimated. Belgian law accepts the theory of "illegal competition": this means that any infringement of a law or regulation by a trading partner in the course of its business, which actually or potentially damages the interests of other traders (or consumers) is considered to be an infringement of the general provision on unfair trade practices[41]. If those conditions are fulfilled, the infringement of the legal rule is sufficient to establish an infringement of the general provision on unfair trade practices. In this situation, Belgian courts do not have to verify in addition whether the act of the trader could be considered to be contrary to "fair commercial practices".

However, the most important added-value of the "unfair practices" clause is that it can be invoked when in practice an "unfair" behaviour according to commercial usages is not prohibited by any legal rule. On the other hand, an infringement of a rule laid down by a professional body or prescribed by a code of conduct does not automatically lead to an infringement of art. 93[42].

The notion of "fair commercial practices" is defined in Belgian jurisprudence. In the contextof art. 93 a standard interpretation is that "fair commercial practices" generally entail the conduct and the customs of prototypical merchants and economic players[43].

Given the wide scope of this generic clause and the fact that it can be invoked when express or more specific provisions on unfair conduct are lacking, it can be inferred that art. 93 may be used to undermine a variety of abusive business conduct occurring on B2B e-markets.

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[40] Art. 1, point 6 of Commercial Practices Act.

[41] This interpretation, referring also to Court decision of the Belgian High Court, Cass. 2 May 1985, T.B.H., 1985, 631, case note I.V., can be found in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, co-ordinated by Prof. Dr. Reiner Schulze and Prof. Dr. Hans Schulte-Nölke, June 2003, Annex, Belgian Report, p. 4.

[42] See L. Cornelis, *Principes de droit belge de la responsabilité extra-contractuelle - L'acte illicite*, Brussels, Bruylant, Maklu, CED Samson, 1991, p. 277; R. Van den Bergh, *Beroepsdeontologieën en eerlijke handelspraktijken: geen synoniemen*, R.W., 1983-84, p. 545-568; References found in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, op.cit. footnote 38, p. 8.

[43] As quoted from *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, co-ordinated by Prof. Dr. Reiner Schulze and Prof. Dr. Hans Schulte-Nölke, June 2003, Annex, Belgian Report, p. 5.

Unfair business conduct under the Commercial Practices Act, including art. 93, is sanctioned (basically through cease and desist orders initiated by harmed parties). Moreover, the law does not preclude criminal sanctions against the person who breaches specific provisions of the law in bad faith (but not of the generic provision 93 as discussed above). Damages resulting from unfair conduct may be obtained on the grounds of civil law[44].

5.2.3 Cyprus

Cypriot laws and regulations referring to unfair trade practices relate as such to seller-consumer relations.

In principle, any agreement in a B2B context, even though when one of the contractual parties is in a weaker position than the other, is considered valid and "fair" as long as: a) there is compensation and b) there is no cause to treat the agreement as void or subject to annulment.

In a B2B relation, including the e-markets environment, an agreement may be declared null and void under the following causes:

a) lack of consent (absence of agreement upon the same issue as understood by all parties);

b) lack of free consent (the consent expressed has been the result of deceit, psychological pressure, etc. exercised by one of the parties);

c) coercion;

d) undue influence;

e) fraud;

f) misrepresentation (any manifestation by words or conduct that amounts to an assertion not in accordance with the facts).

Apart from these causes of annulment deriving from basic civil law principles, a transaction taken place on an e-market platform will be deemed invalid in the following situations:

a) unlawfulness: when it violates legal rules;

b) restraint of trade: when it results in unjustified trade restrictions and distorts fair competition;

[44] E.g., on the basis of fault in tort law (art. 1382 Belgian Civil Code).

c) restraint of legal proceedings: when it deprives contractual parties from bringing before justice disputes arising from the agreement;

d) uncertainty: when contractual terms are vague and confusing.

"In the eyes of the Cyprus courts" (as the court rulings often state), these causes go hand-in-hand with the term "unfairness". They are not used interchangeably though - the term "unfair" is used in addition to the specific cause challenged before the courts.

Relevant to the validity of agreements in e-markets may also be cornerstone provisions of the Cyprus Contract Law (Cap. 149) which deal with "consent".

According to Section 10(1) of this law: "*All agreements are contracts if they are made by the free consent of parties capable of entering into a contract, for a lawful consideration and with a lawful object*…". Further, Section 13 states that: "*Two or more persons are said to consent when they agree upon the same thing in the same sense*", whereas Section 14 stipulates that "*Consent is said to be free when it is not caused*…" by the six causes specified above.

It is noteworthy to pinpoint that the notion of "(un)fair trade practices" in the Cyprus legal system is closely related to consumer protection (through case-law founded on general contract principles and European legislation, e.g. on unfair contractual terms in consumer contracts). Following a teleological interpretation of these clauses, it can however be inferred that contractual terms that are clearly "unfair" to the detriment of a business party shall be caught by courts even in a B2B relation.

5.2.4 Czech Republic

Chapter Five of Part One of the Czech Act no. 40/1964, as amended, regulates unfair trade practices in a B2C context. This regulation does not cover, however, B2B relations[45].

The Czech regulatory framework which could apply on unfair trade practices in the B2B e-markets may be summarised as follows:

- General legal principles of the Commercial Code which provides for a specific section on "unfair competition"[46]. The core provision of this section contains a general prohibition of unfair competition. The notion of "unfair competition" has been formed through practice and covers, among others, false advertisement, false description of goods and services, bribery, etc.

[45] Act No. 40/1964 Coll, Civil Code, as amended.
[46] Sec. 44 and following of the Commercial Code.

- Article 265 of the Commercial Code which provides that:

"The exercise of rights and duties contrary to fair trade practices is not legally protected".

According to this provision the abuse of rights or any other action which is detrimental to other business partners is excluded from legal protection. The provision represents an overriding rule prohibiting the unlawful conduct in business relations.

- Criminal law provisions: specific and serious unfair practices may also constitute criminal offences in the Czech legal order, for instance fraud, breach of binding principles of commercial relations, violations of rights on trade names, etc.

5.2.5 Denmark

The main regulation that can apply to unfair practices in the B2B e-markets environment in Denmark is the Marketing Practices Act[47]. Only a few provisions of this Act address solely B2C relations, basically the prohibition of certain prize competitions and the regulation on guarantees.

Section 1 of the Marketing Practices Act sets out that private business activities and similar activities undertaken by private bodies shall be carried out in accordance with *good marketing practices.*

It should be noted that the concept of "marketing" upon which the whole Act is articulated shall be understood in wide terms. It comprises any commercial activity undertaken by private firms, ranging from initial efforts, such as advertising, to the formation of contracts and of standard contract terms, including the various sales activities deployed by the company. Thus, the word "marketing" actually addresses any business activity[48].

Good marketing practices may derive, *inter alia*, from what is generally admitted in society (e.g. undisputed rights of a person, economic interests) or rules consolidated by industry and trade (e.g. as prescribed in codes of conduct).

Further, Sections 2, §1 of the same Act is of particular relevance to the B2B e-markets context. Accordingly, it is prohibited to make use of any false, misleading or unreasonably incomplete indication or statement likely to affect the demand for or supply of goods, real or personal property, and work and services. Same acts are considered as unlawful if they are improper in relation to other persons carrying out trade or business.

[47] The Marketing Practices Act of 14 June 1974 (consolidated Act 699/2000 being amended in 2002) constitutes the core of the Danish legal framework regarding unfair commercial practices.

[48] As per comment in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, op. cit. footnote 38, Danish report, p. 2.

It is important to highlight that illegal actions which cannot be sanctioned on the grounds of the specific provisions of the Act, may be caught under the generic clause of Section 1[49]. Thus, Section 1 serves in a way as a "default" provision to undermine commercial practices that deviate from the imperatives of the "good" commercial conduct.

Infringements on the grounds of Marketing Practices Act open the way to injunction proceedings before courts. In addition, any person violating the rules of the Act, including of the generic provisions of Section 1 and 2, can be held liable to pay damages to the parties harmed on the basis of general tort law. Yet, criminal sanctions cannot be imposed solely on the basis of the generic provision of Section 1.

5.2.6 Estonia

The Estonian Act on Contract Law[50] seems to be the most relevant legal instrument to cover unfair conduct relating to B2B e-market transactions.

In particular, Sections 35 to 45 of the Estonian Contract Law Act makes provision of standard terms used in contractual relations, also in a B2B context. A reason of invalidity of such standard terms is the *unfair harm* caused to counter-parties. The unfair harm is presumed if a standard term: a) derogates from a fundamental principle of law or b) restricts the rights and obligations of the counter-party as they normally derive from contract, so that it is doubtful whether the purpose of the contract can still be attained.

Furthermore, Section 62 of the same Act sets out a number of rules relating to the conclusion of contracts at a distance, basically following the rules of the EU Directive on electronic commerce. In this respect, for instance, appropriate technical means shall be provided to customers putting orders at a distance in order to identify and correct typing mistakes with regard to the electronic orders they send.

It also appears that the Estonian Consumer Protection Act[51] may apply to B2B relations, and, hence, to undermine unfair behaviour deployed in B2B e-marketplaces. Amongst the practices set forth in Sections 43-47 of this law, cases that may be relevant to e-market trading refer for instance to: the offering for sale of harmful goods or services, the failure to provide information about products' characteristics or conditions of use, the failure to provide true information about products or services in the Estonian language, and so on.

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[49] As per comment in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, op. cit. footnote 38, Danish report, p. 9.
[50] Act entered in force on 1 July 2002 - RT I 2002, 53, 336.
[51] RT I 2004, 13, 86, as amended.

5.2.7 Finland

Two legal instruments can be relevant to unfair trade practices occurring in B2B e-marketplaces: the Act on Unfair Practices in Business (UTPA)[52] and the Act on the Regulation of Contract Terms between Businesses[53].

According to Section 1.1 of UTPA "*good business practice may not be violated nor may practices that are otherwise unfair to other entrepreneurs be used in business'.*

Section 2 of the same act prohibits untruthful or unlawful statements harmful to other tradesmen in the business. The harmed entrepreneurs may be suppliers at the same level or even distributors at a lower level.

However, the law does not define in itself what constitutes unfair business practice nor does it provide guidelines on how this term shall be interpreted. A typical unfair business practice under this regulation is communicating misleading or wrong information of product or service.

The notion of "good practice" derives from various sources such as decisions of the (unofficial) Board of Business Practice[54] and from self-regulation among tradesmen. However, the market court is not bound by self-regulatory rules. In general, in the Finnish legal system, the "good business practice" can be defined as a generally acceptable action in the business activity conducted by a diligent and honest tradesman[55].

5.2.8 France

The fairness in the conduct of commercial transactions is not regulated by a specific statute or explicit regulation in France. The principle of fair trade is indirectly invoked in several areas of the French private law. However, there has been a recent legal initiative which is described in the supplement to this chapter.

Unfair trade practices in a B2B context, including B2B e-marketplaces, may be caught under the general provisions of the Civil Code and more specific clauses of the Commercial Code. The notion

[52] Act 1061/1978 aiming at securing the interests of tradesmen and fair trading in general.
[53] Act 1062/1993.
[54] According to *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, op. cit. footnote 38, the Board of Business Practice operates in subordination of Finnish Central Chamber of Commerce (Finnish report, p. 4). Although its decisions are not binding, they help tradesmen to define the scope and the content of good business practice (idem, p. 6). The highest jurisdiction to settle disputes on fair trade practices arising between traders is the Finnish Market Court.
[55] As quoted in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, op. cit. footnote 38, Annex, Finnish report, p. 4.

of "unfair competition" has actually been formed by case-law and can be sanctioned on the basis of a cease and desist order and of damages for the loss suffered.

According to basic tort rules, a person (incl. traders) injured by a competitor's or any merchant's particular trade practices can seek redress under the tort principles[56]. A variety of cases constituting unfair practices have been brought before the French courts, invoking in principle competition breaches (such as the damage of competitors' reputation or the imitation of competitors' products or company, etc.).

On the other hand, one of the key provisions of the French Civil Code stipulates that contracts shall be performed in *good faith*". The principle of contractual good faith is actually linked to this of "fairness". The latter shall strike the balance between the freedom of parties to give to their contractual relation the content they wish and the need to prevent abuses on the manner in which contractual obligations should be understood and executed by parties.

Under the French Commercial Code, trade practices that are considered as illegal and unfair comprise:

- *The refusal to deal*: Prohibition of refusal to deal applies to businesses only when such refusal is part of an illicit collusion or an abuse of dominant position. Nevertheless, French civil law allows a professional to challenge any refusal to deal under general French tort law principles.

- *Price maintenance*: The practice of setting a minimum price for goods, services or retail margins is prohibited. A maximum resale price may still be set, so long as it does not result in sale at a loss.

- *Resale at a loss*: This practice is prohibited for goods sold "as is", i.e. which have not been substantially altered by the seller. Resales at a loss are authorised only on exceptional circumstances, e.g. to align prices to the competitive level of the market.

The consequences of unfair conduct against the infringing company are, *inter alia*:

- to cease and desist the unlawful conduct;
- to destroy the means being in the origins of the unfair behaviour;
- to pay damages to the party harmed; and/or
- to provide information on the parties involved in the production or marketing of the unlawful products.

[56] Primarily on the basis of art. 1382 and 1383 of French Civil Code, providing, i.e., that a person intentionally or negligently causing injury to another is liable to the injured party for damages.

Apart from civil law sanctions, specific unfair practices may constitute criminal offences (e.g. price maintenance and resale at a loss). The penalty varies depending on the prohibited conduct that was entered into (fines, imprisonment, closure of business website, etc.).

Recent development in France- Supplement

During our legal Study and the drafting of our final report, an important legal development has occurred in France with the adoption of an Act in favour of SMEs. The Act n° 2005-882 of 2 August 2005, the so-called "*Loi Dutreil*"[57] has as ambitious objective the modernisation of commercial relations and seeks to further regulate the relations between providers and distributors, especially by introducing additional protective measures in the Commercial Code ('Code de Commerce').

The *'Loi Dutreil'* introduces new provisions and modifies already existing provisions in various fields, including the funding for starting up a company, simplifications concerning the daily management of a company and the transfer of companies.

In reaction to challenges from certain providers association, the Act provides in its section VI ('Modernisation of Commercial Relations') a legal framework for reverse (e-)auctions.

In this respect the Act inserts a new article in the Commercial Code comprising the following principles[58]:

- I. A contract is not valid (…) in case the organised reverse e-auction did not respect one of the following principles:

[57] La loi n°2005-882 du 2 août 2005 en faveur des petits et moyennes entreprises, J.O. n° 179 du 3 août 2005, page 12639.

[58] After article L. 442-9 of the Commercial Code the following article L. 442-10 is inserted:
«Art. L. 442-10. - I. - Est nul le contrat par lequel un fournisseur s'engage envers tout producteur, commerçant, industriel ou personne immatriculée au répertoire des métiers sur une offre de prix à l'issue d'enchères inversées à distance, organisées notamment par voie électronique, lorsque l'une au moins des règles suivantes n'a pas été respectée :

1° Préalablement aux enchères, l'acheteur ou la personne qui les organise pour son compte communique de façon transparente et non discriminatoire à l'ensemble des candidats admis à présenter une offre les éléments déterminants des produits ou des prestations de services qu'il entend acquérir, ses conditions et modalités d'achat, ses critères de sélection détaillés ainsi que les règles selon lesquelles les enchères vont se dérouler ;

2° A l'issue de la période d'enchères, l'identité du candidat retenu est révélée au candidat qui, ayant participé à l'enchère, en fait la demande. Si l'auteur de l'offre sélectionnée est défaillant, nul n'est tenu de reprendre le marché au dernier prix ni à la dernière enchère.

II. - L'acheteur ou la personne qui organise les enchères pour son compte effectue un enregistrement du déroulement des enchères qu'il conserve pendant un an. Il est présenté s'il est procédé à une enquête dans les conditions prévues au titre V du présent livre.

III. - Les enchères à distance inversées organisées par l'acheteur ou par son représentant sont interdites pour les produits agricoles visés au premier alinéa de l'article L. 441-2-1, ainsi que pour les produits alimentaires de consommation courante issus de la première transformation de ces produits.

IV. - Le fait de ne pas respecter les dispositions des I à III engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé. Les dispositions des III et IV de l'article L. 442-6 sont applicables aux opérations visées aux I à III du présent article».

1. Preliminary to the auction, the buyer or the person organising the auction communicates in a transparent way and without any discrimination to all the candidates allowed to bid the determining elements of the products or services he seeks to obtain, the purchasing conditions and modalities, the detailed selection criteria as well as the rules applying to the auctions;

2. At the end of the auction period, the identity of the selected supplier is disclosed at the request of a candidate who has participated in the auction,

- II. The buyer or the person organising the auction registers the progress of the auction and stores the data for a period of one year. He is represented in case an investigation is carried out in the conditions as foreseen in section V of the Commercial Code;

- III. Reverse e-auctions organised by a buyer or by his representative are prohibited for agricultural products (…) as well as for food products for daily use resulting from a first transformation of those products;

- IV. Not respecting the provisions I to III engages the responsibility of the offender and obliges him to repair the caused damage (…).

In addition to the obligation to pay damages, the *Loi Dutreil* also lays down severe prison sentences (2 years) and fines (30.000 €) for price manipulation concerning reverse e-auctions, especially if the price manipulation takes place through one of the following means:[59]

- by diffusing, by any means, deceptive or libellous information;

- by introducing into the market or by soliciting either offers intended to trouble the market prices, either unbalanced high or low bids in relation to the prices asked by the sellers or service providers;

- by using any other fraudulent means.

An attempted price manipulation is subject to the same sanctions.

[59] The new article L. 443-2 of the Commercial Code:
«I. - Est puni de deux ans d'emprisonnement et de 30 000 d'amende le fait d'opérer la hausse ou la baisse artificielle soit du prix de biens ou de services, soit d'effets publics ou privés, notamment à l'occasion d'enchères à distance :
1° En diffusant, par quelque moyen que ce soit, des informations mensongères ou calomnieuses ;
2° En introduisant sur le marché ou en sollicitant soit des offres destinées à troubler les cours, soit des sur-offres ou sous-offres faites aux prix demandés par les vendeurs ou prestataires de services;
3° Ou en utilisant tout autre moyen frauduleux.
La tentative est punie des mêmes peines.(…)»

The *Loi Dutreil* is a first initiative of France to regulate reverse e-auctions by sanctioning some unfair commercial practices. Although this initiative takes away the legal uncertainty in this area, the usefulness and the efficiency of the Act is still to be awaited. Taking into account that reverse e-auction can involve bidders and sellers of various jurisdictions and that the e-auction gives rise to cross-border transactions, the question arises whether it is appropriate to regulate these e-auctions at a national level.

5.2.9 Germany

In German legal system, a distinction shall be made between the regulation applying to contractual content and the rules applicable to (un)fair trade practices.

The German *Act on Unfair Competition* (UWG)[60] may be considered as applicable to both B2C and B2B relations. Therefore, its applicability can be extended to B2B e-marketplaces as well.

According to §3 UWG acts of competition that are *unfair* and capable of materially distorting competition by harming competitors, consumers or other market participants are prohibited.

This provision, which is the cornerstone of the German legal framework in the field of fair trade practices, is subsidiary to other provisions of the UWG and other acts that regulate specific issues. Several categories of unfair practices covered by general clause of §1 have been distinguished by the courts and legal literature. A number of these cases concern practices detrimental on competitors or competition as a whole.

Relevant to anti-competitive (unfair) conduct in a B2B e-market are notably the cases of:

- Obstruction ("*Behinderung*"): This category covers a wide range of unfair practices that harm the interests of competitors, *inter alia*, boycott, discrimination and coercion of other businesses and predatory pricing.

- Breach of Law ("*Rechtsbruch*"): This category covers cases in which a trader gains an advantage over his competitors by breaching his statutory or contractual obligations.

- Market Disturbance ("*Marktstörung"*): Such category of unfair conduct addresses practices which have a detrimental effect on an indefinite number of market participants. Unfair conduct which disturb the functioning of the market as a whole fall under this category[61].

Based on the implementation of Directive 93/13/EC, the German regulation on unfair contractual

[60] *Gesetz gegen den unlauteren Wettbewerb* ("UWG") of 7 June 1909, as last amended on 8 July 2004.
[61] See also *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, co-ordinated by Prof. Dr. Reiner Schulze and Prof. Dr. Hans Schulte-Nölke, June 2003, Annex, German report, p. 2.

content (e.g. unbalanced terms and conditions, abusive clauses, etc.) is primarily directed to protect consumers. On the contrary, the same rules leave a margin of interpretation in the B2B context. However, German jurisprudence has applied the principles governing B2C relations in purely B2B situations as well[62].

Civil remedies and criminal sanctions against unfair commercial acts are possible under the German Unfair Competition Act. The injured party may demand injunctive relief or sue the violating party for damages. Anti-competitive behaviour (e.g. deceptive advertisement) can also be sanctioned as criminal conduct[63].

5.2.10 Greece

The core regulation in Greece on unfair trade practices that may also extend to transactions held on e-marketplaces is the *Unfair Competition and Unfair Practices Law* 146 of 1914 (as amended). This statute regulates issues relating to unfair competition and unfair practices in trade, industry and agriculture.

Article 1 of this statute provides for a "generic clause" prohibiting any act with anti-competitive purpose relating to commercial, agricultural or industrial transactions which contravenes "*bonos mores*". Other provisions establish specific prohibitions of acts distorting competition, such as the disclosure of business secrets or the engagement in specific anti-competitive practices (art. 7).

The protection granted by the Unfair Competition and Unfair Practices law is basically of a civil nature, consisting of actions of discontinuance of unlawful practices and actions for damages. Actions are primarily brought by the injured party[64]. The purpose of the Act is to protect traders from unfair practices of their competitors contravening good morals.

In the Greek legal system, the concept of "good morals" (*bonos mores*) refers to the ethical and social principles which are generally recognised in society, as these are felt by a fair and honest average person.

In particular, article 3 of L. 146/1914 prohibits all inaccurate statements in the context of any declarations or notifications made in public and intended for a wide circle of persons, which (statements) are capable of creating the impression of an extremely favourable offer.

By way of indication, the law provides certain cases which are regarded as "*inaccurate statements*" for its purposes, i.e. these concerning:

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[62] As mentioned in the German Report, Question 9, Annex I.

[63] See *The New Law Against Unfair Competition: An assessment* by M. Finger and S. Schmieder, German Law Journal, vol. 6, n°. 1, 1 January 2005, p. 8 and ff.

[64] See Apostolos Georgiades about Greece in Matthew Bender & Co. , Inc. Pub. 927.

a) The quality of the goods (or services)

b) The origin

c) The way the product has been manufactured

d) The pricing of goods or services

e) The way through or source from which the product has been supplied

f) The possession of prizes or other distinctions

g) The cause or purpose of the sale and

h) The quantity of the goods for sale.

The purpose of the above Act is to protect the interests of competitors of the person or business which makes the inaccurate statements. Consumers (end-users) who were misled into buying a product as a result of the inaccurate statements may also benefit from this clause.

In cases of infringement of the above law, the person violating its provisions may be sued for damages as well as in order to omit making the inaccurate statements in the future. Criminal responsibility (which may draw imprisonment of up to six months and pecuniary punishment) can not be excluded in cases where the false statements were made deliberately for the purpose of misleading the public.

For the time being, there is no explicit case law or legal literature supporting that the Unfair Competition and Unfair Practices Act covers also B2B e-marketplaces. However, given the broad scope of this Act, it is inferred that unfair and anti-competitive practices in relation to transactions deployed in e-marketplaces will be caught by this regulation.

The core legislation in Greece on consumer protection[65] regulates various forms of unfair, misleading and comparative advertising and provisions on distance-sales contracts. However, the scope of application of this law covers only B2C relations. Most of the legal doctrine considers that the Act applies to businesses if they act as end-users (i.e. as final recipients) of products or services.

[65] Law 2251/1994 for the protection of consumers having incorporated into the Greek legal system the following Directives:

a) 85/374/EC concerning liability for defective products.
b) 85/577/EC in respect of contracts negotiated away from business premises.
c) 93/13/EC on unfair terms in consumer contracts
d) 84/450/EC concerning misleading advertising.
e) 92/59/EC on general product safety.

A part of the legal doctrine, however, is of the view that the exact interpretation of "consumer" should be made on an "*ad hoc*" basis. To infer whether a tradesman may invoke the provisions of this law, one should take into account: on the one hand, the *ratio* of the provisions of law to be applied in the light of EU law and, on the other hand, the negotiating strength of the parties[66].

5.2.11 Hungary

The general regulation that may apply to cover unfair trading in B2B e-markets in Hungary is the *Unfair and Restrictive Market Practices Act*[67].

The purpose of this Act is twofold. First, to struggle against the unfair practices of fellow competitors against each other. Second, to eliminate competition restrictions and abusive market dominance inline with the EU competition regime.

This statute is in general applicable to a B2B context, save certain clauses applicable only in B2C relations (e.g. Chapter III on the prohibition of unfair influencing consumers' decisions).

The core rule of the Act relevant to unfair trade in B2B e-markets stipulates the prohibition to conduct economic activities in an *unfair manner*. Besides this generic rule, the law introduces a number of examples that shall be considered as contravening unfair trade: violation of the good reputation of the competitor; gaining access or using business secrets in an unfair manner; false making of the goods; violation of the integrity and fairness of bidding[68].

Disputes which arise from unfair practices of this kind are introduced before the competent ordinary courts and not before the competition authorities[69].

In a study published by the Hungarian Competition Authority in October 2000, it is confirmed that e-commerce formations (such as e-marketplaces) are also covered by the competition rules applying to traditional markets. However, commercial practices outlined in this report are mostly discussed from a competition viewpoint (cartels, anti-trust collisions) rather than as conduct contravening unfair trade law or trade practices in general.

However, the concept of consumers under this Act shall be meant broadly, covering customers, buyers and end-users. In a recent case, the Hungarian Competition Authority ruled that a car dealer is regarded as the consumer of the general importer[70]. In order to evaluate the misleading conduct in a

[66] See the meaning of "consumer" under the new law 2251/1994, E. Perakis, DDE 1995, 32.
[67] Act LVII of 1996, setting the new legal framework of competition in Hungary.
[68] *Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices*, article of Dr. Gergely Antal, November 2002, published in newsletter of Drhidasi & Partners.
[69] *Competition Office's Resolution affects Trademark Use*, article of Dr. Orsolya Görgenyi and Dr. Andras Szeckskay, internet publication of Szeckskay Law Firm, February 2002.
[70] As cited in Hungarian report, Question 9, Annex I.

B2B relation, competent bodies and courts in Hungary take into account that professionals in general must have different knowledge than average consumers. Thus, protective clauses favouring primarily consumers shall be adjusted accordingly when they are to apply to businesses.

5.2.12 Ireland

As a rule, Irish law relating to unfair trade practices applies primarily to B2C transactions. Indeed for transactions between traders and consumers, the law assumes that the consumer is always the weaker party and, accordingly, it requires special protection.

Nevertheless, certain core principles of common law doctrine and Irish legislation may apply to unfair trade practices in B2B e-markets.

a) Unconscionable Bargain

In certain circumstances the laws of equity may intervene to set aside as "unconscionable" a transaction where the parties to the transaction have unequal bargaining positions and the weaker party has not been adequately protected. It is usually assumed that the parties in a B2B transaction will be in equal bargaining positions and that accordingly the doctrine may not be applicable. However, this is not always the case. In principle, it is difficult to obtain relief from an allegedly unfair bargain if the transaction is struck between two commercial organisations. However, the case of *O'Flanagan v Ray-Ger Ltd.* (28 April 1983, unreported) High Court seems to indicate that even business transactions may not be immune from the doctrine of unconscionable bargain.

b) Misrepresentation

It seems that the doctrine of misrepresentation may also apply in relation to B2B e-markets if: (i) a negligent or fraudulent representation of fact is made by or on behalf of one party to another, (ii) the representation is untrue, and (iii) the other party was induced to enter the contract by reason of the representation. Under this doctrine, the innocent party may, depending on the circumstances, be entitled to damages or to equitable relief including the right to have the contract rescinded.

c) The Sale of Goods Acts 1893 and 1980

Sections 12-15 of the *Sale of Goods Acts 1893 and 1980* imply a number of conditions into a contract for the sale of goods (e.g. adequate description of goods sold, fitness to purpose, etc.). In cases in which the seller deals other than with a consumer, these implied terms may only be excluded where it is shown that it is fair and reasonable to do so[71].

[71] Section 55 of the Sales of Goods Acts 1893 and 1980.

Moreover, the Sale of Goods Act regulates specific aspects on e-auctions that are discussed in Chapters 6 to 12 below.

d) Consumer Information Act 1978

Certain provisions of the *Consumer Information Act 1978* would seem to apply in relation to B2B e-markets. This Act provides for an increase in the level of accuracy required and information given in relation to the supply of goods and provision of services. In particular, the Act provides that it is a criminal offence if a person offering to supply goods of any description or provide any services gives by any means a false or misleading indication of prices or charges, or if it makes a false statement. Furthermore, the Act provides that a person shall be guilty of an offence if he, in the course or for the purposes of a trade, business or profession, recklessly makes a statement as to services which he knows to be false to a material degree. Thus, businesses making statements on an e-marketplace may commit an offence where they fail to comply with some of the provisions of the Consumer Information Act 1978.

Other Irish statutes are maybe relevant to e-marketplaces but the practices they describe are out of the scope of this study: misleading advertising, intellectual property infringements and anti-competitive behaviour[72].

5.2.13 Italy

A number of provisions of the Italian regulation on unfair trade practices aim specifically at protecting consumers following the implementation of the EU consumer protection legal framework in the Italian legal system. These new rules have either been incorporated in the Italian core legal instruments (e.g. Civil Code) or they form a distinct regulation. However, these provisions do not apply to transactions which do not involve consumers.

On the contrary, relations between commercial operators are usually governed by general principles on unfair competition conduct. Such rules apply in all situations in which it is possible to apply a relation of competition between two or more traders. According to the Italian rules, it is not required that market players are involved at the same supply and/or purchase level to establish a competitive relation; an interaction of parties operating at different levels of trade (e.g. producers and distributors) should also align with fair competition provisions.

Within B2B e-markets, unfair practices may cover the commercial conduct of the trading partners (invitors / sellers / buyers) involved, if a) these parties interact in a competitive environment and b)

[72] These laws are respectively: The European Communities (Misleading Advertising) Regulations 1988, the Merchandise Marks Act 1887 to 1978, and the Competition Act 2002.

the commercial conduct of one party causes or may cause a competition damage to its counter-parties.

The most important provision of the Italian legal system connected with unfair trade practices is article 2598 of the Italian Civil Code. This article prohibits, *inter alia*, any conduct of a competitor - either direct or indirect- which does not conform to the principles of *professional fairness* and threatens to damage the competitor[73]. The clause is deemed to solely protect the interests of competitors.

This clause has been used extensively by courts and legal doctrine to sanction any commercial behaviour which is not expressly caught by the specific anti-competitive "causes" of the rest of art. 2598 C.Civ.

The standard of *professional fairness* has been interpreted as referring: either a) to commercial customs, which are established by the business community, or b) to a wider (but also less defined) standard of fair behaviour. The assumption of whether the said behaviour is "fair" implies a comparative judgment of the conflicting interests involved.

Trade practices violating fair professional conduct may brought before the judge by means of injunctive relief. The decision can prohibit the continuation of the acts at hand while it can take all needed measures to remove their damaging effects, such as:

- payment of damages if the unfair anti-competitive behaviour was performed with fraud, malice or negligence;
- publication of judgment in the press;
- restitution/destruction of products.

However, according to most case law and legal doctrine, in order to bring a case of unfair practice related to competition before the Italian courts, it shall be established that: a) both parties are professionals[74], thus that they perform a contract for purposes connected to their trade and b) such parties have a competitive relation.

Regarding the fair conduct of transactions negotiated or performed in B2B e-trading platforms, the general principle of *good faith* of the Italian Civil Code may also be relevant. This principle underpins the phase of negotiation, performance or interpretation of contracts[75], also of the ones

[73] Art. 2598, §3 lays down that: "*Acts of unfair competition are committed by any person who directly or indirectly makes use of any other means not in accordance with the principles of professional fairness, which would be likely to damage the business of others*" (inserted in part of the Civil Code concerning competition).
[74] Art. 1469 - bis, §2 Civil Code.
[75] According to art. 1375, 1337, 1175 and 1366 of Italian Civil Code.

concluded between professionals[76].

5.2.14 Latvia

The most important and protective provisions regulating fair trade in Latvia are integrated into the legislation on consumer protection[77]. This means that such provisions apply first and foremost in the B2C context.

The *Latvian Civil Code* establishes the principle of freedom of will in the negotiation and conclusion of private agreements. Therefore, it is feasible, under the Latvian law, to have parties negotiating or transacting on unequal terms, rendering a party in a weaker position than its counter-parties. Such "unbalanced" formation of contractual relations is allowed as long as contracting parties negotiate and act in good will.

On the other hand, the *Latvian Law on Information Society Services* provides a more lax regime for businesses. Accordingly, if the recipient of the respective service is not a consumer the parties may agree to follow less strict information requirements in their business relations (art. 5 §2).

Certain unfair practices in the B2B context may also be covered in the scope of "unfair competition" being sanctioned by the *Latvian Competition Law*.

5.2.15 Lithuania

The Lithuanian regulatory framework which applies on unfair trade practices in the B2B e-markets may be summarised as follows:

- *General contract law principles*:

Art. 6.158 and 6.163 establishes a general principle of good faith and fair dealing that shall be respected in contractual relations but also during the pre-contractual phase. The commentary of the Lithuanian Civil Code provides that the principle of fair dealing is especially relevant to commercial activities and business relations[78].

[76] On the Italian legal framework of fair trade practices, see also *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, co-ordinated by Prof. Dr. Reiner Schulze and Prof. Dr. Hans Schulte-Nölke, June 2003, Annex, Italian report, pp. 2 and 3.

[77] Consumer Rights Protection Law of 25 November 2001 (as last amended); Law on Liability for Defective Goods and Deficient Services of 20 June 2000.

[78] *Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė (I), Vilnius, 2003*, p. 197-198.

This principle of Lithuanian Civil Code actually follows the UNIDROIT principles of International Commercial Contracts. Therefore, the content of this principle corresponds practically to the comments provided in the UNIDROIT principles.

- *Lithuanian doctrine*:

Cases that are recognised as violating the good faith and fair dealing principles and which are relevant to the practices looked into in this study are notably:

- the offeror fixes too short period for accepting an offer and rejects a late acceptance;
- a party performs its obligations in a non-economic way;
- a person starts negotiations without any intention to conclude the contract;
- a party does not disclose information which is essential for the contract performance[79].

The Lithuanian doctrine recognises the principle of technological neutrality. This means that unfair trade practices in the off-line environment have to be considered as unfair in the on-line context, thus in a B2B e-market platform as well.

5.2.16 Luxembourg

There has not yet been any specific regulation in Luxembourg expressly applicable to B2B unfair commercial practices, including e-markets. However, the Grand-Ducal laws that may be of relevance to commercial conduct deployed unfairly in e-marketplaces are the following:

- *The Luxembourg Act on Certain Trade Practices and Unfair Competition*[80]:

This Act regulates a number of commercial practices and applies to both consumers and traders. Amongst the trading modes regulated by this law figure: auctions, liquidations sales, sales at a loss, snowball systems, etc..

More importantly, art. 14 of this Act contains a general clause on unfair trade practices directed exclusively to competitors. According to this provision: " *Any act by any person exercising a commercial, industrial, artistic or liberal activity, contrary to honest practices in commercial, industrial, artistic or liberal matters or to contractual engagement, which (act) removes or tries to remove a part of the clientele from their competitors or from one of them or which affects, or intends*

[79] However, application of this requirement to business relations is narrower than to consumer contracts, since it is generally admitted that traders act on their own risk and have to be interested in details essential to the contract on their own initiative.

[80] *Loi du 30 juillet 2002 réglementant certaines pratiques commerciales et sanctionnant la concurrence déloyale (LPC)*, as amended.

to affect their competitive capacity is unfair". Thus, the unfair character of a commercial behaviour as long as it can be, or it is actually, detrimental to its competitors is prohibited.

- *The Luxembourg "e-commerce" law*[81]:

The law sets forth specific obligations on transparency of commercial information communicated by electronic means, as well as on the formation of orders and electronic contracts (esp. art. 5, 51 and 52 of the law).

5.2.17 Malta

There is no express Maltese legislation that relates specifically to unfair trade practices in the context of B2B e-markets. However, certain principles of law may derive from a number of legislative acts, being:

a) The Maltese Commercial Code:

Sections 32 to 37 of the Maltese Commercial Code[82] deal with 'Of Limits of Competition". These provisions are applicable in relationships involving traders, i.e. in a B2B context. These rules are not directed towards any particular form of business activity; neither are they made applicable to any specific forum of activity. In this regard, it would be up to the national courts to determine whether they may be invoked in a B2B e-market relationship and, if applicable, the courts shall decide on the extent of their application.

Section 33 of the Code states that traders shall not make use of any false indication of origin of the goods. This rule is subject to an exception in the case where a designation is considered as a common designation according to commercial usage that is not deemed to be false.

Other provisions of these Section refer to the unfair use of a company's symbols and distinctive signs, the use of fictitious names, the defamation of a competitor, intellectual property infringements etc. - clauses not particularly relevant to this study.

Any trader which infringes any of the above rules would become liable under civil proceedings. The injured trader may lodge a claim for damages, but other civil remedies may also be awarded by court.

b) Consumer Affairs Act:

A number of provisions in the Consumer Affairs Act (Chapter 378 of the Laws of Malta) could be invoked by a Maltese Court on the basis of legal doctrine in the context of a B2B e-market

[81] Law of 14 August 2000 as modified by Law of 5 July 2004, transposing the EU e-commerce directive in Luxembourg.
[82] Chapter 13 of the Laws of Malta, "the Code".

transaction. Having stated this, no such occurrence seems to have arisen yet before the Maltese courts.

The provisions in question would be those relating to 'Unfair Practices', notably: unfair contract terms in consumer contracts, misleading advertisements, permitted comparative advertising, offering of gifts and prizes together with the supply/provision of goods and/or services, and provisions of law dealing with misleading representations about a number of different schemes or activities considered by this Act.

c) Civil Code:

The Maltese Civil Code[83] contains a number of provisions dealing with obligations which may be invoked by traders against other traders within the context of a B2B e-marketplace transaction. The provisions in the Code regulating 'Torts and Quasi-Torts' may be invoked by traders against other traders in any form of business relationship and context since they are of general application. Thus, for instance article 1031 Civ. C. states that "*Any person, however, shall be liable for the damage which occurs through his fault*".

Another important provision of general application is art. 1032(1) of the Code which holds that "*A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus pater familias.*"

5.2.18 Netherlands

It is noteworthy that there is no specific legislation on unfair trade practices as such in the Netherlands, not even in connection with unfair competition.

In the absence of a national regulatory framework in this area:

- International conventions become of particular relevance. In this respect, Dutch traders are bound by art. 10bis of the Paris Convention which defines unfair competition as any act contrary to *honest trade practices.*

- All unfair practices issues are subject to the generic rules of Dutch civil law. Accordingly, the unfair conduct may be caught by Dutch legislation of tort, since:

> "*A tort is an infringement of a right, or acting or omitting contrary to a statutory obligation or contrary to unwritten rules of proper conduct in society*" (art. 162, §2, Book 6 Civil Code).

[83] Chapter 16 of the Laws of Malta, "the Code".

Dutch jurisprudence has clarified that an act contrary to *bona fide* trade usage may be considered as a tort, but not necessarily so[84]. On the other hand, fair trade usages and fair competition practices may not always be directed to the same objectives. In this respect, the Dutch legal doctrine supports that if the fair trade usage on a certain market has the intended or unintended effect to prevent third parties from entering that market, the principle of free trade prevails over the trade usage[85].

Unfair practices amounting to unfair competition (when misleading other parties) constitute a criminal offence[86].

5.2.19 Poland

Unfair trade practices in B2B e-marketplaces in Poland are regulated by general unfair competition law.

The key piece of legislation in this respect is the *Act on Suppression of Unfair Competition*[87]. This law regulates the prevention and suppression of unfair competition in business (including commerce and services), in the public interest, in the interest of entrepreneurs and customers, and also of consumers (art. 1).

Pursuant to art. 3 of the Act, an act of unfair competition is any activity in violation of law or good practice if it threatens or impairs the interest of another entrepreneur or customer.

Apart from this generic provision, other articles of the Act define in detail specific acts of unfair competition[88]. However the general clause may serve as an independent legal basis in order to evaluate whether a given commercial conduct distorts fair market relations; and this regardless of whether such behaviour is sanctioned by a specific clause or not[89].

The conditions for the application of Art. 3 clause 1 include:

1. the violation of law or good practice by the activity. The Polish legal doctrine defines "good practice" as the ethical and customary standards which apply in fair business or commercial activity;

2. the activity threatens or impairs the interest of another entrepreneur or customer. In the case law, it has been emphasised that such term should be understood broadly. Namely, it is a specified condition which is beneficial to the entrepreneur or a condition which in the future may be a source

[84] Supreme Court, 8 January 1960, NJ 1960/415.
[85] *Ongeoorloofde mededinging*, Verkade, n°. 20, Kluwer: Deventer 1986.
[86] Art. 328bis Criminal Code.
[87] Act of 16 April 1993, Journal of Laws No. 153, item 1503.
[88] Articles 5-17e of the Act.
[89] *Komentarz do ustawy o zwalczaniu nieuczciwej konkurencji*, E. Nowińska, M. du Vall, Warszawa 2001, p. 25. The authors add that it is possible – relying on the general clause of Article 3 clause 1 – to create acts of unfair competition which are not regulated in detail in Article 5 et seq. of the Act.

of actual or expected benefits for him[90].

The following detailed provisions of the Act may be applicable to B2B e-markets:

- Art. 5, stipulating that: an act of unfair competition shall be any designation of the enterprise which may mislead the customer as to its identity through the use of a business name, logo, abbreviation or other characteristic symbol previously used, in accordance with law, for the designation of another enterprise. Such a provision may be of relevance to commercial practices in B2B e-marketplaces relating to identity theft.

- Art. 11, laying down that: an act of unfair competition shall be any transfer, disclosure or use of other party's information constituting business secrets, or acquiring such information from an unauthorised person, provided that it poses a threat to or impairs interests of an entrepreneur[91].

- Art. 15 clause 1, which prohibits the restriction of access to other competitors through sales techniques like the sales at a loss.

Infringements of the unfair (anti-competitive) practices set forth in the Act may result in:

1) cessation of the infringement;

2) elimination of the effects of the infringement;

3) the production of a single or a series of statements with appropriate contents and in a proper form;

4) payment of damages according to general principles of the Polish law;

5) release of unjust benefits according to general principles of the Polish law;

6) ordering the payment of an adequate amount of money for a specific public purpose connected with supporting Polish culture or protection of national heritage - if the act of unfair competition was culpable.

5.2.20 Portugal

Unfair commercial practices in a B2B context, including e-marketplaces, are covered by highly fragmented regulation in Portugal. In the absence of any specific generic rules on commercial practices, competition and intellectual property rules seem to be the most relevant to sanction the

[90] Resolution of the Supreme Court of 23 February 1995, III CZP 12/95, Monitor Prawniczy 1995/10, p. 308.
[91] The business secret is meant as any technical, technological, commercial or organizational information concerning an enterprise and not disclosed to the public, in respect of which the entrepreneur has undertaken appropriate measures to preserve its confidentiality.

abusive commercial conduct in business relations conducted in e-markets.

The *Portuguese Legal Framework for Competition*[92] is applicable to all economic activities carried out, permanently or occasionally, in the public, private and co-operative sectors. For the purposes of this law, as company is qualified "*any entity that carries out an economic activity consisting in the offer of goods and services in a certain market, irrespective of its legal form or its business or operational practices*".

On the other hand, *the Portuguese Industrial Property Act*[93] establishes a general clause on unfair trade practices supplemented by a (non-exhaustive) list of examples. Yet, this general clause requires a competitive relationship and, additionally, a close similarity in commercial activities between the parties. Accordingly, art. 260 of this law sets out the meaning of "unfair behaviour" as follows:

"Any person acting in the course of business activity and trying to cause a loss to anybody, or to get an illegitimate gain for himself or for a third party is deemed to be acting unfair if his behaviour is in breach of rules or honest trade practices".

This clause provides some indications about what should be considered as unfair commercial conduct. Nevertheless, given that it is contained in a sector-specific law, it cannot serve as a general rule about fair trading.

5.2.21 Slovak Republic

The approach of the Slovakian legal system to unfair commercial practices is quite similar to this of the Czech Republic.

General provisions of the Slovakian Commercial and Civil Codes cover unfair trade practices. These basic rules may also serve to sanction unfair conduct in B2B e-markets.

On the one hand, Slovakian law prohibits unfair commercial practices through rules and principles undermining any unfair competitive behaviour. The section "Unfair Competition" of the Commercial Code defines unfair competition as *the competitive conduct that is contrary to the standard practices of competition and that may be detrimental to other competitors or consumers.* Same section stipulates clearly that such unfair conduct is prohibited.

On the other hand, the Slovakian Commercial Code contains a fundamental provision prohibiting the "unfair commercial practice" in general. Thus, "*the exercise of rights and duties contrary to the fair trade practices is not legally protected*"[94]. On the basis of this clause, the harassment, abuse of rights

[92] Law n°. 18/2003.
[93] *Codigo da Propriedade Industrial*, Decree-Law nr. 16/95 of 6 January 1995.
[94] Art. 265 of Slovakian Commercial Code.

or any other action that aims at placing a trading partner in less advantageous situation than its counter-party in order to promote own commercial interests shall be sanctioned by courts.

In addition, serious cases of unfair conduct may be caught as criminal acts under the Slovakian Penal Code. In this respect, the fraud, the breach of binding principles of commercial interests and violations regarding intellectual property rights (e.g. abuse of business names or trade marks) may be criminally punished.

In principle, the main Slovakian Act[95] on consumer protection does not cover business relations unless a company conducts transactions on a B2B e-market for obtaining goods or products to satisfy its own direct needs. In this situation, it is deemed that the private business acts as a "consumer" and, consequently, it deserves the protection deriving from provisions on fair trade of the consumer protection law[96]. In this case, the Consumer Protection Act stipulates in detail the obligations of a seller towards the company/consumer. Specific provisions about non-discrimination[97] and equal treatment should also apply. On the other hand, any acts of harassment or deceit against the business/consumer should be prohibited as this is the case in a B2C relation.

5.2.22 Slovenia

Two pieces of legislation may cover unfair trade practices in relation to B2B e-markets in Slovenia:

a) The Act on Protection of Competition as amended by the new Act on Protection of Prevention of Competition[98] and b) general provisions of the Slovenian civil law.

With respect to the competition act, any commercial activity which restricts competition on the market or acts in conflict with good *business practices* relating to market access or acts of prohibited speculation is prohibited.

According to art. 5 of the Slovenian Civil Code, parties shall act *honestly* and in accordance with *good business practices* when they enter into the contractual relation or perform it (art. 5).

Another core rule of the Slovenian civil law is the principle of parties' equality in a contractual relation (art. 4 of Civ.C.).

[95] Act n°. 634/1992 Coll. on Protection of Consumer, as amended ("Consumer Protection Act").
[96] The Consumer Protection Act defines a consumer as "*any person buying goods or using services for its direct use or for direct use of members of its household*" [art. 2, sec. 1, item a)]. According to sec. 2 of the same article, "*a legal entity buying goods or using services for its own use shall be deemed as consumer, if such legal entity is towards the seller in similar position than the natural person according to art. 1, sec. 1, item a)*".
[97] Act n°. 365/2004 Coll. on Equal Treatment in Certain Areas, as reported in the Slovakian report, Annex I.
[98] *Zakon o varstvu konkurence*, Official Gazette of the RS, nos. 56/1999 and 37/2004.

5.2.23 Spain

Unfair trade practices in a B2B context are mainly caught under the Spanish regulation on unfair competition[99]. This law should in principle apply to address unfair conduct in e-market platforms as well. The object of the regulation on unfair competition is to protect the development of fair competitive relations to the equal benefit of all market players. The law applies to any natural or legal person acting on the market and it covers all their activities having an actual or potential effect in the Spanish territory. According to the general clause of the Unfair Competition Act "*any behaviour is unfair if it objectively violates the principle of good faith*"[100].

On the basis of this Act, the unfair commercial conduct may be detrimental to consumers, competitors or the market itself.

With respect to business competitors, an unfair behaviour aims at preventing the action of other players on the market and to exploit in a non-justified way their competitive position. Thus, behaving aggressively or violating business secrets or inducing counter-parties to contractual breaches or selling at a loss constitute in principle unfair conduct.

In the same vain, a commercial conduct will be "unfair" towards the market if it violates the institutional bases of the competitive system organised on the market: infringing the market rules or abusing the financial dependency of a party and, again, selling at a loss violate the principle of fairness[101].

In more generic terms, abusive or unfair trade practices are prohibited by core principles of the Spanish civil law. Accordingly, art. 7 of the Spanish Civil Code (CC) stipulates that "*the exercise of rights shall not be abusive*". In addition, art. 1258 CC sets out that consequences deriving from contracts are of a mandatory nature if they are in line with usages and good faith[102].

Furthermore, unfair commercial behaviour in relation to e-market transactions is subject to a special regulation on general terms of agreements[103]. This law covers any contract between trading parties which is not negotiated on an individual basis but is rather "imposed" by a trading partner to other contractors.

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[99] Basically, Act 3/1991 of 10 January 1991, on unfair competition (*Ley de Competencia Desleal*).
[100] Art. 5 of Unfair Competition Act, as reported in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, co-ordinated by Prof. Dr. Reiner Schulze and Prof. Dr. Hans Schulte-Nölke, June 2003, p. 14.
[101] As commented in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, Spanish report, op. cit. 98, Annex, p. 12.
[102] Free translation in English - as reported in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices*, Spanish report, op. cit. 98, Annex, p. 7.
[103] Spanish Act nr 7/1998 on General Terms of Agreements.

The Spanish regulation protecting consumers[104] applies in principle to B2C transactions only. On the grounds of this act, however, as consumers are also regarded companies which acquire, use or enjoy assets, real estate, goods, services or activities as final users. If they are qualified as "final users", companies may also invoke the more protective regime of the Spanish consumer regulation.

5.2.24 Sweden

Four legal instruments in Sweden may be relevant to (un)fair business relations formed in B2B e-marketplaces.

First, the *Swedish Marketing Practices Act* states specifically that it applies in all situations in which an undertaking puts on the market or makes itself inquiries with respect to products in the course of operating its business[105]. The purpose of this law is to promote the interests of consumers, trade and industry and to counter-act marketing practices being unfair to consumers and companies[106].

Section 4 of the Marketing Practices Act stipulates that marketing practices shall be consistent with *generally accepted* marketing practices[107]. Such practices shall not mislead counter-parties as to the origins, quality, nature or other characteristics of products or services. Generally accepted marketing practices shall in principle reflect the usages and commercial customs that prevail in the market whereby the product is being traded.

This core provision applies if none of the more specific clauses of the Act can be invoked. However, unlike the violation of the special clauses, in breaches founded solely on the generic provision, the injured market participants (competitors or consumers) are not entitled to damages. In such cases, compensation is possible on condition that the defendant infringes a prohibition or order issued by the court based on the violation of the general clause[108].

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[104] Especially, Spanish Act nr 26/1984 of 10 July 1984 (*Ley General para la Defensa de los Consumidores y Usuarios*).

[105] *Marknadsföringslagen* 1995:450 of 27 April 1995, Section 2.

[106] In the sense of the law, *good marketing practice* means good commercial practice or other established standards aimed at protecting consumers and business when marketing products. It is more far-reaching that merely "misleading" advertising. Aggressive marketing methods (e.g. pressure to put an order within a very limited time-frame) may be caught under the Act - as described in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices,* Swedish report, op. cit. 38, Annex, p. 6.

[107] "*Marketing must be compatible with good marketing practice and also in other respects be fair towards consumers and businessmen"* - literal translation found in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices,* Spanish report, op. cit. 38, p. 20.

[108] Section 29 of the Swedish Marketing Act, as mentioned in *Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices,* Spanish report, op. cit. 38, p. 20.

Second, the *Swedish Act on Contracts*[109] may apply. Section 16 of this law stipulates that a contractual term or condition may be modified or set aside if it is unconscionable, taking into account the contents of the agreement, the circumstances prevailing at the time the agreement was concluded, subsequent facts and factual circumstances in general. In case that it would be unreasonable to demand the continued enforcement of the remainder of the agreement subsequent to the modification or setting aside of the said clause, the agreement may be modified further or be revoked in its entirety.

Third, the *Act on Terms of Contract between Tradesmen*[110] may be applicable. According to this law, a trading party claiming that a contractual term or condition is unfair may require the Market Court (*Marknadsdomstolen)* to decide about the fairness or not of the said provision. If the Market Court confirms the unfair character of such a clause, it may forbid the undertaking to continue to use such a term under the penalty of fine.

Fourth, unfair practices in B2B e-markets involving credit sales can be caught by the *Act on Credit Sales between Undertakings*. This act applies to credit sales conducted between companies in the course of their business activities.

5.2.25 United Kingdom

As a rule, the UK law relating to unfair trade practices applies primarily in B2C transactions.

However, certain core principles of common law doctrine and UK legislation may also cover unfair trade practices in a B2B context and, hence, in e-marketplaces. These acts are the following:

a) The Sale of Goods Act 1979 (as amended)

This legislation implies a number of terms into a contract for the supply of goods relating to quality, fitness for purpose and the seller's right of title to the goods sold.

b) Business Efficacy

This principle was laid down in the case of the *The Moorcock (1887) 14 P.D. 64* and has been applied many times subsequently.

A contractual term will be implied in a contract if it is necessary in the business sense to give efficacy to the contract.

c) Misrepresentation and Deceit

[109] *Avtalslagen*.
[110] *Lagen om avtalsvillkor mellan näringsidkare.*

B2B contracts may be the subject of claims under the tort of misrepresentation if one party is induced to enter into a contract by an untrue statement made by the other party either negligently or fraudulently.

d) Unconscionable Bargain

There is no equitable principal under UK law that gives relief to a party to a harsh bargain. However, under certain circumstances a party may be able to seek protection. The circumstances are namely: when the bargain is oppressive, where one party has weak bargaining power and the other party has acted unconscionable in exploiting that weakness.

This principle is unlikely to apply to B2B contracts[111].

d) Unfair Contract Terms Act 1977 (as amended) ("UCTA")

This law relates to the validity of exclusion clauses. The provisions protect persons dealing as a consumer as on another's standard terms of business. It is noteworthy that a person is never regarded as a consumer if he is an individual who buys at auction which he may attend in person, or if it is a company that buys at auction[112].

The provisions of UCTA will be unlikely to apply in the case of B2B amendments[113].

5.3 Synthesis of findings of per-country descriptions

5.3.1 The major legal streams

Except for France[114], none of the EU Member States ("Member States") has established to date any specific legal framework to govern the fair conduct of commercial practices in B2B e-marketplaces. However, in all countries, commercial behaviour causing or susceptible to cause harm on e-market trading platforms can actually be caught by rules and trade practices applicable in B2B-relations widely speaking.

From a horizontal viewpoint, the fairness of commercial practices which are formed and carried out in a B2B environment (and thus, in e-marketplaces) is tackled in reality in a variety of legal instruments. From an EU-wide perspective this means that the legal approaches followed in the Member States differ significantly. But more than that, the majority of the national legal systems under examination encapsulate rules relating to fair B2B trade practices in more than one regulations. Hence, the divergence of legal rules applicable to fair trade practices in the business environment is

[111] As quoted from the UK report, Question 9, Annex I.
[112] s.12(2) of the Contract Terms Act 1977.
[113] As quoted from the UK report, Question 9, Annex I.
[114] *Loi Dutreil*, see Section 4.1.8 above.

observed at two levels: at EU level and, quite often, at national level.

Over and above these divergences, nevertheless, it is possible to identify some "common streams" in the way Member States regulate fair trade practices in B2B relations:

Stream 1: In a number of EU countries, the (un)fair commercial conduct is inherently linked to the notion of anti-competitive behaviour, and, thus, to fair competition regulation. This is especially the case in Austria, Germany, Hungary (to a certain extent), Greece, Italy, Luxembourg, Malta, Poland, Slovenia and Spain. The list can, however, be extended if we take into account the combined approaches discussed below.

Stream 2: In a number of Member States, the unfair and abusive commercial practices are mostly tackled through generic principles and rules of civil and commercial law. This is, especially, the situation in Ireland, Cyprus, Estonia, Latvia, Lithuania, Slovakia.

Stream 3: Some countries regulate fair trade practices through legal acts on marketing practices. This is, in particular, the situation in Denmark and Sweden.

Stream 4: In a few Member States, the legal framework to which unfair trade practices in e-markets may be subject is presented quite fragmented, such as in France, the Netherlands and Portugal. In these countries, it is essential to have recourse to principles of tort law to sanction the unfair commercial conduct.

Stream 5: In two countries, namely in Finland and Hungary (partially), it has been noticed that there is special regulation tackling expressly the "unfair practices in business" (Finland) and the "unfair and restrictive market practices" (Hungary).

Stream 6: In one country, Belgium, a cornerstone provision relating to unfair trade in B2B relations stems from a regulation which, to its great extent, aims at protecting consumers.

The above classification of countries is illustrative only and is mainly aimed to facilitate the comparative exercise. It does in no way reflect a "clear-cut" distinction of the EU regulatory landscape on fair commercial practices in e-marketplaces.

As stressed above, the majority of Member States subject the unfair conduct of business in a combination of legal instruments (Germany, Greece, Ireland, Malta, Slovakia, Slovenia, Spain, Sweden…). The most frequent combination is this of fundamental principles of contract or, generally, civil law with rules preventing the anti-competitive behaviour.

Finally, all countries appear to have established clear rules with regard to commercial practices deriving from the EU regulation on e-commerce and the formation of contracts at a distance.

5.3.2 The concept of fairness

The concept of "fairness" or "fair practices" is an established notion in all legal systems under examination.

Accordingly, the Austrian regulation prohibits any act "*contra bonos mores*" in business dealings; the same term is used in the Greek Unfair Practices Law. Similarly, Danish and Swedish laws refer respectively to "*good marketing practices*" and "*generally accepted marketing practices*". It is however clarified that the concept of fairness should not be understood in the said provisions as solely related to marketing activities strictly speaking (commercial communications and advertising). Other jurisdictions use clear terms to make explicit that the given legal instrument addresses fair practices in business, such as Slovenia and Finland (referring to "*good business practices*") or Italy (making use of the term "*professional fairness*"). Belgium and Slovakia refer expressly to "*fair commercial practices*", whilst other countries provides a more ethical nuance to the notion by using terms such as "*honest practices*" (Luxembourg) or by underlying the duties of prudence and care of a *bonus paterfamilias* (Malta).

The concept of "fairness" and its legal implications in each country have most of times been elaborated by jurisprudence (Austria, Belgium, Italy…), recommendations of other advisory bodies (Finland) and/or the practice (Denmark, Estonia). In a number of countries, the legal significance of the term "fairness" or "fair practices" encapsulates also the fairness in which contracts are negotiated and concluded ("contractual fairness"), in the sense of "*good faith*" (Belgium, Cyprus, Greece, France, etc.).

A number of legal systems award a single meaning to the term "unfair practices" regardless of whether these are directed to consumers or traders. Thus, the notion of "fair commercial practices" in Belgium shall be understood as having the same content for consumers and business alike. The case is similar in Greece, since the reference point to assess a commercial conduct as unfair is the perception of "*a fair and honest average person*". In Austria, what is "ethical" and "fair" (in accordance to "*bonos mores*") shall be appreciated not only from the angle of the trader/competitor or the consumer but of the public in general. On the contrary, in the Finnish legal system, the "*good business practice*" shall reflect an action which is generally accepted *for business*, in the eyes of "*a diligent and honest tradesman*".

However, it seems that common elements may be distilled from the variety of the preceding nuances of the term "fair trade practices", so as to support that this notion is legally recognised at an EU level.

5.3.3 Fair trade practices and legal framework on competition

In the majority of legal cultures, unfair practices that occur in a B2B context have been regulated through legal instruments addressing fair competition. In a number of countries, the law refers strictly speaking to competition. Examples are the Austrian and German *Federal Unfair Competition Acts*, the Polish Act on *Suppression of Unfair Competition* or the Slovenian Act on *Protection of Prevention of Competition*. In all these statutes, a commercial conduct is unfair, insofar as it harms or risks to harm the interests and activities of competitor traders. Consequently, the commercial unfair conduct is meant and described in the statute as the corollary of the (unfair) anti-competitive behaviour.

This is also the case with the Greek *Unfair Competition and Unfair Practices Law* or the Luxembourg Act on *Certain Trade Practices and Unfair Competition.* The *raison-d'être* of these statutes is, as in the previous cases, to protect traders from unfair practices of their competitors contravening good morals. However, the protection granted by these laws is of a civil nature and can sanction all unfair "causes" that may harm competitors. In other words, the purpose of these laws is not to eliminate competition restrictions and abusive market dominance, issues which are regulated by classical competition/cartel-law instruments. The purpose of this competition/fair trade practices regulation is primarily to ensure a fair interaction between market players.

On the contrary, the Hungarian *Unfair and Restrictive Market Practices Act* serves both objectives: on the one hand, it struggles against unfair practices of fellow competitors and, on the other hand, it aims at eliminating anti-competitive structures on the Hungarian market.

Most of the above statutes are structured in the following way: a key clause provides for a generic prohibition about unfair business practices distorting competition. Other clauses set forth (most often in a non-exhaustive way) specific practices that should be caught as unfair towards competitor traders.

In a number of countries, unfair trade practices in relation to competitors are incorporated in generic legal instruments, usually civil or commercial law. This is the case, in particular, in Italy and Malta. A provision of the Italian Civil Code stipulates, for example, that any conduct of a competitor which does not conform to the principles of *professional fairness* and threatens to damage a competitor shall be prohibited. The Maltese Commercial Code provides for similar clauses.

It is however noteworthy that the notion of the competitive relation, being the pre-requisite to apply these regulations, is widely described in most of the countries (Germany, Italy, Hungary, Finland…). Accordingly, *competitors* may not only be traders at the same level of supply but, under certain circumstances, even commercial partners active at different levels, i.e. suppliers vis-à-vis distributors. B2B e-marketplaces may often offer a trading model for the creation of such *competitive relations* between trading partners. Therefore, the afore-mentioned statutes may be of direct relevance to

commercial relations evolving in e-marketplaces.

5.3.4 Fair trade practices and civil (contract/tort) law

In almost all countries, fair trade practices in e-markets are governed by general provisions of civil law (France, Ireland, Slovenia, Slovakia, Spain…).

In a number of Member States, landmark principles of contract law fill in the vacuum of special regulation on unfair trade practices (France, Lithuania, the Netherlands). In France, for example, the principle of *good faith* sets the limits to the contractual freedom of parties, so that rights and obligations deriving from contract will be interpreted and performed in a fair manner. In the same vein, the Lithuanian Civil Code establishes the general principle of *good faith and fair dealing* that shall be respected in contractual relations, but also during the pre-contractual phase. Also, the Dutch tort law lays down explicitly that a tort may result from a behaviour *which violates the unwritten rules of proper conduct in society*. In Cyprus, the causes that in principle render a contract null and void on the basis of civil law rules (e.g., lack of consent, coercion, fraud, etc.) may also lead courts to consider the contractual behaviour or performance as *unfair*.

In other countries, cornerstone rules of civil (contract or tort) law complete restrictions imposed by other regulatory instruments (Germany, Ireland, Slovenia…). The Irish courts, for instance, apply principles of the common law doctrine (doctrine of unconscionable bargain, misrepresentation, etc.) to protect the weakest party in an imbalanced transaction, be it consumer or trader. More specific causes of unfair conduct can be caught in Ireland on the grounds of sector-specific regulation (Sale of Goods Act, Consumer Information Act that may also apply in a B2B context, etc.). Besides the express regulation on prevention of competition, unfair trade practices in Slovenia are also subject to the fundamental rules of the Slovenian civil law. Accordingly, parties shall act *honestly and in accordance with good business practices* when they enter into the contractual relation or perform it.

5.3.5 Fair trade practices and marketing laws

In Denmark and Sweden, fair trade practices are constituent of the *good marketing practices*. However, the scope of the marketing regulation in these countries is broader than mere marketing and advertising activities. In fact, the Danish regulation covers any commercial activity, from promotional efforts to contract formation and performance. Under such a wide scope, any commercial activity shall finally align to good (marketing) practices, according to this regulation.

The scope of application of the *Swedish Marketing Practices Act* appears to be narrower, compared to the Danish law. However, unfair trade practices other than the ones subject to the marketing legislation can be caught by other regulatory instruments (e.g. *Swedish Act on Contracts*, etc.).

5.3.6 Special regulation

In a few countries, examples were found of more tailored regulation to the unfair conduct of business.

In Finland, there are two regulations that tackle specifically business relations: the *Act on Unfair Practices in Business* and the *Act on the Regulation of Contract Terms between Businesses.* The core provision of the first statute prohibits the recourse to practices that are unfair to other business entrepreneurs. Also, it makes reference to the standard of "*good business practice*".

In France, a special Act issued in 2005 in favour of SMEs, the so-called *"Loi Dutreil"*, introduced a considerable amendment to the French Commercial Code with a view to undermining unfair trade practices related to e-auctions[115].

In Spain, it appears that the special *Law on general terms of agreement* can also be invoked in a B2B relation, and thus in e-marketplaces. This regulation covers any contract between trading partners which is not negotiated on an individual basis but is rather "imposed" by a trading partner to other contractors.

In Sweden, the *Act on Terms of Contract between Tradesmen* provide means of redress for trading parties claiming that a contractual term or condition is unfair.

5.3.7 Fair trade practices and regulation on consumer protection

Almost all Member States have special regulation on fair trade practices when these are directed to consumers. In a number of countries, the rationale of these laws is to provide a more protective legal framework to consumers, assumed to be the weakest parties in transactions with traders (Belgium, Cyprus, Greece, Ireland, Italy, Latvia…),.

Such protective regulation may also be of relevance in a B2B relation when business partners act as end-users of products and services (Belgium, Greece, Italy, Latvia, Slovakia, Spain). However, it is a matter of legal interpretation (by legal doctrine or courts) from which point on businesses may benefit from the more advantageous provisions of the national laws governing fairness in a B2C context.

A quite distinct case is the fair trade practices regulation of Belgium. The law aims first and foremost to protect consumers. Nevertheless, few of its provisions address also B2B relations (e.g. sales at a loss). Additionally, one of its core provisions refer exclusively to the fairness that shall underpin B2B relations (see Sub-section 5.1.2, above)

[115] This law is also discussed on Section 4.2.8 above.

In certain other Member States (Belgium, Cyprus, Estonia, Ireland, Malta), it has been reported that it may be possible to extend the application of certain provisions aiming primarily to protect consumers in the B2B context. This can be the result of a *teleological interpretation* of the said clauses. In other words, such an extension will mainly depend on the scope and purposes of the said regulation in the national legal system, the circumstances of the given case, the interests threatened, the nature of contractual relation, etc.

6 LEGAL ANALYSIS ON THE BASIS OF THE "CASE STUDIES"

6.1 Unbalanced Terms and Conditions

6.1.1 The issue

In the majority of cases, the conduct of commercial transactions through an e-marketplace is based on a contract (explicit or implicit) between the e-market operator and trading partners. Quite often, participation and involvement in an e-market requires interested trading partners (buyers/sellers) to become members. Parties are invited to fill in electronic subscription forms in order to be entitled to access and transact through the e-market.

Many rules and conditions may frame the relation between the e-market operator and participants on the said e-marketplace or between participants with one another. The rights and obligations of the parties involved in an e-market, as well as the rules with regard to the organisation and operation of the e-market, can normally be found in a variety of contractual documents.

Such documents may be categorised in the following order[116]:

i) Membership terms: any kind of legal document (general T&C, subscription forms, etc.) that lays down the rules and conditions of involvement in an e-market / technical terms of the e-market operation / organisational rules of the e-marketplace / operational "guides", etc.

ii) Contract: binding agreement between the e-market and participants/members regarding their participation in the e-marketplace. This contract differs from the conditions of sales (or other) contract which is the object of the transaction and which generally involves a supplier (seller) of a product or service and a client (buyer).

iii) Conditions of sales: any kind of document (general T&C or specific contract) governing the transaction being the object of the e-market (e.g. a sales transaction).

Basically, these documents are prepared and issued by the e-market operator. It may be the case that in the "e-markets" business of certain countries, the content of these documents is quite standard and participants have little margin or no possibility at all of negotiating their terms. It may also happen

[116] It should be stressed that we mostly use this categorisation here and in the following chapters of this study for the sake of simplicity and in order to avoid the reader's confusion on terminology issues. Such a categorisation does not reflect any strict classification from a legal or doctrinal viewpoint.

that these documents are quite imbalanced in favour of e-market operators.

Another problem may be that these documents are not brought to the attention of the trading partners in the form and at the time they were supposed to be. The e-markets practice may prove that it is often very difficult for existing or candidate participants to get hold of these documents (e.g. to find them easily on the e-market website).

In the sub-sections below, the term "Terms and conditions" and its abbreviation (T&C) shall be understood as any document by which an e-market operator edicts rules regarding its relationship with e-market participants or documents setting rights and obligations with respect to the organisation or the operation of the e-market service as such. The term mostly refers to documents relating to category i) cited above (Membership terms). However, the conclusions highlighted in the following sections refer to any document in general that e-market operators are bound to prepare, make visible on their websites or convey to their contractual parties in relation to their business, as national law may require.

Against this background, the issue examined in the sub-sections below is whether T&C may obviously or indirectly favour e-market operators in an unjustified way, especially in the following manners:

Case 1: The e-market operator binds the (potential or existing) participants by T&C that have not been communicated to them and/or have not been accepted by them.

Case 2: The e-market operator modifies at its own discretion T&C without notifying its participants or having asked them for approval by.

Case 3: The e-market operator binds its (potential or existing) participants by surprisingly burdensome or unusual terms for the specific e-market or the transactions the said e-market platform supports.

Case 4: The e-market operator stipulates in the T&C as applicable law the law of a country having no connections with the parties, the e-market platform itself of the transaction being the object of the e-market.

In relation to all the above cases, the practices of representative samples of e-markets operating in the Member States are also summarised ("e-market practices").

6.1.2 Case 1: Duty of communication of T&C

6.1.2.1 Summary of national findings

It can be stated as a common rule that, in all Member States, it is unfair to bind e-market participants by T&C that have not been communicated to them.

All over the EU, it appears that the contractual parties' knowledge of the legal conditions and rights deriving from contractual relations constitutes a *sine-qua-non* condition for an agreement to be fair and legally valid. In most situations, contractual parties must be made fully aware of the terms and conditions governing the contractual relation, and most of times, before they accept the said agreement. The majority of countries do not require just knowledge, but *specific* knowledge of the exact and precise conditions which are stipulated in the contract. This condition is all the more relevant if such agreements are formed by one party only leaving no or little margin of negotiation to counter-parties (model or standard contracts).

In almost all countries under examination, the obligation of prior communication of T&C to the parties bound by contractual agreements is a general rule applicable in the B2B context. More importantly, this principle binds marketing partners (e-market operators or e-market participants)in B2B e-marketplaces.

However, it has been noted tha, in a number of countries, national courts adopt a certain flexibility in the way of applying this rule in relations between professionals. Yet, such interpretation depends mostly on the circumstances of the given case and it cannot be considered as reflecting a general legal tendency for all EU countries.

6.1.2.2 The legal basis

In the vast majority of Member States, the obligation to make e-market participants aware of the T&C stems from *generic principles and rules of local contract law* (Austria, Cyprus, Hungary, France, Germany, Ireland, Italy, Malta, Sweden, UK…).

Cornerstone provisions of the countries' civil law, underpinned in civil codes or other fundamental law instruments on contractual obligations, constitute most often the legal basis of the communication duty. In two countries, the Czech and Slovak Republics, reference should be made, in addition to other legal sources, to rules set out in their respective commercial codes.

The countries founding such a duty of communication to generic civil law principles represent the most important stream of classification under this issue.

A non-negligible number of countries have *specific legislation* referring explicitly to T&C and the conditions that need to be fulfilled in order to acknowledge standard clauses as a valid part of contracts (Germany, Hungary, Italy, Lithuania, Poland, Portugal, Slovenia, Spain, Sweden). These special rules are in some countries integrated in generic civil law: this is the case in Hungary, Germany and Italy, for instance. In other countries, there is distinct regulation on T&C, as it is the case in Spain or Portugal. The countries having stipulated special rules on T&C represent a second stream of classification.

A third stream of categorisation regroups the countries in which *information society regulation* may provide specific rules on whether T&C must be communicated and how. The relevant provisions on when and how contractual clauses, including T&C must be communicated, are either found in entire legal instruments on e-commerce or ICT services or in other, more generic laws. The most important legal instruments in this respect are the laws or set of rules having transposed the e-commerce Directive in the Member States[117].

Countries in which such e-commerce-related rules may be relevant in the issue at hand are, for example, Austria, Belgium, Finland, Ireland, Italy, Latvia, Luxembourg, Poland, Slovenia - the enumeration is not exhaustive.

It is inferred from the above classification that a fourth category may integrate those local legal systems which stipulate relevant rules on communication of contractual clauses through variable legal sources. In the countries concerned, rules on the obligation to communicate T&C are combined in more than one different legal instruments (Belgium, Finland, Hungary, Greece, Italy, Slovenia, Spain…). Such combination may entail principles of general contract law, together with special regulation, e.g. e-commerce related rules and/or special national rules on standard contracts.

Again, the classification attempted in this section aims at facilitating the purposes of comparative assessment. It does not, thus, represent a strict categorisation of the countries examined. As it is noted, the same country may fall within more than one groups, since the issue at hand is often tackled in a variety of legal instruments.

6.1.2.3 Rules and principles of contract law

6.1.2.3.1 Mutual consent as condition of acceptance of T&C

In most Member States, the prohibition to bind e-market participants by T&C that have not been communicated to them (and, therefore, accepted by them) is inherently linked to basic principles of contract formation (Austria, Belgium, Cyprus, Denmark, Estonia, France, Finland, Greece…). Both

[117] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, *OJ* L 178, 17 July 2000, p. 1-16.

in countries of continental law, as well as in common law countries, an agreement is formed and is legally valid on the basis of parties' free and mutual consent.

The practical effect of the principle of mutual consent is that e-market participants (being contractual parties) can only be bound by T&C to the extent that: i) they had knowledge or could reasonably have knowledge of those T&C and ii) they expressly accepted such terms.

In *Austria*, for instance, general conditions become part of a contract only if the parties mutually agree them to be incorporated into the individual contract[118]. Similarly, the general principles of the *Finnish contract law* sets out the rule that the terms applying for a transaction must be, prior to entering into an agreement, available to the counter-party[119]. The rule of mutual consent is enshrined in art. 1108 of the *French Civil Code*.

In the same vein, the *Estonian Act on Contract Law* requires that contractual parties agree upon the fundamental terms of the contractual relation. In the case that parties have not agreed or only believe that they have agreed on a fundamental term, the contract is valid if it can be presumed that parties would have concluded the contract even though there is no mutual consent on such a term[120]. Likewise, on the basis of the *Hungarian Civil Code*, contractual partners shall agree not only on the elements that are objectively essential for the object of the contract but, also, on issues that parties deem as essential in their agreement[121]. In this context, the *Latvian Civil Code* lays down that the essential elements of a transaction are all elements necessary to its concept and without which the intended transaction would be impossible[122]. The Slovenian law requires mutual consent on the substance of the contract[123].

Accordingly, the *Greek Civil Code* stipulates that a contractual agreement presupposes *proposal*, *acceptance* and *consent*[124]. A necessary condition for the conclusion of a contract is the agreed declaration of the will of the parties. Contractual parties who undertake responsibilities by entering into an agreement must be fully aware of the T&C that govern their relation, otherwise these contractual rules are not binding and may be declared void. Same rules govern the contract formation under *Belgian law*[125]. The same concept of "acceptance" and "consent" is followed in the UK legal system as well.

[118] As per Austrian report, Question 10, Annex 1
[119] As per Finnish report, Question 10, Annex 1.
[120] Art. 27 of the *Estonia Act on Contract Law*.
[121] Art. 205 (1) and (2) of the Hungarian Civil Code.
[122] Art. 1470 of the Latvian Civil Code.
[123] Art. 15 and 18 of the Slovenian Civil Code.
[124] Art. 185 and 189, 195 and 196 of the Greek Civil Code.
[125] Art. 1108 of Belgian Civil Code.

The principle of mutual consent has been elaborated through *case-law in Ireland*. Accordingly, an e-market participant could not be bound by T&C which it could not accept since they have not been communicated to it[126]. Whether or not the T&C have been communicated would seem to be a question of fact; it may turn upon whether or not the e-market operator took reasonable steps to bring the T&C to the participant's attention[127].

6.1.2.3.2 Implied consent

The majority of legal systems under examination accept the principle that mutual consent may be inferred from implied acts (Austria, Belgium, Denmark, Finland, France, Hungary, Luxembourg, UK…). However, the rule of implied acceptance is not valid in all situations and under the same conditions in all countries.

In *Austria*, for example, courts are hesitant to reckon the application of standard T&C in a contractual relation unless such terms are explicitly referred to by parties[128]. In the same way, *French courts* may infer implied acceptance of T&C in certain circumstances; especially, if prior dealings exist between same parties which tend to prove that acceptance is usually implied between those parties[129]. On the other hand, in *Luxembourg*, implied knowledge of T&C is more easily founded in lasting or permanent business relations e.g. if they are drafted on the back of invoices[130].

Along the same lines, *the Belgian legal system* knows the principle of "informed silence". This means that, implied acceptance may be inferred by a party's "silence" only as long as the said party has been fully informed about the conditions governing the said agreement. Such an "informed" silence can only be interpreted as a consent[131]. Nevertheless, the rule of "informed silence" is applied with more flexibility in B2B relations in Belgium. Like the Luxembourg legal system, the Belgian legal doctrine and jurisprudence appear to accept T&C on the back sheet of an invoice when the counter-party is a business professional. Thus, the said T&C communicated to business partners after the contract conclusion are enforceable unless the recipient challenged such clauses once it received the invoice[132].

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[126] *Inter alia*, *Tansey v the College of Occupational Therapists* [1995] 2 ILRM 601;
[127] *Shea v Great Southern Railways* (1944) Ir Jur Rep 26.
[128] Quoted from Austrian report, Question 10, Annex I.
[129] Cited in French report, Question 10, Annex I.
[130] In the light of constant case law, as reported in Luxembourg report, Question 10, Annex I.
[131] Rb. Leuven 9 February 1979, *R.W*. 1979-1980, 1551.
[132] Brussels, 2 February 1977, J.T., 1977, p. 472; Gand, 18 October 1978, R.W., 1979-1980, col. 591; *Examen de jurisprudence* (1974-1982), *Les obligations*, P. Van Ommeslaghe.

Also, it is generally admitted by the UK legal doctrine that the implied consent shall depend on the particular circumstances of each individual case[133].

Accordingly in certain jurisdictions, implied acceptance seems to be more easily accepted in the B2B context, in lasting professional relations and according to business customs (e.g. transmission of invoices).

6.1.2.3.3 The concept of knowledge in the consent

Another issue under the rule of mutual consent is the kind of knowledge that national legal systems require from business partners in order to infer their (explicit or implied) consent on T&C. In the great majority of countries, e-market partners shall be fully aware of the contractual rules that will govern their contractual relation (Belgium, Hungary, France, Greece, Portugal…). In addition, almost all countries recognise the duty of the user of T&C - e.g. e-market operator - to furnish in a certain way such terms to parties who will be bound by them.

In *the Netherlands*, for instance, any clause in standard T&C can be nullified if the user of the terms - i.e. the e-markets operator - has not given the opportunity to the other party to take note of such terms[134]. According to the Dutch law, a party can take note of terms if they have been given by the user or if the user has indicated that they can be looked into at its offices or at a public register[135].

The translation of these rules in the B2B e-markets context from the perspective of the Dutch law shall imply that: as long as an e-market participant has had a reasonable opportunity to view, print or download the T&C, it is bound to such terms, even if it can prove that it has not taken actual knowledge of the contents of those terms. The e-market operator, on the other hand, cannot be excused for not communicating the T&C to participants, since it has an easy tool, namely the website, to do so.

In the same way, a special provision of the *Polish Civil Code*[136] provides that in situations in which a model form of contract, in particular general contract conditions, is customarily accepted in a given contractual relation, it shall be binding upon the other party if such party might have easily learnt about its contents. Also, in the *Lithuanian legal system*, standard contract terms are binding on the other party only if that party was given proper opportunity to get acquainted with these standard contract terms[137].

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[133] As quoted in the UK report, Question 10, Annex I.
[134] Art. 233 Book 6 of Dutch Civil Code.
[135] Art. 234 Book 6 of Dutch Civil Code.
[136] Art. 384 §1 of Polish Civil Code.
[137] Art. 6.185 of Lithuanian Civil Code.

The same notion of parties' "knowledge" or "awareness" about T&C in order to be legally accepted is reflected in the German and Slovenian legal system. Accordingly, T&C under the *German law* would become part of the contract if contractual parties could gain knowledge of them[138]. Likewise, in the *Slovenian legal system*, standard contractual terms elaborated unilaterally will oblige an e-market participant if the latter was acquainted or is considered to be acquainted with the T&C[139].

More flexible rules on the parties' knowledge about T&C that have not been communicated to them appear to apply *in Malta*. To conclude whether the said absence of communication is unfair, Maltese courts will in all probability look into the circumstances of the given case. In this respect, the judge in Malta may rely on the good faith of the parties and on the particular type of contract at hand. The determining factor would be whether e-market participants may perform the contract even though they were not aware of the T&C, which need however be observed. In this situation, the court will examine whether the said participant may abide to the contractual obligations without being subject to hardship and as it seems to be reasonable[140].

6.1.2.3.4 Time of communication of T&C

Regarding the issue of *when* such knowledge of T&C shall be gained, the majority of countries require prior knowledge or knowledge at least at the time of contract conclusion (Austria and Denmark[141], Finland, France, Greece, Hungary, Italy, Netherlands, Poland, Slovenia).

Slight exceptions to this rule exist in a few countries. For instance, in the light of the *Irish jurisprudence* and depending on the circumstances, the e-market operator may integrate applicable T&C by reference into a binding relationship between the parties, notwithstanding that the participant has not seen or read a copy of such T&C. Such incorporation by reference can be valid if, this is explicitly agreed between the parties and a copy of the T&C is in general available[142]. Also, in *Belgium, France and Malta*, *ex post* communication of T&C may not constitute an unfair practice in certain circumstances, especially in B2B context (see Sub-section 6.2.3.2. above).

On the other hand, on the grounds of the general contract law in *Italy*, an e-market participant shall in principle be bound by T&C if, at the time of agreement, it was aware or should have been aware of such terms using ordinary care[143]. This rule may be lawfully translated in practice if: a) e-market

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[138] §§145 ff. BGB.

[139] Objective criteria shall be used in order to determine whether such "acquaintance" of the party with contractual terms is actually true, see Slovenian report, Question 10, Annex I.

[140] As commented in report on Maltese law, Question 10, Annex I, with reference to case law: *Angelo Farrugia v Camilleri Marble Works (1993), and Camilleri v Swan Laundry (1995).*

[141] As implied by the rule that general T&C become part of the contract if parties mutually accept them - see Austrian and Danish report, Question 10, Annex 1.

[142] *Tielney v An Post* (7 July, 1998, unreported); High Court, *Sweeny v Mulcahy* [1993] ILRM 289.

[143] Art. 1341 of the Italian Civil Code and subsequent explanations in Italian report, Question 10, Annex I.

trading partners are somehow "forced" to view the T&C on the website of the e-market concerned and b) click on the "accept" button or similar mechanism, prior to/while entering into the e-markets agreement. Accordingly, if T&C are indicated in some part of the website but are not adequately indicated or brought to the attention of potential contracting parties, they may be considered ineffective.

The interpretation of the Italian rules actually express market practices that derive from national regulation on information society services and, in particular, e-commerce. It is indeed the e-commerce legal framework that mostly addresses questions about when and how T&C shall be communicated to e-market participants. This stream of legal rules is discussed below in this Chapter.

6.1.2.4 Rules and principles of commercial law

Following the recent modification of the Commercial Code through the 'Loi Dutreil' in France as regards to reverse e-auctions, a contract is not valid if the T&C for the e-auction have not been communicated prior to the auction.[144]

In the Czech and the Slovak Republics, the conditions of acceptance of T&C by e-market participants are governed by express rules of trade law[145]. In both countries, it is valid to have the contents of an agreement specified by reference to general terms and conditions, known to the parties or enclosed in the contract. In other words, T&C that are prepared by one party only (e.g. the e-market operator) can fairly bind counter-parties if

a) these terms are known to the contracting parties (and parties express their intention to be bound by such T&C by reference in the contract); or,

b) these T&C are enclosed in the agreement.

A contrario, T&C which have not been communicated and accepted by participants cannot be imposed on them.

Binding e-market participants by T&C that have not been communicated to them is also a prohibited and unfair practice according to the Danish and Swedish Acts on Marketing Practices.

6.1.2.5 Special regulation

In a number of Member States, the condition of prior communication of T&C in order to accept them as a fair practice binding contractual parties (and, hence, e-market partners) is regulated in specific

[144] New article L-442-10 of the Commercial Code inserted by the Loi n° 2005-882 du 2 août 2005 en faveur des petites et moyennes enterprises (article 51).
[145] Sec. 273, §2 of Czech and Slovak Commercial Codes.

laws or special provisions. These rules are most of times incorporated in generic laws as commented above - Germany, the Netherlands, Poland, Slovenia.

Noteworthy are the cases in Lithuania, Spain and Portugal.

In *Lithuania*, the special provisions on standard contract terms are encapsulated in the Lithuanian Civil Code[146]. The condition of having a party "acquainted with" T&C imposed on it in order to accept them as enforceable is commented in the Sub-section 6.2.3.1 above. Moreover, an explicit provision of the Lithuanian contract law establishes a special duty of disclosure of such terms upon the party preparing the standard T&C. In other words, this party (being most often the e-market operator),

> a) shall hand over the said rules to e-market participants in writing before or while they sign the contract;
>
> b) shall inform e-market participants that the contract will be concluded using standard terms before contract signature. In this respect, the e-market operator shall indicate the place where T&C can be found (e.g. downloaded);
>
> c) upon individual request, the e-market operator shall send such T&C to contractual parties.

In addition, Lithuanian case-law has confirmed that if contractual parties have no proper possibility to acquaint themselves with said T&C, these terms cannot be used against such parties[147]. However, the burden to prove that the standard terms were not properly disclosed falls on the party which claims that it did not get knowledge of these rules[148].

In *Spain*, a special statute regulates the validity of general terms and conditions. In case that agreements are complemented by standard terms, there is no consent if contractual parties have not been informed that such terms exist, neither have they been provided with a copy of T&C[149].

Portugal has also enacted special legislation on standard terms, the Standard Contractual Clauses Act[150]. The law stipulates that a service provider (*in casu*, e-market operator) must inform the addresses (*in casu*, e-market participants) of all provisions of the contract so that parties are fully and effectively informed about those conditions.

Therefore, special laws in the above-mentioned countries confirm the general rule that trading

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[146] Art. 6.185 of the Lithuanian Civil Code, esp. §3.
[147] Ruling of the Supreme Court of Lithuania as of 3 May 2000, case no. 3K-3-486/2000, *UAB "Pozicija" v. AB "Lietuvos draudimas*" at: http://ovada.tic.lt/lat/nutartis.aspx?id=18515.
[148] *Lietuvos Respublikos civilinio kodekso komentaras*. Šeštoji knyga. Prievolių teisė (I), Vilnius, 2003, P. 232-234.
[149] Act 7/1998, art. 5, Spanish Report, Questions 9 and 10, Annex I.
[150] Decree-Law n°. 466-85, art. 5, Portuguese Report, Question 10, Annex I.

partners on e-markets shall be fully informed about T&C governing their relations in the e-marketplace. In principle, such terms shall be disclosed as pre-requisite of the signature of the agreements confirming the participation of the said market partners in the e-marketplace.

6.1.2.6 Regulation on information society services

The majority of countries (all old 15 Member States, but also the majority of new adhering Members) have enacted special rules on the formation of contractual relations in cyberspace. Such rules primarily transpose the e-commerce Directive in the local legal systems. This Directive provides a number of provisions about: a) information to be provided by suppliers of information society services before/at the contract conclusion; b) the form in which such information must be made available and c) the time at which this information must be furnished and when electronic transactions are presumed as concluded.

This regulation is particularly relevant in B2B e-markets given that they entail by definition transactions at a distance through the use of electronic means. Since T&C in B2B-markets are inherently linked to the formation of electronic contracts between the market players involved, the conclusion of fair contractual terms need also be viewed from the point of view of the national rules relating to information society services.

In effect, a number of countries have established basic principles on the fairness to bind contractual parties by T&C in e-commerce regulation (meant in the wide sense of the term). This is notably the case in *Austria, Belgium, Finland, Ireland, Italy, Latvia, Luxembourg, Poland, Slovenia.* In most countries, e-commerce related provisions on T&C supplement fundamental rules of the general contract law or other special regulation about standard terms.

The enumeration of countries in this category is not exhaustive. It may happen that other countries may regulate the T&C issue also on the basis of their legal framework on e-commerce. However, such rules have not been explicitly reported since they confirm (in our assumption) what is herein monitored on the grounds of other, general or sector-specific regulation.

On the basis of the e-commerce acts of the above-mentioned countries, service providers (hence, e-market operators) are required to make available general terms and conditions in a way that allows contractual parties to store and reproduce them. *Polish law* requires in addition that such T&C are made available free of charge before concluding the said contract[151].

[151] Polish Act on provision of services by electronic means, art. 8 §1, point 2.

The *Finnish Act on Information Society Services* stipulates that contractual parties operating under this law are obliged to make available to counter-parties applicable contractual terms[152]. If the terms are available, there is no requirement for addressing such terms *de facto*. Yet, the Finnish rules require that a proper reference to T&C is made, in addition to the requirement of easy availability. This reference shall be clearly visible on the e-market website.

In *Ireland*, the European Communities Regulations 2003 do not expressly require a service provider (herein, e-market operator) to provide T&C of an electronic contract to the recipient of the service. Nevertheless, it seems to be an implicit presumption that the relevant service provider should do so. This presumption stems from the general rule to make T&C available in a means enabling their storage and reproduction[153].

In the same vein, the *Latvian Law on Information Society Services* lays down the obligation of the service provider (hence, e-market operator) to ensure that the service recipient is able "to make acquaintance" with the terms of the agreement[154].

6.1.2.7 The e-market practices

Our survey revealed that the market practices in the majority of Member States comply with the requirements of the respective national regulations on the issue of communication of T&C. However, exceptions to this rule have been reported as well.

Accordingly, isolated cases in which T&C are not communicated have been monitored in Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Portugal and the Slovak Republic.

The state-of-play has not been reported in a few countries (Cyprus, Estonia, Greece and Spain). This is due to the fact that: a) either these countries lack representative examples for drawing up generalised conclusions on the issue or b) there are no e-market applications initiated or driven in the given country (Cyprus) or c) the elaboration of regulation on B2B practices is quite new and business practices are still in their infant phase to enable correct generalisations (Estonia).

In the countries in which market usages align with national laws, e-market participants are provided the possibility to take knowledge of T&C that bind them and, in many cases, also to confirm their acceptance of these terms. Generally speaking, e-marketplaces follow three ways to convey information and obtain agreement on e-markets rules:

[152] Act of 5.6.2002/458, §9 and relevant comment in Finnish report, Question 10, Annex I.
[153] Art. 13(3) of the Act, relevant comment in Irish report, Question 10, Annex I.
[154] Art. 7(1), as reported in Latvian report, Question 10, Annex I.

1] E-markets websites provide "tick-boxes" that participants have to mark in order: a) to confirm that they took knowledge of T&C and/or b) to express their will to participate in the e-market service available;

2] E-markets websites rely on the presumption that, once the candidate e-market participant initiates the registration process, this automatically means that he accepts the T&C. In a number of countries (e.g. Lithuania), websites also warn participants not to start using the services of the e-market before (without) being acquainted with membership terms. Most of times, the "registration web page" provide direct hyperlinks to the URL whereon T&C are posted.

3] The T&C of e-markets websites contain in themselves the statement that the user has read and understood the content of T&C. Such a statement is often accompanied by the warning not to use the e-market application in case that (candidate) participants do not agree with a term or various terms.

In *Poland*, the e-market practices on communication of T&C seem to be quite divergent. A number of e-market operators ask candidate participants to send to the address of the operator a written statement confirming that they accept the T&C. On the contrary, seldom are the cases in which application forms contain an express provision stating that it is mandatory to read the T&C before using the e-market and/or which provide tick-boxes. The practice to incorporate a hyperlink to T&C on the registration forms is the most usual practice of e-markets in Poland. However, the visibility of such hyperlink is often doubtful[155].

Same concerns about the visibility and easy accessibility of T&C may be relevant to other countries (e.g. Belgium) but, to a lesser extent, for some others (e.g. the Netherlands[156]).

An example of good compliance has been stated with regard to an Irish website: on an e-auction website, additional T&C that govern a particular auction become available once the relevant auction is advertised. In addition, in respect of particular defined transactions, a further set of T&C is incorporated by reference. In this regard, it is provided that where there is a conflict, the latter T&C shall prevail[157].

However, in certain countries, a number of examples have been cited that are questionable as to their lawfulness/fairness.

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[155] "*Finding a relevant hyperlink is often difficult, operators place the link to T&C in different places (e.g. in the "Help" or "Information" sections)*; *on some websites, it was impossible to find T&C or any other document setting out the rules of using the electronic trading platform"*, as quoted from Polish report, Question 14, Annex I.

[156] As per Dutch report, Question 14, Annex I.

[157] As quoted from Irish report, Question 14, Annex I.

In *Ireland*, the following case has been reported: T&C of an e-market lay down that the participant acknowledges that the seller's trading terms and conditions will constitute the effective T&C for supply of the said goods. In this way, it seems that the said e-market attempts to bind a participant to T&C, and possibly policies, of which he is not aware[158].

In *Sweden*, it appears that a number of e-markets require prior registration before e-market participants have the possibility to take knowledge of the T&C governing the e-market operation[159]. A similar case has been noticed with regard to a *Belgian* e-marketplace.

In a few countries, cases have been reported where membership terms and conditions are not at all referred to on the e-markets website (Latvia, Malta, Slovenia).

In *Latvia*, it appears from the e-markets investigated, that none of the e-market operators have strictly determined membership terms and conditions. Only a few Latvian websites of e-markets contain generally available information regarding ordering, delivery, disbursement, guarantees, etc.. However, there is no express statement regarding knowledge or acceptance of such T&C by e-market participants.

The situation is similar in *Malta*: either the issues of communication or knowledge of T&C are not at all discussed on the e-markets websites or such T&C merely do not exist.

Regarding the examined *Slovenian e-marketplaces*, T&C are usually not posted on websites. Additionally, issues about the participants' knowledge of (and agreement on) the rules governing the e-market services are not particularly addressed on the websites in any of the ways outlined above.

6.1.3 Case 2: Unilateral Modification of T&C

6.1.3.1 Summary of national findings

In almost all Member States, T&C modified by the e-market operator unilaterally without having them previously notified to or accepted by the e-market participants must be considered as unfair. Such national rules are the implementation of the EU e-commerce Directive. Therefore similar regulation should be found in every Member State. In addition, in most countries, unilaterally-modified rules do not bind participants who have not been informed about them; without prior information, such rules can be declared null and void.

[158] Case stated in Irish report, Question 14, Annex I. It may be envisaged that interested buyers may request a copy of any seller's T&C prior to submitting a bid; however, this is not clear from the T&C posted on the website.
[159] As per Swedish report, Question 14, Annex I.

The unfairness of unilateral modifications is generally implied by fundamental rules and principles of contract law, especially the prerogative of mutual consent (as commented above). In the majority of legal systems under examination, this is the most common legal basis to justify the notification of changed contractual terms to e-market participants before considering them as legally binding (Austria, Belgium, Cyprus, Denmark, France, Greece, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Spain, Portugal…).

However, in a number of countries, special provisions (of the civil or commercial law) lay down explicitly how the termination and modification of contractual obligations shall be dealt with (Estonia, Czech and Slovak Republics…).

On the other hand, in certain countries (Finland, Ireland, Lithuania, Malta, the Netherlands, Sweden) unilateral modifications imposed by the e-market operator are unfair *per se*. However, they can be accepted if certain conditions are fulfilled.

In one country, *Poland*, there is specific regulation on how changes can be operated with regard to auction terms.

Finally, the legal system of one country, *Germany*, appears to be less strict regarding the acceptability of non-notified modifications when these operate in a B2B context. Accordingly, it has been reported that in B2B relations (and, hence, in B2B e-markets), it is not necessary to inform market participants about the changes made in T&C or to notify such modifications to them[160].

6.1.3.2 Rules and principles of contract law

The principle of mutual consent and rules on contract formation in the majority of countries require the modifications of T&C to be notified and accepted by counter-parties in order to become part of the contract. Both in continental law and common law countries, the core principle of contractual freedom entails that a contractual party may not amend contractual terms at its discretion without the other party having accepted such modifications.

The e-market participants' acceptance to the changed rules does not need be explicit. No objection to the notification of the modified terms suffices in principle. In other terms, the e-markets T&C may stipulate that notified changes to which business partners express no objection within a reasonable period of time are considered as accepted. Such implied acceptance is actually legally acceptable and fair (Austria, Belgium, Denmark, Finland…).

Generally speaking, amended T&C that have not been communicated and accepted by e-market participants would have no effect on existing contractual relations on e-marketplace. E-market

[160] As per German report, Question 11, Annex I.

trading parties would be bound only by membership or other rules that they have accepted prior to the modification of those rules.

These generic principles allow for certain variations in certain countries, notably:

In *Finland*, it appears that unilateral modifications in a B2B context may not constitute an unfair practice if such modifications are negligible.

In *Ireland*, it is confirmed by case-law that, in certain circumstances, a contractual party may unilaterally modify the T&C as long as the terms governing the parties' relationship expressly allow for this. However, the obligation to notify such new terms remains[161].

Similarly, according to the *Dutch law*, unilateral modification of T&C may well be deemed valid and fair if an explicit provision in membership rules reserves such a right to the e-market operator. Like in the Irish case however, e-market participants shall not be deprived from the opportunity to view the modified T&C. If there is no such a possibility the original unmodified terms remain valid[162].

The same exception is recognised in the *Lithuanian* legal system. Nevertheless, e-market participants may not accept the modified terms which the e-market operator imposes unilaterally if they can prove that the inserted modifications are surprisingly unusual. Also, there is no breach of the good faith principle, insofar as the right of the e-market operator to change T&C at its own will is coupled with the right of the e-market member to terminate the relation if it does not agree with the said modifications.

This condition confirms actually the lawfulness of this practice in other countries, such as *Sweden*: amendments to an agreement at a party's own discretion may be allowed, provided that the other party is awarded the right to cancel the agreement should it not wish to prolong it under the new terms. In addition, Sweden has introduced a particular (judicial) practice to undermine the application of unfair clauses. According to the Act on Terms of Contract between Traders, a tradesman who deems a term or condition as unfair may apply to the Market Court for a decision whether or not the said term is unfair. According to a recent decision of the said court, the party having modified T&C at its discretion was not allowed to do so without granting to counter-parties the right to cancel the agreement[163].

In the *Maltese legal system*, good faith may be a decisive element to assess the fairness or not of unilateral modification in a given case. However, the facts and circumstances of the situation at hand need to be considered.

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[161] *Honiball v McGrath* (23 March 2000, unreported), High Court, Irish report, Question 11, Annex I.
[162] *Algemene voorwaarden*, Boom: Den Haag 2001, p. 48-49.
[163] *MD 2004:22* as quoted from Swedish Report, Question 11, Annex I.

In accordance with *the Italian law* on contracts, e-market participants shall be notified in a reasonably adequate and effective manner of the amended T&C. However, even in cases in which notification is made as due, unilateral modifications which affect negatively the participants may not be enforceable.

6.1.3.3 Special regulation

In a few countries, special provisions of the law on contracts stipulate the conditions of legally-valid amendments (Estonia, the Czech and Slovak Republics, Hungary, Poland). All these rules confirm basically that unilateral modifications constitute in principle an unfair practice.

According to the *Estonia Act on the Law of Contracts*, a contract may be amended upon agreement of the parties. It is not required, however, that the amendments are inserted in the same format as the initial contract, unless the contract provides otherwise. On the other hand, implied acceptance of the modified terms that can be inferred from a party's conduct is accepted[164].

On the contrary, the *Commercial Codes of the Czech and the Slovak Republics* provide the diametrically opposite rule: Amendments in a contract concluded in writing shall only be modified in writing[165]. In addition, the reservation of unilateral modification that may be stipulated in the T&C may be in conflict with proper morals under the Czech law[166].

A specific provision of the *Polish Civil Code* stipulates that the modification of auction terms is valid only if the T&C of auctions expressly allow for such modifications[167].

6.1.3.4 The e-market practices

In the majority of Member States, changes of the T&C by e-market operators take place through publication of the amended version of T&C on the e-markets' websites.

The state-of-play has not been reported in a few countries only (Cyprus, Estonia, Greece and Italy). This is due to the fact that: a) either these countries lack representative examples for drawing up generalised conclusions on the issue or b) there are no e-markets applications initiated or driven in the given country (Cyprus) or c) the elaboration of regulation on B2B practices is quite new and business practices are still in their infant phase to enable correct generalisations (Estonia).

On an average level, e-market operators in the countries under examination reserve a right to amend T&C at their own discretion and without prior notice. Accordingly, the acceptance by the e-market

[164] §13 of the Act on the Estonian Law of Contracts.
[165] Sec. 272 §2 of the Czech and Slovak Commercial Codes.
[166] As expressed in the Czech Republic report, Question 14, Annex I.
[167] Art. 70 §3 of the Polish Civil Code.

participants of the new rules is either implied or *de facto* - resulting from the continued use of the e-market service (Austria, Belgium, Czech Republic, Denmark, France, Ireland, Luxembourg, Netherlands, Slovak Republic, Spain). However, exceptional cases are not to be precluded (Poland…)[168].

For example, T&C of e-markets in *Austria* reserve a right of the e-market operator to proceed to amendments of the rules of the e-market at its discretion, observing a reasonable notice period. *Danish* e-markets recognise, at the same time, the right of business participants to terminate the agreement if they do not agree with the notified changes. The notice period, at the expiration of which the participants' acceptance of the new T&C is presumed, varies from country to country, being at an average level, between one week, 10 days and one month.

According to a *Luxembourg e-market*, participants may be notified of the changed terms in an adequate manner, via an information letter or another means of communication. In the same way, the T&C of an e-marketplace active in *the UK* stipulate that changes will be notified via e-mail or by a suitable announcement on the website.

In a number of countries, there is uncertainty as to whether certain observed practices for amending T&C comply entirely with the legal requirements. However, the absence of a notice period or a very short notice period awarded for acceptance may be remedied by other operational steps (see the Hungarian example below).

In *Finland*, for instance, it has been noticed that an e-market operator reserves the right to change T&C at will; the modified terms become binding one week after their publication on the website. The same practice has been observed in *France*. In *Hungary*, the same right is reserved to the operator of an e-market service, but here changes become enforceable immediately upon their publication on the company's website. However, users of the said e-market may view the amended version of T&C whenever they log into the on-line auction service. Additionally, T&C urge users to read their content (thus, any amendments that may have occurred meanwhile) before entering each auction event.

Immediate enforceability of T&C upon their publication on the e-market website has also been noticed in *Lithuania*.

A clause of another e-market in *Hungary* seems to be less acceptable. Such clause basically asks e-market participants to proactively agree on modified T&C if ever any modifications happen[169].

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[168] In this respect, T&C of an e-market operating in Poland states that if a participant does not accept changes, it shall immediately notify the e-market operator of such objection - as quoted from Polish report, Question 14, Annex I.

[169] This clause states: "*we may at any time revise these Terms and Conditions by updating this posting. You*

Moreover, in many situations (Lithuania, Poland…) e-market participants are expressly or implicitly required to monitor regularly of the operator's website and to react quickly as to the approval or not of the amended contractual conditions.

In *Latvia*, it appears from the e-markets investigated that none of the e-market operators have strictly determined membership terms and conditions. Only a few Latvian websites of e-markets contain generally available information regarding ordering, delivery, disbursement, guarantees, and so on. Likewise, the issue of unilateral modification of T&C is not at all dealt with or discussed on these websites.

The situation is similar in *Malta*: either the issue of unilateral modification of T&C is not at all discussed on the e-markets websites or such T&C merely do not exist.

Regarding the *Slovenian e-marketplaces* that have been looked into, T&C are usually not posted on websites. Additionally, issues about the participants' knowledge, and agreement on amended rules governing the e-market services are not particularly addressed on the websites of these e-markets.

6.1.4 Case 3: Surprisingly burdensome or unusual terms

6.1.4.1 The issue

T&C that are unilaterally prepared by e-market operators may contain clauses which favour their drafters to the detriment of e-market participants. Thus, business partners interested in joining an e-market platform have practically no other alternative than accepting such, for them, unfavourable provisions or abstaining from registration.

It should therefore be considered whether inserting extraordinarily beneficial clauses for e-market operators in T&C shall be regarded as an "unfair practice" in Member States.

6.1.4.2 Summary of national findings

In the majority of countries under investigation, the inclusion of burdensome terms in a B2B contractual relationship cannot from a first sight be considered as unfair. Accordingly, providing unusual terms in the e-markets' T&C that are to the disadvantage of e-market participants would not be automatically rejected as abusive and unlawful in most of the Member States (Belgium, the Czech

agree to be bound by such revisions, and you should periodically revisit this page to review the then current T&C", as quoted from Hungarian report, Question 14, Annex I.

Republic, Cyprus, Denmark, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, the Slovak Republic, Spain, UK…).

The majority of the afore-mentioned countries justify the acceptance of unfavourable clauses for e-markets participants on the grounds of the principle "*pacta sunt servanda*". This principle expresses actually the parties' freedom to incorporate in contract rights and obligations that correspond to their mutual will. On the other hand, the principle requires from contractual parties to respect the contractual engagements they agreed on. Contractual clauses that have actually been considered by a party and upon which the party has consented, must be abound with.

However, there are restrictions to the *pacta sunt servanda* principle. Thus, on an average level, all the above-mentioned countries which recognise this principle recognise also limitations to the rules of contractual freedom (Belgium, Czech Republic, Germany, France, Luxembourg, Malta, Portugal…). In this regard, surprisingly burdensome or unusual terms contained in the T&C of e-market operators may be set aside as not applicable if these legal conditions are not respected. Such conditions are primarily the e-market participants' prior and specific information of the unfavourable rules but also other requirements.

On the other hand, in a few countries only (Estonia, Greece…), surprising terms may be considered as unfair. However, exceptions are not to be excluded in these countries either.

In the majority of Member States, the (un)fairness of inserting burdensome clauses in T&C is generally based on rules and fundamental principles of general civil law (basically contract law, e.g. *pacta sunt servanda*). In a number of countries, nevertheless, special provisions of specific statutes or of civil codes regulate this issue (Austria, Estonia, Lithuania, Hungary, Italy…).

6.1.4.3 Limitations to the principle of "*pacta sunt servanda*"

A consequence of the *pacta sunt servanda* principle is that contractual parties are free to establish the contents of their contract. Consequently, if the e-market participants agree on the surprisingly burdensome or unusual terms then the terms will become part of the agreement. This consequence is recognised in most countries (Austria, Belgium, the Czech Republic, Finland, France, Hungary…).

However, legal rules and principles in almost all these countries[170] can neutralise the negative effects of parties' discretionary power.

For instance, in *Hungary*, if unusual or surprisingly burdensome terms of e-market participants become part of the T&C, the following rule applies: the business partners shall receive an express

[170] Cyprus and Latvia may derogate from the rule, see respectively Cypriot and Latvian reports, Question 12, Annex I.

and separate notification of such clauses that substantially differ from the usual contractual practice or regulations. Upon receiving such special notification, receivers must explicitly accept those clauses[171]. Therefore, in order for burdensome T&C to become binding on e-market participants, the e-market operator shall expressly and separately communicate the unusual terms to the participants before entering into the membership agreement.

Apart from this subjective limitation, objective limits are also imposed by the *Hungarian* Civil Code. Namely, even if agreement of the other party is obtained on the burdensome T&C, such clause shall not, in addition, contravene imperative provisions of the Hungarian law or good morals[172]. In the same way, in the *Czech Republic*, burdensome provisions can be fair on condition that they do not enter into conflict with "proper morals" or "fair business conduct"[173].

Along the same lines, the *Austrian General Civil Code* states that provisions of unusual content which are detrimental to the other party are legally valid only if the party having prepared them makes its counter-party aware of them. However, any minor provision is null and void if, taking all circumstances into account, it puts one party at a serious disadvantage[174].

In the same vein, under the *Finnish law*, burdensome contractual terms must be particularly highlighted to the party bound by them, otherwise they are unenforceable.

Express acceptance of burdensome terms by the parties who are negatively affected by them is also explicitly required by the *Italian*, *Portuguese and Polish* regulations, in order for such terms to be accepted by courts as fair and legally valid[175].

The same limitations to the validity of surprising clauses have been confirmed by jurisprudence in *Ireland.* Accordingly, surprisingly onerous or unusual terms may be required to be brought fairly and reasonably to the attention of the signatory[176]. The signature at the end of a contract may not automatically mean that it incorporates all preceding clauses[177]. In the light of this case-law, it is arguable that e-market operators may be required to show that the e-market participants' attention was particularly and fairly drawn to the burdensome clauses of T&C.

In certain legal systems, the unfairness to impose surprising clauses especially by standard T&C is based on the principle of good faith (Belgium, Denmark, France…). In *Denmark*, the judgment as to whether the principle of good faith has been violated shall take into account all circumstances

[171] §205 (5) of the Hungarian Civil Code.
[172] § 200 (2) of the Hungarian Civil Code.
[173] Sec. 39 of the Czech Civil Code and Sec. 265 of Commercial Code.
[174] Section 864a and 879 ABGB.
[175] Art. 1341 of Italian Civil Code.
[176] *Ocean Chemical v Exnor Craggs* [2000] 1 All ER (Comm) 519 and *Crocker v Sundance Northwest Resorts Ltd* (1988) 51 DLR (4th) 321.
[177] Paul A. McDermot, *Contract Law* (Butterworths 2001) at paragraph 8.41.

existing at the time the contract was concluded, the terms of the contract and subsequent circumstances[178].

In this regard, *French courts* ruled that abusive conditions, forbidden in agreements to which a consumer is a party, could be held as void even between professionals[179].

Almost all countries under examination accept as "objective limitations" to the freedom to impose and/or accept burdensome clauses: the violation of rules of public policy[180] and good morals.

6.1.4.4 The concept of "surprisingly burdensome" terms

In a few countries, the law itself, legal doctrine or jurisprudence provide directions on how assessing whether a particularly burdensome clause is indeed unfair (the Czech Republic, Finland, Lithuania…).

Accordingly, under the general rules of the *Finnish contract law*, a term must be both unfair and surprising in order not to be binding. As surprising term, one should understand an unusual term deviating materially from either express regulation or usual general provisions of the said business. On the other hand, there is no clear definition under Finnish law of what constitutes an "unfair" burdensome clause; in general, this must entail imposing relatively heavy contractual burdens to the other party[181]. However, in a B2B relationship, it is substantially more difficult to claim that a provision of a standard agreement is surprising and unfair than in a B2C context.

Under the *Lithuanian legal system*, surprising standard clauses are those which were not reasonably expected to be included in the contract by the other party. In order to evaluate whether a term is indeed surprising, one should consider the content, wording and way of expression of the term under examination[182].

In the same direction goes the *German Civil Code*, which provides that clauses which are extraordinarily unusual in the given circumstances that the other party could not expect them do not become part of the contract even if there was a binding agreement on the T&C[183].

In other countries, such as in the *Czech and Slovak Republics and Luxembourg*, it is upon the judge to evaluate whether specific terms are unfairly unbalanced to the detriment of a business partner,

[178] Sec. 36 of the Danish Contracts Act.
[179] e.g., Cass. Com. 22 October 1996, D. 97 121.
[180] The term shall be understood in wide terms as encompassing any legal norm that parties are not allowed to deviate from by contract (the so-called "*règles d'ordre public*" in Belgium, France or Slovenia, "*imperative norms*" in Lithuania, etc.).
[181] Comment from Finnish report, Question 12, Annex I.
[182] Art. 6.186 of Lithuanian Civil Code.
[183] §305c I BGB.

taking into account the circumstances of the case.

In addition, pursuant to the *Maltese law*, a determining factor of such evaluation would be the frequency of facing such surprisingly burdensome terms within the same contractual relationship or with the same party (-ies). If this is a recurring event, it will be easier for the e-market participant to prove "undue duress" of the said clauses and to require their annulment as unfair.

"Surprisingly burdensome" terms may be "abusive" contractual terms in a number of jurisdictions. This was, for instance, confirmed by the Belgian courts which ruled that the abuse of powers conferred by a contract can be sanctioned on the basis of the good faith principle[184].

As confirmed in the sub-section above, the great majority of countries seem to accept that if an undertaking has willingly entered into an unfavourable agreement while it was informed about the unfavourable terms, this does not automatically mean that the agreement is unfair.

6.1.4.5 Unfair conduct

In a few only countries the unfairness of inserting surprising terms in a contract (or T&C) is pronounced in a more clear-cut wording and provides no exceptions (Estonia, Greece, Ireland).

In this regard, the *Estonian Act on the Law of Contracts* sets out that, in contracts of which the object does not concern payment, performance of an obligation shall not be required if such performance is unreasonably burdensome or expensive for the obligor. In addition, the same Act stipulates that standard terms are invalid if they cause unfair harm to the other party, particularly if they cause a significant imbalance in the parties' rights and obligations arising from the contract to the detriment of the other party[185].

The *Greek legal system* recognises that in cases where a contracting party is in a weaker position than its counter-party (or have no option to choose another party) the powerful party must not i) amend or set burdensome or unusual terms or conditions, or ii) change the contractual obligations, or iii) restrict the other party's rights, or iv) generally cause major imbalance between the rights and the obligations of the parties[186].

This clause aims primarily at protecting consumers; however, Greek legal doctrine and jurisprudence extend its effects to business partners if these are the "weaker" parties in a transaction[187].

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[184] Cass. 19 September 1983, *R.W.*, 1983-84, 1480.
[185] Art. 108 (2) and 42 (1) respectively.
[186] Art. 2 of L 2251/1994, "General Terms of Transactions".
[187] This is our interpretation from Greek report, Question 12, Annex I, ref.: Apostolos Georgiades, *Contract Law, General Part 1999*, pages 12-24, 176-181; Michael P. Stathopoulos, *General Contract Law, General Part*, 3rd edition, 1998, pages 243-265; Vassilios Vathrakokoilis, *Civil Code-Interpretation-Jurisprudence*

Special regulation in *Ireland* prohibits to exclude certain clauses relating to the sale of goods unless it is shown that such exclusion is fair and reasonable[188].

6.1.4.6 The e-market practices

The matter of whether T&C of e-market operators impose usually unusual or surprisingly unfavourable clauses to participants requires an in-depth examination which is out of the scope of the present study. Therefore, the market situation described herein aims at providing only some indications on the subject matter and should not be considered as exhaustive.

A number of countries did not report any problems in this respect (Austria, Estonia, Hungary, Spain, Greece, Latvia, Malta…). However, given that a) the e-markets services have not yet been widely used in these countries and b) that publication of T&C often lacks transparency, it would be premature to jump to the conclusion that all contracts exchanged on these e-markets are fairly balanced.

On the other hand, in a number of Member States, there is no strong indication that standard T&C benefit e-market operators much more than what it should normally be expected from a fair B2B relationship (Belgium, Denmark, Finland, Germany, Ireland, Lithuania, Luxembourg, Netherlands, Poland…). However, almost all these countries rather pinpoint as problem the sometimes surprisingly wide disclaimers and the lax clauses on limitation of liability that are included in standard T&C[189].

In *Belgium*, for instance, e-markets exclude any liability in case problems occur in the performance of transactions between buyers and sellers or in case of participants' misrepresentations. In this regard, it happens sometimes that e-market operators discharge themselves from any responsibility that good faith customers would by definition expect them to take up. In an e-auction website, for example, there is an express exclusion of liability with regard to, amongst other, "…*the publication of the posted auctions/negotiated sales, the posting/acceptance of offers/products and (specified and proxy) bids, the consideration of submitted bids/offers, the functioning of the (e-market's) system, the undisturbed execution of auctions/negotiated sales*…". Too broad disclaimers in this sense have been noticed in T&C of e-markets operating in *Poland*[190].

Similar examples have been reported in Lithuania. Quite often, e-market operators exclude their liability with respect to the quality of information they provide to their members, the successful processing of orders or damages that may arise from the use of the e-market service.

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pages 23-28, 271-293.

[188] Sec. 55, Sale of Goods Act 1893 and 1980.

[189] Such issue is discussed in detail in Chapter 12 of this study.

[190] See Polish report, Question 14, Annex I.

Sometimes, penalty clauses that e-market participants impose on their members may be too onerous. However, the (un)fairness of such clauses actually depends on the kind of breach sanctioned and the situations in which they are imposed. Accordingly, in our view, a fine of 12.000 EUR which is imposed on e-market participants by a *Dutch e-market operator* should not be considered as unfair when they share their confidential login information with a third party[191].

The T&C of another e-market site in *Belgium* state that the operator is paid by commission, the amount of which is determined at the beginning of an auction/negotiated sale (no indication of a standard percentage in the T&C). Such a clause would not preclude, for instance, the unilateral fixing of far too onerous commissions that participants have to accept if they wish to participate in the given auction/negotiated sale.

6.1.5 Case 4: Unfair clauses on applicable law

6.1.5.1 The issue

It may be possible that T&C governing an e-marketplace stipulate as applicable law the law of a country having no connections with the parties, the e-market platform itself or the object of the transaction(s) aimed by the participants' interaction on the e-market.

The question arises about whether the incorporation of such "surprising" clauses about applicable law in T&C would be considered as legally valid and fair in Member States.

6.1.5.2 Summary of national findings

All countries under examination seem to recognise the contractual parties' freedom to determine at their discretion the law applicable to their contractual obligations.

With regard to the 15 "old" Member States, this freedom is enounced in the European Convention on the law applicable to contractual obligations (Rome Convention of 1980, as amended). Most of the 10 new Member States have established the principles of the Convention in their international private laws (Czech Republic, Estonia…) or within their civil laws (Latvia).

Therefore, business partners on an e-market may freely choose the law applicable to their agreement. They can even opt for a legal system of a third (non-EU) country. However, in all Member States, it is accepted that the autonomy of will may be set aside by compulsory legal provisions. In addition,

[191] Case reported in Dutch report, Question 14, Annex I.

special restrictions regarding the free choice of law have been introduced in a few countries (Finland, Hungary, Lithuania…).

Applying these rules in the e-market case means that an e-market operator is, in principle, free to set out in the T&C as applicable law the law of a foreign country, even though all the other elements relevant to the situation at the time of the choice are connected with another country. Nevertheless, the e-market operator cannot exempt himself from the applicability of the mandatory provisions of the latter country by merely pretending that it opted for (and e-market participants agreed on) another law to govern their contractual relationships. Such a rule is a recognised principle in all Member States.

Consequently, in all the legal systems under scrutiny, it appears that it would be an unfair practice if the choice of a particular legal system was based:

a) on parties' malicious intention to deviate from mandatory rules of their own legal system (being this of the country in which they are established or with which the transaction has, normally, the most or significant connections), and/or

b) on parties' intention to benefit from the more favourable legal regime of another country.

This conclusion is based either on the interpretation of international private law principles (Rome Convention or equivalent national statutes), express regulation in a few countries (Hungary) or jurisprudence (Luxembourg).

6.1.5.3 Limitations to the free choice of law

Even if in all countries B2B e-market actors enjoy a wide discretion in opting as applicable law "favourable" and "convenient" laws to their situation, such discretion is actually subject to certain limits.

In this regard, this choice may be regarded as unfair if it is manifestly incompatible with the public policy of *the forum* or would conflict with mandatory rules of *the forum* (Austria, Belgium, Czech Republic, Denmark, Greece, Ireland, Italy, Latvia…).

It is noteworthy that in *Luxembourg*, the same principle has been confirmed by the Grand-Ducal Supreme Court. Actually, Luxembourg has made a reservation to art. 7-1 of the Rome Convention. This provision lays down that effect shall in any case be given to the mandatory rules of the country with which the situation has a close connection whatever the law applicable to the contract is. However, the Court has ruled in a case that the law chosen by the parties was invalid because it

infringed the rules of public order of the country to which it was closely related[192].

Jurisdictional power to set aside clauses on applicable law chosen by contractual parties is recognised in other countries as well, such as *Malta. Maltese courts* have indeed a discretion to set aside the choice of jurisdiction clause in certain circumstances such as: a) a party may be unfairly prejudiced (the "*forum non conveniens"* rule) or b) the bulk of the evidence relative to the proceedings is in Malta.

In some jurisdictions, the choice of a manifestly "irrelevant" law may be considered as incompatible with the principle of good faith (Cyprus).

In B2B e-market practices, it is also noteworthy that the choice of a foreign law does not prevent the application of obligatory legislation stemming from information society laws. In *Finland*, for instance, the choice of law by contractual parties is in principle free. Nevertheless, if the service provider of the e-market platform (operator or other) is located in Finland, the Act on Provision of Information Society Services applies. Under this law, the e-market service must comply with the requirements of the Finnish Laws. In addition, under the Finnish legal system, if the stipulated applicable law is to construe an obstacle for access to justice, such law may not apply.

6.1.5.4 Unfair practice

In a few countries, the e-market operator's freedom to choose a foreign law as applicable to the contractual relationships in the e-market is restricted.

In *Hungary*, for instance, Hungarian entities shall be subject to Hungarian law. Foreign laws into a relationship between Hungarian parties can be stipulated only if there is a foreign person, asset or right in such relationship directing to the applicability of the said law. Parties are in principle free to establish the contents of their contract but cannot stipulate as applicable law the law of a country that has no connection at all with their legal relationship[193].

Also, according to the *Hungarian International Private Law*[194], a foreign law which is attached to a foreign component created by the parties artificially or through pretence for the purpose of avoiding the law otherwise applicable shall not apply.

In *Lithuania*, discretionary practices on the choice of applicable law are not covered by explicit regulation. The legal doctrine, however, recognises that a choice of law which is not a national law

[192] Supreme Court of Luxembourg, February 2, 1956 (*Pasic.* 16, 425).
[193] Decision of the Permanent Arbitral Tribunal attached to the Hungarian Chamber of Commerce and Industry, No. 1998/3.
[194] §8 of Law-Decree N°. 13 of 1979.

for both parties would probably be a surprising term[195]. Apart from Lithuania, in a number of other countries, a provision setting forth unrelated *forum* with remote access could reasonably be deemed as "surprising and unfair" term according to the explanations provided to the sub-section 6.4.4 above. (Finland).

6.1.5.5 The e-market practices

In the majority of e-markets examples scrutinised at a country level, it appears that no particular problems appear regarding the clause of T&C on applicable law.

Most of e-market operators choose the legal system of a country with which their relation with e-market participants has a connection. This is, quite often, the law of the country from which the e-market service is provided or the country whereby the e-market operator has its place of business.

With regard to a number of e-marketplaces, it has been reported that the T&C set out as applicable the law of a country with which the contractual relation has, from a first glance, no connection (Belgium, France, Luxembourg…). However, in these situations, it seems that the chosen country has had a justified liaison with the e-market service at hand. In the reported cases, for example, the applicable law directs to the country in which the e-market operator has its legal seat or its main place of business. This is particularly relevant for e-market operators with connections and offices in many countries (in multinational e-markets or structured as a group of firms).

An e-marketplace operating (also) in *Italy* is a characteristic example of how the problem of applicable law is usually resolved in practice by e-market operators active in different countries. In the Italian example, the e-market service is represented in each country by a distinct firm of the same group of companies. Accordingly, the T&C of this marketplace state that:

"*Controversies relating to the interpretation, execution or resolution of agreements with the e-market have to be addressed in accordance with the national legislation and assigned to the exclusive jurisdiction of the court <u>where the relevant group company is based</u>*".

It has also been noted that, in certain e-markets T&C refer to the US law as applicable (France, Ireland, etc.).

On the one hand, such clause may not be considered as an "unfair" practice if, in the light of the comments above, the e-market service has connections with the US (for example, if the head offices or the main business seat of the e-market operator is located in the US). On the other hand, T&C inspired by the US legal system, stating the US law as applicable and the US courts as opted jurisdiction may constitute "unusual" or "surprisingly burdensome" terms for an EU-citizen. In the

[195] As reported in Lithuanian report, Question 13, Annex I.

light of the preceding sub-section, it can be argued that such clauses may be caught by certain EU legal systems as favouring unjustifiably e-market operators because:

a) they bind in principle e-market participants by rules of a jurisdiction they may not be familiar with;

b) by stipulating the US courts as competent jurisdiction, they effectively discourage recourse to justice for disputes arising between the European-based companies of the group and European citizens.

6.2 Uncertainty about the legal implications of parties' initiatives and reactions in e-marketplaces

6.2.1 The issue

It may happen that the parties involved in an e-market (primarily, e-market operator and candidate or existing participants) interpret erroneously "actions" or "signs" by the counter-party with respect to the conclusion of a contract (of participation in the e-market) or deal (e.g. to buy goods put up for auction). Or, the intention of a party may be transmitted or understood otherwise by its counter-parties due to an operational or technical mistake occurring during the process [e.g., in an e-auction: a bidder puts in a bid of a higher value than what he was intended to (instead of 40 EUR, bidder types 400 EUR) / invitor has mistakenly assumed that bidder had the intention to bid a high price.

Certain "actions" or "signs" may have a particular meaning in the e-markets context in certaincountries. For instance, in e-auctions: in certain legal systems, the submission of a bid may be considered as a "promise" that binds the bidder to buy the goods under auction if the invitor accepts his bid. Consequently, it may constitute "unfair behaviour", harming the invitor,if the bidder changes his mind later on and reneges on his promise. In other jurisdictions, the invitation of the auction initiator may be considered as binding upon the invitor only but not on the bidders; in this case, bidders are considered to enter into a phase of "negotiation" with the invitor.

On the other hand, it is possible that the meaning of "actions" or "signs" crucial for the process on an e-market is not defined in a certain law or practice. In these situations, the parties contesting a transaction may retract more easily from agreements or "deals" that they claim as "not concluded" or "not binding" upon them. Such withdrawals or cancellations may harm the e-marketplace itself or the parties who have to bear the consequences of these actions.

On the same terms, an e-market operator may consider that the submission of a subscription form or membership application binds already the party having expressed interest to join the e-marketplace.

Such an assumption may be particularly burdensome for the party concerned (e.g. prohibition to join a competing e-market, confidentiality obligations, etc.), especially if there is uncertainty about which point on the contractual relationship is formed between parties.

Against this background, signs, initiatives or reactions by the trading partners in e-marketplaces may be considered as "unfair" conduct towards their counter-parties, especially if they turn to the disadvantage of those parties.

In the following sub-sections, it is examined whether certain scenarios do objectively violate the fair practices rules in the Member States, in particular when e-market T&C do not particularly address the legal consequences of these situations.

The questions/scenarios discussed below are:

Case 1: The binding nature of filling in registration forms (membership forms);

Case 2: The binding nature or not of putting up objects on auctions or submitting bids in the e-auctions (reverse auctions) procedures.

6.2.2 Case 1: the posting and filling-in of membership forms

6.2.2.1 The issue

Contractual agreements are validly formed when interested parties express their intention to be bound by the object and specific conditions of the said agreement. In e-marketplaces, the intention to use the e-market services requires in most cases the completion of a membership form.

If T&C do not specify so, the mere posting of membership terms on the e-market website may be interpreted in certain Member States as an offer to join the said e-marketplace. Additionally, in a number of countries, membership forms duly filled in by (candidate) participants may constitute already a valid acceptance of an offer to contract, and they are probably binding upon them.In other countries, completing subscription forms may represent a mere "offer" of potential participants expressing their interest to access the e-market activities.

Whatever the legal qualification of subscription forms may be, the completion of them may entail legal consequences for e-market participants. For instance, the mere "sending" of such subscription forms may bind participants to the T&C of the said e-market. The legal consequences of sending out subscription forms may be expressly explained in the e-market T&C or not. The fact that such membership forms can bind e-market trading partners or affect them in another way may objectively

found an unfair practice in some Member States.

6.2.2.2 Summary of national findings

In all Member States, the posting and completion of membership forms on an e-marketplace is regulated through laws relating to the formation of contracts and, more specifically, to the binding nature of offer and acceptance.

The statements of commercial partners on e-market platforms must fulfil a number of conditions in order to fall within the legal meaning of "offer" and "acceptance". Such conditions are primarily set forth in basic contract law instruments in the majority of countries under scrutiny (Austria, Belgium, Czech Republic, Cyprus, Finland, Estonia, Malta, Slovenia…). Besides, other regulation may be relevant, especially regarding the formation of electronic orders and the transmission of legally-valid electronic contracts (Lithuania, Greece, Ireland, Poland…).

As a common rule, all jurisdictions under examination recognise a binding effect to legally valid offers and acceptances, as long as they fulfil a number of legal prerequisites (e.g. they must express the free will of contractual parties, being specific in terms of content, being expressed in a clear manner, etc.). These basic prerequisites are on an average basis common in all jurisdictions under examination.

If these prerequisites are met, the posting of subscription forms on the website of the e-marketplace and the subsequent completion of them by interested trading partners may be qualified as "offer" and/or "acceptance". Consequently, the submission of a completed membership form can then bind the (potential) e-market participant and such binding effect shall not be considered as unfair.

In addition, all legal systems provide for rules specifying from which point of time and beyond the said "offer" or "acceptance" (the filling-in of the membership form and its submission) acquires its binding effect. If, after that time, an e-market participant purports that it completed and sent the subscription form without having any intention to conclude a binding agreement, such a claim can be considered as unfair.

In practical terms, the following reasoning may be considered as valid for almost all legal systems under scrutiny:

It is lawful and fair to infer that the submission of a registration form has a binding effect both on e-market operators and participants if:

a) it responds to a legally valid offer of the e-market operator. Such offer may constitute the posting of a membership form, potentially accompanied by other documentation specifying it

(e.g. T&C).

b) it can be qualified in itself as a valid "acceptance". This is the case if the conditions of national law about forming a valid acceptance are met.

c) it has been communicated to the e-market operator. From this point on, in almost all countries, it can be accepted that, at least for B2B relations, the receipt of the acceptance suffices to form the electronic contract of participation in the e-marketplace.

6.2.2.3 Posting of membership forms: legal concept and conditions

In the majority of Member States, the completion and submission of a subscription form by a potential e-market participant shall be considered as a legally-valid "acceptance" (Belgium, Czech Republic, Denmark, Finland, France, Ireland, Italy, Portugal, Sweden…). However, in all these jurisdictions, such acceptance can have a legal effect on the party who made it only if it replies to a legally-formed offer. In these situations, therefore, the posting of the membership form (in itself or, most often, as accompanied by other information and legal documents, such as T&C) must fulfil the requirements of the valid offer.

The completed membership form can be binding provided that the membership form as posted represents a valid offer to conclude a contract with the subscriber. The offer is valid if it is sufficiently specific (definite) and if it clearly reflects the operator's intention to be bound by such offer in case that the offer is accepted. Such minimum conditions of the valid offer are expressly laid down in national regulation (e.g. Austria[196], Czech Republic[197], Estonia[198], Germany[199], Italy[200], Slovenia[201], Slovak Republic…) or derive from generic legal rules and principles of the countries under scrutiny (Belgium, Cyprus, Ireland[202], Malta, the Netherlands).

Additional elements to these minimum prerequisites of the valid offer are prescribed in a number of jurisdictions (Austria, Belgium, Italy…). For example, according to the *Austrian legal system*, apart from the above-mentioned common content, the offer shall stipulate the principal elements of the contract, i.e. for a sales contract, the item for sale and its price.

[196] Section 869 ABGB.
[197] Sec. 43a and 43c of the Czech Civil Code.
[198] §16 of the Estonian Act on Contract Law
[199] § 145 of German Civil Code, according to which a binding offer needs to constitute the will to legally bind oneself.
[200] Art. 1326 of the Italian Civil Code.
[201] Art. 22/1 of Slovenian Civil Code.
[202] The offer in Ireland is understood as "a clear and unambiguous statement" of the terms upon which the offeror is willing to contract, as quoted from Irish report, question 15, Annex I.

In the same vein, a provision of the *Italian civil code*[203] regulating the "offers to the public" requires that the proposal shall be complete in its essential elements (such as price, the main characteristics of the object of the agreement and the main T&C) in order to be considered as a valid "offer". If an offer is not that complete it shall be regarded as a mere "invitation for a proposal". Subsequently, a response to it cannot be regarded as an "acceptance" but as a new proposal itself.

According to the *Belgian legal system*, the membership form as offer (eventually, accompanied with T&C) shall define the object of the transaction in such a way that only the submission of the filled-in subscription form suffices to conclude the contract. Apart from the price and value, any element that e-market participants' may consider as important in order to accept the e-market operator's offer shall be referred to through the membership form[204].

In a number of jurisdictions, the offering of services to a previously unspecified set of persons on a public computer network shall be considered as an invitation to make offers and not as an offer in itself, unless the proposal indicates otherwise (Estonia, Slovenia). It is also noteworthy that membership forms addressed to an indefinite number of potential participants may be considered anyhow as valid "invitations to conclude" with the e-market operator if such assumption is based on business customs[205].

If the membership form does not fulfil the afore-mentioned conditions - minimum or additional at the country level -, it is deprived from legal effect. Subsequently, if the e-market operator purports that this membership form has been posted as offer suitable for generating legal consequences, its assumption is unfounded and, as such, can be regarded as unfair.

6.2.2.4 Filling in membership forms: legal concept and conditions

In the majority of Member States, similar requirements to these of the valid offer shall be fulfilled by the filled-in membership form in order to be considered as a legally valid "acceptance".

To quote some examples, the *Cyprus law* prescribes that acceptances shall be "absolute and unqualified". In addition, they must be expressed in some usual and reasonable manner, unless the offers prescribe the manner in which they are to be accepted[206]. In addition, the *Austrian civil law* requires the free adherence of the offeree to the offer, with the intention to create a legal relationship. The meaning of the acceptance shall be clear, but it does not matter whether the acceptance is express

[203] Art. 1326 of the Italian Civil Code.
[204] Christine Biquet-Mathieu and Joëlle Decharneux, *Aspects de la conclusion du contrat par voie électronique, in Le commerce électronique: un nouveau mode de contracter*, Liège, A.S.B.L. Editions du jeune barreau de Liège, 2001, p. 151.
[205] According to Slovenian report, Question 15, Annex I, ref.: *Obligacijski zakonik s komentarjem*, 1. knjiga, GV Založba, 2003, page 242. Please note that, in other legal systems, such as Belgium, it does not
[206] As quoted from Cyprus report, question 15, Annex I.

or implied[207].

Moreover, according to the *Finnish* legal system the subscriber's prior "acquaintance" with the T&C is required before sending out the membership form, since a legally valid "acceptance" implies full knowledge of the elements of the offer[208].

In the *Irish legal system*, the acceptance shall reflect the "final and unequivocal expression" of agreement of the e-market participant to the terms of the offer[209]. Under *the UK legal system*, the acceptance would need to contain a clear expression of consent to the membership terms.

The *Slovakian Civil Code* requires the declaration of the contractual party to which the offer has been addressed to be "timely". A valid "acceptance" can anyhow be expressed in other ways than declarations, provided that they are made in time and are sufficient to infer the offeree's consent to the terms of the offer[210].

On the other hand, an acceptance containing reservations, amendments or other changes constitutes in effect a new offer (Austria, Belgium, Czech and Slovak Republics, Portugal…).

6.2.2.5 Relative effect of the legal qualifications

Only in a few countries, the submission of membership forms may be considered as the "offer" and not as the "acceptance" (Hungary, Austria, depending on certain circumstances as identified below). However, this differentiation does not seem to have considerable practical consequences compared to the category of countries whereby completed subscription forms are mostly qualified as "acceptance".

The exact qualification of the completed subscription form as an "offer" or "acceptance" actually depends on the circumstances of the specific case. For instance, the design of the membership form may determine whether its completion constitutes acceptance of an offer or an offer in response to an invitation to treat[211].

Under the *Polish legal system*, the nature of application forms that are posted on-line is evaluated according to general criteria of the civil law. Therefore, in cases of doubt about whether a membership form constitutes an "offer", such information shall be treated as an invitation to conclude a contract. In the light of the Polish legal doctrine, there is doubt if the application form does not contain a relevant stipulation that it should be treated as a valid offer. In these situations, the

[207] Section 869 ABGB.
[208] As implied by Finnish report, question 15, Annex I.
[209] As quoted from Irish report, question 15, Annex I.
[210] Art. 43c of the Slovakian Civil Code.
[211] This statement has been expressed in the Irish report. However, it expresses, in our view, a valid statement for all legal systems under review.

behaviour of the user (e.g. the entity applying for the services of the e-market operator) will be treated as an offer (i.e. expressed by the proper completion of the application form)[212].

Accordingly, the *Hungarian Civil Code* stipulates the binding nature of the offer unless it contains a clause to the contrary. An express reservation that the membership form shall not be considered as an offer is valid and it would not be considered as an "unfair statement" in the majority of Member States. However, from a practical viewpoint, the completion of a membership form that is posted on the website (being usually a "standard" document) is always binding since e-market operators make rarely provision of such reservation in the membership forms they prepare[213].

In a number of legal systems (Sweden, Latvia…), the binding nature of offers and acceptances may be founded on the principle of promise enshrined in their contract laws. This means that an offer to enter into a contract (*in casu*, the posting of membership forms) and the reply to such offer (*in casu*, the filling in of the said membership form) are binding on the offeror and offeree respectively, unless the contrary can be inferred from the offer or reply, from commercial practice or any other custom.

6.2.2.6 Rules relating to the conclusion of electronic contracts

In a number of Member States, rules regulating the formation of electronic contracts or the exchange of electronic statements cover the issue of valid "acceptance" and "offer" (France, Greece, Lithuania, Poland, Spain…).

Nevertheless, the rather strict requirements that impose these regulations - esp. regarding transparency and information duties of the offeror towards offerees - may be set aside in the B2B context.

Accordingly, with regard to the formation of electronic contracts, the *French civil code* stipulates that: a) the offeree shall have the possibility to verify the contents of its order and its price and to correct possible mistakes, and b) the offeree shall confirm its order, with a view to expressing its acceptance[214]. However, it is stressed that this rule is not mandatory in relations between professionals.

In the same vein, the presidential decree having transposed the e-commerce Directive in *Greece* requires that the offeror fulfils a number of conditions especially with regard to information to be conveyed to the counter-party. Only if such information is communicated to the e-market participant

[212] On the basis of art. 71 of Polish Civil Code and relevant literature: Z. Radwański, *System prawa prywatnego. Prawo cywilne – część ogólna*. vol. 2, Warszawa 2002; W. Kocot, *Wpływ Internetu na prawo umów*, Warszawa 2004, p. 183-184.
[213] § 211 (1) of the Hungarian Civil Code - statement quoted by Hungarian report, question 15, Annex I.
[214] As quoted from French report, question 15, Annex I.

the acceptance (and, hence, the electronic contract) can be considered as valid[215]. However, as in the case of France, business partners on e-marketplaces can deviate from such rules being mandatory only in B2C relations.

Same conditions are prescribed in the laws of other countries having implemented the e-commerce directive in their legal systems[216], but, also in these countries, business parties may agree otherwise.

Moreover, in *Lithuania*, the binding nature of the filled-in membership form is regulated on the basis of "click-wrap" contracts. According to the legal doctrine on this kind of contracts, the will of the e-market participant to be bound by filling-in the membership form is expressed by clicking the "acceptance" or "send" button (or similar icon or text). Thus, the filling-in of subscription forms is to be considered as binding if membership terms were available to e-market participants before they complete registration[217].

Along the same lines, the *Polish legal system* refers to the legal validity and binding effect of the electronic declarations of intent. On the grounds of the Polish Civil Code, an intention of a party performing a legal act may also be expressed to counter-parties in electronic form (declaration of intent). Moreover, an exchange of statements in electronic form between parties constitutes a sufficient and clear manifestation of the parties' intent to deem that a contract was concluded in this procedure. Thus, the selection of specific options on the e-market website and a proper completion of a participant form implies the conclusion of an agreement with binding effect on the contracting parties[218].

6.2.2.7 Binding effect of completion of membership forms

In all jurisdictions under examination, the completed membership form becomes binding on the offeree and/or e-market operator at a certain point of time.

In almost all countries a combination of provisions on the formation of electronic contracts and basic rules of contract law determine from which moment on the acceptance binds the party who communicated it (Austria, Belgium, France, Greece, Germany, Hungary, Ireland, Malta…). In all these jurisdictions, if a completed membership form has the legal meaning of "acceptance", it would be unfair to retract from the contract after completion..

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[215] Greek Presidential Decree 131/2003, art. 8 and 9, which actually transposes the requirements of the EU e-commerce Directive, art. 10 and 11.

[216] Such as the Hungarian e-commerce act, the Lithuanian order N°. 119/2002, the Luxembourg law on electronic commerce, the Maltese e-commerce act, etc. An obligation to confirm the receipt of an offer is more generic in the Polish legal system, since it applies to any contract and not just to on-line agreements - however, even in this case, business partners may exclude this formality in their professional relations.

[217] Informacinių technolgijų teisė, Vilnius, 2004, P. 323-331.

[218] art. 60 of the Polish Civil Code as amended (year 2002) and legal doctrine, B. Fischer, M. Skruch, *Prawo komputerowe w praktyce*, part 7.2.3, Warszawa 2002.

In the majority of Member States, this moment is determined according to the "theory of receipt" (Austria, Belgium, the Czech Republic[219], Germany, Hungary, Lithuania, Luxembourg, the Netherlands…). The essence of the theory of receipt is also valid in the formation of electronic contracts.

In nearly all Member States, the rules governing the moment at which an electronic membership form shall actually conclude the electronic contract suggested by the e-market operator are set out by their national e-commerce regulations. According to these rules, the filled-in membership form is considered as binding and the agreement is concluded once the subscription form is received by the offeror. With respect to relationships formed on-line, the reception is deemed to occur at the point in time when the electronic form enters the sphere of control or influence of the offeror, in such a way that the latter can be aware of it. The possibility to take knowledge of the acceptance is mostly presumed as soon as the e-market operator may access the (electronic) form[220].

Pursuant to the e-commerce acts in most countries, the completed membership form is deemed to be received when the e-market operator is able - under regular circumstances - to access it.

For the majority of the countries following the theory of receipt, the moment of effective access appears to coincide with the moment at which the filled-in membership form has successfully entered into the e-mail box of the e-market operator[221]. Consequently, access to the e-membership form does not necessarily imply that the e-market operator shall actually view the message on its computer screen or go into the contents of the subscription form[222].

In a few countries, a number of variations have been noticed, depending on the way the membership form is sent to the e-market participants (Cyprus, Denmark, Italy, Malta, Poland…),.

For example, in the *Cyprus legal system*, the instant at which an acceptance becomes effective varies according to whether the question is posed from the angle of the offeror or the offeree. Accordingly, the acceptance is binding on the offeror when it is put in the course of transmission to the offeror, so as to be out of the power of the offeree. On the other hand, the acceptance is binding upon the offeree when it comes to the knowledge of the offeror. Hence, the revocation of a filled-in membership form shall be "fair and valid" towards the offeror if it is made before the membership form reaches the

[219] According to Sec. 43c of the Czech Civil Code, the acceptance of an offer becomes effective when the declaration of consent *reaches* the offeror. A provision with the same content can be found in the Greek Civil Code - art. 192. According to the Hungarian Civil Code, the statement of acceptance shall be received by the offeror - § 213 (1).

[220] Austria, France, Greece, Ireland…

[221] Belgium, Greece, Germany…

[222] As expressly confirmed in the reports of Belgium, Germany and the Netherlands, Question 15, Annex I; In this sense, the German report states that, as soon as the electronic membership form is saved (in the mailbox), the e-market operator practically has the opportunity to take notice of it and therefore such "acceptance" is received and is in effect.

offeror.

In the same vein, in *Denmark*, the filled-in membership form becomes binding for both the e-market participant and the operator once the acceptance is out of the sphere of control of the offeree (i.e., when the offeree clicks the "send" button). The same reasoning seems to be valid according to the *Italian rules*: thus, in case of publicly-available membership forms, a simple "point and click" on the electronic form would be sufficient to express the participant's acceptance and, as from this moment, is binding upon the participant.

In *Malta*, variations as to the binding offer of acceptance exist between the on-line and the off-line environment. If the membership form is sent off-line, it becomes binding as from the moment the e-market operator becomes effectively aware of it. Objective receipt (thus without effective knowledge) suffices only if the operator does not get to know the participants' acceptance because of the participants' own fault or negligence[223]. However, as in the majority of the above-mentioned countries, if the membership form is sent electronically, it appears that its contents become binding as soon as the e-market operator is able to access it.

The same observations regarding the off-line or on-line membership forms are valid for the *Polish legal system* as well. With respect to subscription forms which are sent electronically, they become binding as from the moment they are introduced in the electronic communications system in such a way as to enable their e-market operator to learn its contents[224].

It should be stressed that in almost all Member States, parties in B2B relations are free to determine differently the rules regarding the time at which membership forms would be considered as binding (for both e-market operator and e-market participants). In the same way, the e-market actors may also set up their own rules specifying the time at which the (electronic) agreement of participation in the e-marketplace shall be considered as concluded[225].

If these rules are explicitly defined in the T&C of e-markets and are brought to the knowledge of e-market participants as required by national laws, they are valid and cannot be considered as "unfair".

6.2.2.8 The e-market practices

In the majority of e-market websites that have been examined, electronic membership forms become available to interested trading partners for subscription in the e-marketplace.

[223] This is our interpretation on the basis of the Maltese report, Question 15, Annex I.
[224] Pursuant art. 61 §2 of the Polish Civil Code.
[225] Such discretion is justified on the grounds of the e-commerce legislation in almost all Member States. Moreover, this flexibility can also be founded in the generic contract rules of Member States, in which the free will of parties prevail, especially in the framework of B2B relations.

In a number of websites, it has been noticed that applicable terms and conditions are made directly available at the registration form or behind a visible hyperlink (Belgium, Denmark, Finland, Lithuania…). In the light of the above comments, such practices imply that e-market operators post such membership forms as "offers" to interested parties to conclude an electronic contract.

In all e-markets operating from *Lithuania*, e-market operators state expressly during the registration process that, upon registration, users agree to be bound by T&C. In all cases, hyperlinks to T&C are provided, so that users may easily access them to get "acquainted" with the terms of the proposed agreement. In the same vein, an *Italian e-market* specifies that T&C shall be accepted by participants by clicking on the various "Accept" options that are shown on the website during the registration process. In all these situations, the posting of membership forms shall constitute a valid "offer" and the sending of filled-in membership forms a valid "acceptance".

In T&C of *Hungarian e-marketplaces*, it is often stipulated that, amongst others, the completion of the membership form should be considered as a "sign" that e-market participant accepts the T&C and agrees that such terms are binding upon it.

It has been noted that, in their great majority, T&C of e-markets do not specify expressly the moment at which the submission of the membership form becomes binding (e.g. the moment at which it is sent or the moment at which it is received). Nevertheless, all T&C (linked to the membership form or not) provide that they bind participants.

In two cases reported from *the Netherlands*, e-market operators require an "opt-in" from participants to express their consent to T&C (by ticking a box). Consequently, the registration does not take place until the prospective participant has expressed its consent to the T&C. In another e-market, the T&C can be accessed from the page on which the registration form is posted.

In a case reported from *Belgium*, T&C of an e-market operator stipulate expressly that registration on the website confirms the will of the user to be bound by the published T&C. Moreover, registration is a prerequisite for using the services offered by the said e-marketplace.

In the light of these examples, it is clear that, on an average level, e-market operators intend to link the membership form (and its subsequent completion by participants) with certain legal effects. In a number of cases, it is obvious that the posting of registration forms constitute valid "offers" (if referring to T&C). In these situations, the e-marketplace contracts are deemed to be concluded once participants send out the filled-in registration forms to operators.

6.2.3 Case 2: Placing of a good on e-auction and the submission of bids

6.2.3.1 Placing of a good on e-action (reverse auction)

6.2.3.1.1 The issue

In auction (reverse auctions) procedures, it may be considered as unfair if the seller or e-market operator (if this is a different subject than the seller) steps back from its announcement that an auction will take place at a specific moment of the procedure or at any time before a bid is retained. In other words, auction invitors (sellers or e-market operators) may decide to close a bidding procedure that has already been started or to withdraw the item that has been put up on auction.

6.2.3.1.2 Summary of national findings

Member States' jurisdictions are divided on this issue.

In a first group, the invitor's withdrawal from an auction procedure that has been announced or the withdrawal of the good put up on auction may be considered as fair. The majority of the legal systems of this group will found such thesis on basic contract law rules, especially on the fact that the invitation to bid cannot be qualified as a binding "offer". However, exceptions to this rule can be foreseen. These exceptions may refer to cases where: a) the auction T&C stipulate that the invitors are compelled to conclude a sales transaction and b) auction invitors announce that the auction procedure starts with a minimum reserve price.

A second group comprises the countries in which invitations to bid or announcements of a bidding procedure generate legal effects for the invitor and they are therefore binding. Contrary to the first group, the legal systems of this category would consider the invitation to bid as a valid and binding "offer".

Finally, a third group comprises the countries in which the answer to the question may vary, taking into account the particular circumstances of the given case, rules stipulated in T&C, the auction tradition, etc.

6.2.3.1.3 The unfairness of withdrawals

In a number of Member States, if the placing of a good on auction expresses the will/intention of a seller to proceed to a sales transaction, such "action" has a binding effect upon the seller (acting by itself or through an independent auctioneer). Consequently, the withdrawal of the good from the auction is not allowed as soon as the seller's intention has been communicated on the e-market.

According to the rules of the *Austrian civil law* on offers and acceptances, an offer is legally binding if it is done with the offeror's intention of establishing a binding relationship[226]. Such an intention may be assumed in the case of placing a good on auction.

It is interesting that, according to *Cyprus case-law*, the advertisement of an auction shall not be considered as an offer to hold the auction. Yet, the actual request for bids once the auction is open seems to be an engagement by the auctioneer on behalf of the owner that it is prepared to accept the highest bid and hence, it is binding.

Along the same lines, in the *Irish legal system*, an invitor may be contractually bound to sell to the highest bidder if it places a good for sale by auction "without reserve". In this case, the putting up of a good for auction without reserve may be understood as the invitor's offer to sell to the highest bidder once the "offer" is accepted by the highest bidder. On the contrary, the situation may be different (and, thus the invitor's offer may be withdrawn) if the invitor has announced from the start of the bidding procedure that there is a reserve price[227].

According to the *Italian rules*, the sale by auction shall be considered as an offer to the public and not as an invitation to contract[228]. Therefore, the invitor (or the seller if it is a different subject) reserves the right to accept or not the bidders' proposals. But even in this case, the invitor is bound by placing the good on auction in the light of the Italian general principles of contract law (i.e. the manifestation of will to conclude a contract),. Such an "action" or "sign" expresses actually the invitor's intention to start the auction procedure[229].

Under the *Swedish legal system*, the placing of a good on auction is normally deemed to be an offer by which the offeror is bound, provided that the offer contains all necessary elements for the conclusion of the "deal".

6.2.3.1.4 Acceptable withdrawals

A number of countries invoke basic rules of their national contractual laws to found that the opening of an auction procedure and/or the offering of a good on auction shall not be considered as binding upon the auctioneer or seller (if this is a different person than the auctioneer). This is the case of Belgium, Denmark, Estonia[230], France, Greece, Hungary, Latvia, Luxembourg…In almost all these countries essential elements of the action of putting up a good on auction are missing, so that such "action" or "sign" cannot be qualified as a valid and binding "offer".

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[226] Section 869 ABGB.

[227] *Payne v Cave* 3 TR 148; *McManus v Fortescue* [1907] 2 KB 1; *Tully v Irish Land Commission* (1961) 97 ILTR 174; for more details on the question, see Irish report, Question 16, Annex I.

[228] According to art. 5.1.g) of the Guidelines.

[229] As expressed in the Italian report, Question 16, Annex I.

[230] As implied by the Estonian report, Question 16, Annex I.

According to the *Danish law*, the placing of a good on an auction is an "invitation to submit an offer" and should not be binding. The same assumption is valid under the *French, Hungarian, Latvian, Maltese and Portuguese laws*, since essential elements of the agreement, such as the price, have not yet been determined[231]. However, provisions to the contrary in the e-markets T&C, thus stating that the placing of a good at the auction binds the offeror, are not to be excluded.

The same principle has been confirmed by the Belgian jurisprudence, meaning that the placing of a good on auction may only constitute an invitation to make offers and is therefore not binding[232].

In the *Finnish legal system*, the placing of a good on auction is binding only if it has been announced that the good shall be sold in any case. In all other circumstances, it can be deemed as not binding. Therefore, the auctioneer is actually free to accept or reject to transact with the bidder who will offer the highest bid. Also, if the auctioneer sets a minimum selling price this does not necessarily mean that the invitor is obliged to sell the good in any case. However, this regulation is not mandatory; consequently, e-market operators' may state in their T&C that the invitor offering a good on auction has to conclude an agreement if the minimum selling price is reached.

Similarly, according to the *UK law*, the placing of goods on auction is binding if the auctioneer declares that the auction is without reserve. Such a rule is also confirmed by the UK jurisprudence[233].

6.2.3.1.5 Varying legal interpretations

Under the *Czech and Slovak legal systems*, putting up a good on auctions may be considered as binding if it reflects the invitor's *manifestation of will*. For a *manifestation of will* to be binding according to the Czech rules, it must be sufficiently specific (definite) and it must clearly reflect the offeror's intention to be bound by its offer[234]. To fall within the definition of the binding manifestation of will, the putting up of a good on auction must be sufficiently specific; thus, it must contain at least the essential elements of the contemplated contract.

For a part of the *Czech and Slovak legal literature*, the placing of a good on an auction in a B2B e-market may also represent a "public tender"[235]. In this case, putting up an item on auction will also have a binding effect, since the duties of the invitor are even stricter in this case.

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[231] Such as ruling of the Hungarian Supreme Court, n°. 2003/939.
[232] Ruling of Belgian Supreme Court, January 13, 1966, R.W. 1965-1966, 1987.
[233] *Harlow v Harrison; Barry v Healthcote* Ball & Co.
[234] Section 43a of the Czech Civil Code. An offer is binding according to the legal doctrine of the Czech Republic, FRIMMEL, M.: Elektronický obchod/právní úprava, Praha, Prospektrum, 2002, p. 125, as quoted from the report of the Czech Republic, Question 16, Annex I.
[235] Sec. 281 and ff. of the Czech Commercial Code, FRIMMEL, M.: Elektronický obchod/právní úprava, Praha, Prospektrum, 2002, p. 124, as quoted from the report of the Czech Republic, Question 16, Annex I.

The only possibility for considering the submission of a good on auction as a non-binding "sign" or "action" upon the invitor is to qualify it as a "*public offer*". According to the Czech and Slovakian legal rules, public offers may actually be lawfully revoked if: a) the offeror announces its revocation before the acceptance of a public offer and b) if the announcement is made in the same manner as the announcement of the public offer. For a part of the Czech legal doctrine, however, the opening of an e-auction shall not be deemed to be a public offer since the purchase price, as one of the essential elements of an "offer", is not yet determined[236].

Under the *Dutch legal system*, putting up a good on auction is generally seen as a mere invitation to place bids. However, if specific circumstances justify so, the placing of a good at an auction can be considered as an unconditional offer to bidders to purchase the item. This may be the case if the auctioneer itself communicates a minimum selling price. It may be inferred from this action that any price higher than this minimum selling price that a bidder may suggest must actually bind the invitor to accept the bid. However, it is difficult to answer to this question with a mere "yes" or "no" since additional factors shall be considered in the light of the case at hand. Such factors may be the type of the object put up on auction, the particular tradition followed in the particular type of auctions, the commercial usages regarding the auction organisation and so on.

In *Poland*, the answer to the question whether the placing of an item at auction is binding differs between auctions and reverse auctions (meant here as tendering procedures). Accordingly, the Polish doctrine derives from the Civil Code provisions that the organiser has a duty to accept the most advantageous bid, unless stipulated otherwise in the terms of the auction. However, a reverse situation occurs in the tender procedure: despite the terms of the tender being generally binding, the organiser may freely close the tender without selecting any of the bids, unless otherwise stipulated in the T&C of the bids[237].

Views to the contrary have however been expressed in the Polish legal doctrine. According to these opinions, an announcement of an auction/tender should be considered as an offer made “on the conditions of the starting price, subject to better bids”[238].

According to the *Spanish legal rules*, it is expected that the interpretation of the invitor's action of putting up an item on auction shall be determined by the auction's T&C. It is further expected that a copy of such terms is provided to the bidders. It is in these T&C that it should normally be stated whether the placing of the good on auction binds the auctioneer or seller (if different from auctioneer).

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[236] Idem.

[237] Art. 70^3 § 3 Civil Code) (Z. Radwański, *Aukcja i przetarg po nowelizacji kodeksu cywilnego*, Monitor Prawniczy 2004/8, p. 357-358).

[238] J. Rajski, *Prawo o kontraktach w obrocie gospodarczym*, Third edition, Warszawa 2002, p. 108.

In the same way in *Germany*, it appears that the governing T&C of the auction determine whether the placing of a good on auction is binding, especially in cases in which no bid seems to be acceptable for the auctioneer (or seller). It should be stressed that there may be cases whereby the seller does not have the will to legally bind itself. Nevertheless, its offer will be binding if, during the time of putting the good up on auction, the seller declared that it will accept the highest bid. However, the T&C of the auction may state the contrary, i.e. that the seller invites bidders to issue bids but reserves the right to expressly accept the highest bid.

6.2.3.2 The submission of bids

The issue

According to national legal rules, it may be considered as an unfair practice if bidders participating in an e-auction (reverse auction) may withdraw their bids at any moment or after a specific point of time while the bidding procedure is running.

Summary of national findings

In the majority of the Member States, the submission of a bid by an auction bidder expresses its intention to a) participate in the e-auction procedure and b) to conclude the sales contract with the invitor if the latter accepts its bid. However, in all these cases, for a bid to oblige the bidder, it is essential that it is clear and specific and that it expresses the bidder's commitment to transact with the seller with the "fall of the hammer". The rule that the bid is binding is stipulated by express provision in a number of countries.

Yet, in a certain countries, it would be unfair to oblige bidders to retain their bids, given that the bid does not correspond to the elements of the binding "offer" as this is meant in the national legal systems (Germany, Cyprus, Portugal). In these cases, however, it appears that bids become binding once they are accepted.

Finally, in a few countries, bids are binding under specific circumstances (Czech Republic, Greece, Poland…). In particular, the binding or not nature of bids may be specified in the e-auction T&C. In other situations, bids are binding only if (and as long as) no higher bids are submitted during the same e-auction.

Unfairness of bid withdrawals

In the majority of legal systems under examination, the submission of participants' bids in an e-auction procedure shall be considered as binding (Austria, Belgium, Denmark, Czech and Slovak Republics, Finland, France, Hungary, Italy…). In these cases, it is considered that the submission of

a bid represents the expression of the bidder's will to conclude a sales contract according to conditions that it specifies in its bid (namely, the price).

According to the *Czech and Slovak civil laws* and legal doctrine, the bid must actually be seen as the manifestation of the bidder's will to conclude a contract with the invitor if the bidder's bid is retained[239]. Along the same lines, a bid shall be considered as an offer in France, Spain, Sweden, and the rest of the above-mentioned countries unless otherwise stated: a) by the bidder; b) the auctions' particular T&C and c) the e-market's generic T&C.

Following the *Belgian jurisprudence* on public auctions of immovable goods, a bid shall be considered as a valid offer. The Belgian Supreme Court affirmed the obligatory nature of the offer on the basis of the engagement theory which accepts a unilateral declaration of will[240]. It appears that, in the absence of more specific rules on electronic auctions, the principles governing the off-line auction procedures may apply by analogy.

It should be borne in mind that for all legal systems of this category a bid or other sign can be binding only if it is fixed and precise, i.e. includes all necessary elements that will enable "the deal" to be closed with "the fall of the hammer". Furthermore, it shall express a real commitment on the part of the bidder to conclude the sales contract with the invitor[241].

In *Lithuania*, the "unfairness" to take back a submitted bid is stipulated in art. 6.420 of its Civil Code.

Bid withdrawals are lawful

By using basic contract rules governing "the offer", a number of countries appear to deny a binding effect to the submission of bids.

Thus, under *Portuguese law*, the submission of a bid is an invitation to make offers and not a binding offer. This is because the bid does not actually contain all substantial and essential elements of the sales agreement. For instance, there is no final price as the seller has not declared that it accepted the value of the bid. On the contrary, it shall be deemed that during the bidding process, bidders and invitors are in a stage of negotiations. Thus, the parties try to obtain a consensus on only one element of the contract, the price[242].

In the light of the *German contract law rules* and legal doctrine, a bid becomes binding if it is

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[239] Art. 43a of the Czech and Slovak Civil Codes; FRIMMEL, M.: Elektronický obchod/právní úprava, Praha, Prospektrum, 2002, p. 125, as quoted from the report of the Czech Republic, Question 16, Annex I

[240] Cass. 9 May 1980, Pas., 1980, I, p. 1120 and 1127; HERBOTS, J.H., *Bijzondere overeenkomsten*, Leuven, Acco, 2000, p. 18.

[241] According, *inter alia*, to Luxembourg jurisprudence: J.d.P Lux., ruling of 18 January 1896, 4, 85; accordingly, in the Dutch doctrine, Asser-Hartkamp 4-II, Kluwer: Deventer 2005, p. 134.

[242] On the basis of art. 232 of the Portuguese Civil Code and art. 32.1 of Decree-Law n°. 7/2004.

accepted. This view is also justified by the e-market practices given that there is always a risk that other bidders will submit higher bids or that the auction will close without any bid being accepted.[243]

Similarly, according to the *Cyprus civil law principles*, any bid may be withdrawn before "the fall of the hammer". The *Irish courts* have ruled in the same sense: thus, a bidder may withdraw its offer at any point of time prior to acceptance of its bid[244]. The Irish regulation on the sales of goods determines the moment at which the bidder's offer may actually be considered as "accepted" by the invitor. Consequently, it seems that a bidder may not be contractually bound by its bid until the auctioneer communicates acceptance of the bid (i) by the fall of the hammer, or, (ii) on the occurrence of any other event which customarily connotes acceptance.

6.2.3.2.1 Conditions of lawful bid-withdrawals

As in the case of the placing of the good on auction, the discretion or not of bidders to withdraw their bids may be addressed in the T&C of the specific auction. If such a right is awarded to bidders, its fair or unfair nature will actually depend on the specific circumstances of the case[245]. Such T&C may allow bidders to take back their bids under specific circumstances or within a given deadline[246].

Pursuant to §10 of the *Estonian Act on Contract Law*, in the case of an auction, a bidder is bound by its bid until a better bid is made. Also, in the absence of a better bid, the bidder shall however not be bound by its bid if the invitor does not accept the bid within a reasonable period of time.

In the same sense, the *Greek civil law rules* on contracts through auctions stipulate that a person who participates in an auction and submits a bid is bound for the whole period up to the point that a better offer is submitted or the auction is adjudicated or cancelled. Accordingly, the highest bidder is committed to each bid until a higher bid is offered. This rule has been confirmed by the Greek jurisprudence[247]. The same rules (bidder's offer cease to be bidding once a higher bid is placed) applies in *Latvia and Poland*[248].

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[243] §156 of BGB; Gaul, WM 2000 p. 1783 (p. 1785), Gramlich/Kröger/Schreibauer, *Rechtshandbuch B2B Plattformen*, p. 158.

[244] *McDermott, Contract Law (Butterworths 2001)* at paragraph 1.15; Section 58 (ii) of the Irish Sales of Goods Acts 1893 and 1980.

[245] See, i.e. comment on "timed auctions" in the German report, Question 16, Annex I.

[246] As commented in the Italian report, Question 16, Annex I.

[247] Art. 185, 187 and 199 of the Greek Civil Code; judgement 994/2004 of the Supreme Court (Arios Pagos), judgement 806/1973 of the Plenary Assembly of the Supreme Court, Judgement 23393/1998 of the Unimember First Instance Court of Athens.

[248] Art. 2082 of the Latvian Civil Code; also, art. 70 §1 of the Polish Civil Code and relevant doctrine W. Kocot, *Wpływ Internetu na prawo umów*, Warszawa 2004, p. 307.

6.2.3.2.2 Mistakes in declaration

In almost all legal systems under scrutiny, the bidder's mistake(s) in the submission of its bid (e.g., typing mistakes, misunderstanding of auction terms, etc.) may justify the annulment or invalidation of its bid.

The issue may actually be addressed by national civil law rules regarding mistakes in contractual declarations or in the formation of a contract (herein, the conclusion of the sales agreement through the e-auction). For instance, according to the *Italian contractual rules*, an agreement based upon an erroneous bid may be declared void if the mistake: a) is essential (e.g., it regards the amount of the bid) and ii) it could have been recognised by a person using ordinary care, taking into account the specific circumstances[249].

In this context, the e-auction T&C may include specific provisions regarding the possibility of mistakes in bids: however, such rules may not derogate from general principles of law ensuring that the free will of a party is respected.

Also, in light of the *Irish case-law*, the bidder will in all probability not be asked to perform the contract if it is confused as to what it is actually bidding for because of lack of care or neglect on the part of the auctioneer or vendor[250].

Similar rules shall actually be relevant to all countries under examination accepting as basic principle of contract formation the free will of the parties and the absence of errors or deceit in the expression of their consent.

6.2.3.2.3 The e-market practices

On an average basis, the tendency of the e-market practice is to recognise/affirm that the bidders' offers are actually binding. On the contrary, in a number of situations, a clear imbalance has been noticed between what T&C stipulate as binding upon bidders and the discretion they leave on auction invitors. Accordingly, in most cases, bidders are compelled by their offers by the time they submit them. On the contrary, it is upon the invitor to decide to "close up the deal" with the bidder, even with the one who offered the highest bid. However, exceptions to these situations have been reported (e.g. in Belgium, France).

The following paragraphs provide a more detailed overview of the situation:

[249] Art. 1428, 1431 and 1433 of the Italian Civil Code.
[250] *Scriven Brothers v Hindley (1913)* KB 564.

In the T&C of a number of e-marketplaces that have been scrutinised, it is expressly stated that the submission of bids is binding. Such examples have been reported from *Belgium, Denmark, France, Ireland, Italy, Lithuania, and Poland.*

However, in e-marketplaces operating from *Italy and Poland*, the auction T&C clarify that bids remain binding as long as no higher bid is submitted.

Also, the rules of an a e-market operating from *France* provide expressly that the initiator of an auction may not retract, modify, limit or suspend the auction after the start date and time, regardless of whether any bids have been submitted. However, according to the same rules, the auctioneer may terminate or cancel the auction at any time. Along the same lines, a Hungarian e-marketplace specifies that the invitor is obliged to conclude a sales contract if there is at least one bid submitted.

On the contrary, in a number of *Spanish e-markets*, it is pinpointed that invitors are not obliged to accept any of the offers and can reject all of them. However, bidders who are awarded the winning bid are obliged to pay to the auctioneer the purchase price they offered. The invitor's discretion to accept or not a bid put up on auction has also been noticed in a few e-markets operating from *Germany*. The contrary has been reported in a case from Belgium: here, the auctioneer is bound to conclude a sales contract with the bidder offering the highest bid at the end of the auction.

It is worth pointing out a case reported from *Hungary*. The T&C of the said e-marketplace specify that the e-market participants shall acknowledge that the invitor is in no way bound to conclude an agreement. On the contrary, the bids bind the participants once they have been submitted. However, the bids remain binding only during 15 days unless the auction organiser specifies otherwise.

In an e-market example from *the Netherlands*, bidders are allowed to increase their bids, but not to decrease or withdraw them. However, the highest bid does not automatically bind the auctioneer but it is subject to its acceptance. In another case of a real-time reverse auction, an item is automatically repealed once a bid reaches the bottom-price indicated by the invitor.

In another case reported *from Poland,* the T&C of the e-market concerned stipulate expressly that the submission of bids, but also the placing of goods at auctions, constitute legally-binding "offers". Nevertheless, the *ad-hoc* T&C of the specific invitation (to buy or sell) may state otherwise.

6.3 Lack of transparency

6.3.1 The issue

To ensure a fair conduct of all market players on an e-market, it is important that the law or the e-market itself defines the "rules of the game". It may be the case that the law of the countries under examination regulates, to a certain extent, this issue. In many jurisdictions, however, it is expected that the matters discussed below are primarily addressed by commercial usages and the e-market practice. Transparency about such rules is another prerequisite of the fair conduct in B2B e-markets.

Operational rules that are not disclosed to all parties under the same conditions or in the appropriate manner encourage unfair behaviour. However, in certain circumstances, the e-market practice allows that certain information is not equally shared by all participants or is not disclosed at all to the trading partners involved. In these cases, it will be investigated whether or not these exceptions comply with the legal imperatives of the Member States' jurisdictions.

6.3.2 Summary of national findings

In almost all Member States, the e-market operator's failure to provide information in a transparent way to the participants is considered as unfair.

However, in none of the countries under examination exists a special statute applicable to B2B e-markets which regulates transparency requirements for e-market operators . On the contrary, in the great majority of Member States, general civil law principles covering also the negotiation phase of a contractual relationship apply in this respect (Austria, Belgium, France, Greece, Hungary, Italy, Lithuania, Malta, Portugal, Slovenia, Spain, Sweden). Such generic rules are inserted in trade regulation in a number of countries (Czech and Slovak Republics and Hungary). In two countries, Poland and Portugal, special legislation provides for duties on information and communication that parties to an agreement shall adhere to.

Given that e-markets transactions fall under the scope of information society services which are subject to special regulation in the majority of Member States, requirements about the clarity and transparency of information that e-market operators shall abide with stem also from the national regulatory frameworks on e-commerce and e-business (Denmark, Estonia, Finland, Hungary, Italy, Ireland, Luxemburg, Spain, UK…).

It is noteworthy that, for a number of countries (e.g. Portugal), the obligation of e-market operators to convey information in a transparent way may be addressed through a combination of the above-mentioned legal sources, e.g. generic civil law rules, together with e-commerce regulation.

6.3.2.1 The obligation of good faith before the contract conclusion

A fundamental rule in the field of contract formation enounces that, during the pre-contractual period, parties must act in good faith and must behave in a lawful and honest way (Austria, Belgium, France, Greece, Hungary, Italy, Lithuania, Malta, Portugal, Slovenia, Spain, Sweden).

According to the theory of *culpa in contrahendo*, parties being in a negotiation phase shall abstain from any behaviour which a normal and careful person in the same situation as the negotiators would not follow[251]. In other words, before entering into an agreement, parties have to abstain from any wilful misconduct. This theory is acknowledged by a number of countries (Austria, Belgium, France, Sweden).

In certain Member States (Hungary, Italy, Lithuania, Portugal, Slovenia, Spain), the theory of *culpa in contrahendo* is expressly stipulated in their civil codes. The *Hungarian Civil Code*; for instance, requires that parties shall cooperate during the conclusion of a contract, and they shall respect each other's lawful interests[252].

Also, the *Italian Civil Code* imposes on parties to behave in good faith while negotiating an agreement[253]. The civil codes of the rest of the above-mentioned countries provide for similar provisions with respect to good faith and loyalty that must be observed during the pre-contractual phase[254].

In the same vein, according to *Lithuanian law*, parties shall behave in good faith during the pre-contractual phase and shall disclose to each other the information they have and which is of essential importance for the conclusion of a contract[255]. Thus, if a party: a) has intentionally withheld information that is essential for the other party to form its consent over the agreement or b) has presented false information with a view to inducing the other party to conclude the contract, the harmed party may request the court to declare such an agreement void or to modify its terms.

In a number of countries, examples of situations that can be covered under the theory of *culpa in contrahendo* have been elaborated by the legal doctrine and jurisprudence (Austria, Belgium, Italy, Slovenia, Greece). In *Austria* and *Slovenia*, for instance, a party may not break off negotiations

[251] As per Belgian Report, Question 20, Annex I.
[252] § 205 (4) of he Hungarian Civil Code.
[253] Article 1337 of the Italian Civil Code.
[254] Article 6.163 of the Lithuanian Civil Code.
[255] Article 6.163 of the Lithuanian Civil Code.

arbitrarily if it has created the other party's reliance[256].

Along the lines of case-law elaborated by *Belgian courts*, parties being at a negotiation stage have the obligation to provide pertinent information[257]. Also, under the *Italian legal system* contracting parties should disclose all elements they have in their possession which can be considered relevant in connection to the agreement being negotiated[258].

Pursuant to the *Greek* legal doctrine, contracting parties have secondary obligations and in particular obligations in order to protect the counter-party beyond the material object of the transaction itself. For example, a contracting party should take protective measures so that the performance of the contract may not damage the financial state or the property of its counter-party[259].

6.3.2.2 Rules of commercial nature

Express rules of trade law in *Czech and Slovak Republic* stipulate the requirement of publication of T&C, an issue that has already been discussed in Chapter 6[260]. The e-market participants can only be bound by contractual rules that have been communicated and accepted by them. On the basis of this requirement, e-market operators have to equally disclose T&C they prepare to all participants.

In Hungary, the core regulatory instrument which justifies the conveyance of transparent information to e-market participants is the Act on the Prohibition of Unfair and Restrictive Market Practices. The Act lays down the overriding principle that economic activities shall not be conducted in an unfair manner, in particular in a way violating or jeopardizing the lawful interests of competitor business partners. The same principle bans the business conduct which conflicts with the requirements of fair trading[261].

6.3.2.3 Special rules

In Poland and Portugal, the transparency requirements are set forth in sector-specific regulation.

In this regard, *the Polish* regulation on the organisation of the standard, off-line auctions covers also auctions services that are conducted on-line. Accordingly, it is required that, in an announcement of an auction or tender, the time, place, subject and conditions of the auction or tender must be specified[262].

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[256] According to the Austrian and Slovenian Reports, Question 20, Annex I.
[257] Brussels 17 December 1963 (not published). In the case at hand, wrongful information was provided by mistake.
[258] See Italian Report, Question 20, Annex I.
[259] As per Greek Report, Question 20, Annex I.
[260] Sec. 273, §2 of Czech and Slovak Commercial Codes.
[261] Sec. 2 of Hungarian Act on the Prohibition of Unfair and Restrictive Market Practices.
[262] Art. 70 §2 of the Polish Civil Code (see Polish report, Question 21, Annex I).

The Portuguese Act on Standard Contractual Clauses[263] (discussed above under Chapter 5) sets out a set of general duties of communication and information in order to secure transparency between the parties.

6.3.2.4 Regulation on information society services

The e-commerce regulation of a large number of countries sets out the nature of information that suppliers of information society services must make available before the conclusion of a contract through electronic means (*Denmark, Estonia, Finland, Hungary, Ireland, Italy, Luxembourg,and Spain*).

On an average level, such rules stipulate also that this particular information shall be conveyed on the suppliers' website and that it shall be communicated in a direct and easily-accessible way to the service recipients. Moreover, these rules address the nature and quality of information that need to be supplied before/at the contract conclusion on-line.

Such provisions are either integrated in the civil codes of a number of countries (Poland, Estonia) or in explicit e-commerce acts (Belgium, Denmark, Finland, Hungary, Ireland, Italy, Luxemburg, Spain).

It is noteworthy that *in Poland*, express information duties that are stipulated in its civil code must be observed in the conclusion of any agreement and not only of a contract on the provision of information society services. However, in a B2B context parties can expressly agree to exclude such duties in their mutual relations[264].

Such information should be communicated in a clear and comprehensible way and shall include:

- technical acts covered by the procedure of concluding a contract;
- legal effects of the receipt of the offer by the other party;
- rules and methods of fixing, protecting and making accessible the contents of the contract by an entrepreneur to the other party;
- technical methods and means for detecting and correcting errors in the introduced data that the service provider must make available to service recipients;
- languages in which the contract may be concluded;

[263] Decree-Law n°. 466-85, art. 5, Portuguese Report, Question 20, Annex I.

[264] Art. 66 § 4 of the Polish Civil Code. To be stressed that, such a discretion is recognized in the majority of Member States having stipulated for similar provisions on information requirements in their regulation on information society services.

- codes of ethics applied by service provider and their availability in electronic form.

In addition, the *Polish* Civil Code contains an express provision with respect to the conclusion of contracts using an electronic model[265]. In this respect, article 385 § 2 stipulates that the model form of contract should be formulated explicitly and comprehensibly and that ambiguous provisions must be interpreted for the benefit of a consumer. The *Polish* doctrine assumes however that this rule applies also in a B2B-context pursuant to the rule of *dubio contra proferentem*[266].

In *Ireland*, the European Communities Regulations 2003 has been transposed to meet its information requirements which are aimed at ensuring a certain degree of transparency. Regulation 7 reflects article 5 of the Directive and Regulation 13 and 14 (information to be provided with respect to the conclusion of contracts by electronic means) reflect articles 10 and 11 of the Directive[267].

In the same vein, the e-commerce acts of the other afore-mentioned countries provide for similar provisions as the respective articles in the e-commerce directive. We expect that, also, in the rest of Member States, suppliers (and, hence, e-market operators) are bound to provide clear and comprehensive information to e-market business partners on the basis of analogous information society laws.

However, such rules have not been explicitly reported. We assume that this is because such regulation actually confirms what is herein monitored on the grounds of other, general or sector-specific regulation.

6.3.2.5 The market practices

Against the legal background analysed above it can be inferred that certain information need to be conveyed to e-market participants so that they can participate in an equal and transparent way in e-market transactions, especially in auctions and reverse auctions.

The sections below outline the practices that e-markets in the Member States follow with regard to the nature and quality of information that operators of e-auctions (and/or reverse auctions) communicate to e-market participants regarding four subject matters:

1] the way in which the winning bid and the price are determined;

2] the payment terms and fees due by e-market participants;

3] the identification of e-market participants;

[265] Art. 384 § 4 Polish Civil Code, relevant comment in Polish Report, Annex I.
[266] Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna*, 5th edition, Warszawa 2005, p. 150.
[267] Irish Report, Question 20, Annex I.

4] the information that the auctioneer/operator is obliged to disclose to other bidders in case the deal is closed;

5] other operational issues.

6.3.2.5.1 Determining the winning bid

The communication of transparent information on the way a winning bid is determined is not expressly required by the national legal systems under examination. The exception may be the Polish regulation which, as outlined above, lays down that explanations about the time, place, subject and conditions of the auction or tender should be specified in the announcement of the e-auction or e-tender[268].

In the majority of e-markets examples that have been scrutinised, it is explicitly stated that the highest bidder will win the auction (Austria, Belgium, Czech Republic, Estonia, Finland, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, the Netherlands, Slovakia, and Slovenia).

In some of these examples, it is also pinpointed that, in case of equivalent prices, the time sequence determines the winner. In other words, the bidder who first submitted the first of the equivalent bids will be the winner (Czech Republic, Belgium, Estonia, and Slovakia).

On the same issue, an e-marketplace operating *from Belgium* stipulates for equal bids submitted in multi-item offers: "*If equally high bids were submitted for a multi-item offer for which the seller will not accept partial fulfilment of the offer, the buyer who first submitted a bid for the entire offer will be awarded the winning bid. If equally high bids were submitted for a multi-item offer for which partial fulfilment is permitted, multiple winning bids will be awarded in the order in which the bids were received and to the extent that they can be concurrently awarded."*

In *Ireland*, it appears from the documentation on an e-marketplace that two reservations exist on the principle of the highest bidder: some assets may be auctioned with minimum reserve prices, and/or subject to seller's right of confirmation[269].

On an e-marketplace operating *from Hungary* a more detailed description of the procedure of the winning bid is provided: "after the bidding period the winner and the three other bidders giving the highest bids will receive an e-mail from the service provider in which the service provider indicates the relevant bidders and their e-mail addresses. The offeror and the winner must contact each other within 3 business days. If they cannot communicate with each other within the above period, the

[268] As per Polish report, Question 21, Annex I.
[269] See Irish report, Question 21, Annex I.

offeror is entitled to contact with the second best bidder."[270].

On the contrary, in examples reported *from Denmark*, it appears that the question of how determining the winning bid is either unregulated or it is stated that the buyer is free to choose between the bidders[271].

6.3.2.5.2 Determining the price of the deal

As mentioned above, it is a common rule of Member States' regulation on information society services to provide information on the different technical steps that need to be followed to conclude an agreement by electronic means. Following a broad interpretation of that obligation, the determination of the price of the deal can be considered as a "technical step".

To note again that, this provision may be set aside by contractual parties transacting in a B2B context.

In the e-marketplaces scrutinised in Member States, it seems that the situations varies: in a number of cases, information about the price that the winner of the e-auction (reverse auction) shall pay is communicated. In other cases, T&C of the relevant e-markets are silent in this respect.

For example, in e-markets examples reported from *Poland and Malta*, a quite usual rule is that in case of pure transactions (a selling contract for instance) the e-market participants (sellers and buyers) are responsible for the calculation of the prices. Other e-markets specify that the price to be paid is the price of the highest bid (*Finland and Latvia*).

In other examples, it is explained that the winner will pay the highest price which it offers by its bid at the end of the auction (*Austria, Belgium, Finland, Latvia, Lithuania, Luxemburg, and the Netherlands*). However, taxes and/or a commission are to be added in this price in a number of cases. The exact amount of taxes, however, is to be specified in the sales conditions issued by the seller (Belgium).

In an e-market case reported from *Austria,* it seems that the final price is the price of the final bid, but increased by the auctioneer's commission and VAT. The percentage of this commission is specified in the T&C.

In another case reported from the *Slovak Republic*, the T&C of the e-marketplace concerned do not contain the provision governing the price determination; this process is determined in the sale conditions which differ according to the object of an auction[272].

[270] See Hungarian report, Question 21, Annex I.
[271] See Danish report, Question 21, Annex I.
[272] See Slovakian report, Question 21, Annex I.

6.3.2.5.3 Payment terms and fees due to the e-market

In most of the countries under examination, the regulation on information society services requires that prices of information services must be indicated clearly and unambiguously and that they state whether they are inclusive of tax and delivery costs.

The market practices in a number of Member States appear to comply with this requirement, but exceptions are not to be excluded. Generally speaking, it appears that e-market operators usually charge three types of fees:

- the payment of a service commission in the amount of a certain percentage of the offered purchase price plus relevant statutory taxes. This is notably the case for e-marketplaces operating from *Austria, Belgium, Hungary, and Italy*. A *Polish* e-marketplace states that the commission depends on the number of contracts concluded;

- the payment of a fixed fee (a registration fee) which, most of the times, is indicated on the website (*Denmark, Italy, Luxembourg, the Netherlands, UK*) or in a separate fee schedule (*France*). In some cases, this fixed fee depends on the number of goods put up for auction, that may be other than the number of goods actually sold (*Latvia*);

- the payment of a combination of both fees mentioned above (*Ireland, Sweden*).

The payment term of the fees due to the e-market operator differs considerably from one e-marketplace to another. (30 days, 8 days, 7 days, etc.). Some e-marketplaces provide for a default interest in case of late payment. Also other sanctions can be applied, for instance that the rights of the offeror with respect to further bids will be suspended (*Hungary*) or that the debtor has no longer access to the auction services until the debt is paid (*Lithuania*).

It is noteworthy also that a number of the reviewed e-marketplaces does not tackle this issue in their T&C. In a number of e-market examples reported from *Hungary*, the fees are usually established separately with each participant of the e-market on a case-by-case basis[273]. Free provision of services has also been reported (e-markets examples from *Lithuania*, the *Netherlands* and *Malta*).

6.3.2.5.4 Identification requirements for e-market participants

Almost all e-marketplaces oblige implicitly existing (or potential) participants to communicate identification details through the procedure of registration.

As reported by *Austria, Spain and Sweden*, in a number of cases, the T&C of the e-market operator shift on participants the responsibility for communicating true and complete information of their

[273] Based upon unofficial information, see the Hungarian report, question 21, Annex I.

(personal) identity and company identity.

It seems however quite a common practice not to communicate the real identity to other parties while transactions take place (*Belgium, Hungary, Ireland, Italy, Latvia, Luxemburg, the Netherlands, Poland, Slovakia*). In this respect, only the user name and number may be visible to business partners. In these situations, it is customary that contact details of parties can be disclosed at the time of contract conclusion. Exceptions to this practice have been reported, i.e. in a case reported from *Poland*, the participant's identities are already revealed during the transaction/auction itself.

Another common practice reported from *Belgium and France* is to publish participants' identification details on a member directory. This directory is normally visible on the website and can be viewed by all users of the e-marketplace. It addition, in one e-market operating from *Hungary*, the participant must itself agree that its registration is entered in a database. Such data become actually available to any business partner (organisers of e-auction) who may select and invite the registered members to participate to new e-auctions.

6.3.2.5.5 Disclosure of information to the other bidders when the deal is closed

This matter is not generally tackled by the documentation/T&C of the investigated e-marketplaces.

Only the highest bidder seems to receive a confirmation that it has won the auction and no information seems to be provided to the other parties at the end of the deal[274]. On a *Hungarian* e-marketplace, however, it is indicated that *"following the close of the auction the organiser can inform the participants about the result of the evaluation of their bids"*.

It can be expected that, following the entering into force of the "*Loi Dutreil*" in France, the French e-markets will incorporate a respective clause in their T&C, since this disclosure (on request of a participant) is required by this new law.

6.3.2.5.6 Other operational issues

With regard to a number of Member States, it has been reported that the T&C set out other operational issues that concern the transactions taking place in the e-marketplace. On an average level, such rules refer mostly to penalties or sanctions that e-market operators may impose on e-market participants violating the e-market T&C or to conditions regarding access to the e-marketplace.

On an e-marketplace operating *from Denmark*, for instance, it is set forth that the operator, in appropriate circumstances, may terminate the accounts of users who do not apply to the ethics of

[274] As quoted from Dutch report, Question 21, Annex I.

conducting business via the system or who infringe the intellectual property rights of other participants.

In another example quoted from *Latvia*, the T&C of an e-market operator stipulate that the auction organizer may block or terminate the access to the e-auction, including taking out the goods intended for auction, in case of participant's failure to comply to the terms of the agreement.

The T&C of an e-marketplace offering services from *the Netherlands* require all participants to demonstrate their creditworthiness; in the absence of such evidence, the e-market operator reserves the right to terminate unilaterally the contract. Furthermore, the participant must have a Dutch bank account. These terms however should not be considered as excessively onerous but rather as additional assurances (and, hence, in line with the legal rules) that the e-market operator imposes on participants in order to enhance the creditworthiness of its e-market platform[275].

Other specific terms reported from other cases are for instance the obligation to appoint a proxy or the e-market participants' obligations to justify the reason for applying for access in the said e-marketplace[276].

6.4 Hidden reserve prices

6.4.1 The issue

In an auction, it may happen that the invitor does not intend to sell the object of the auction (product/service) below a certain price. Sometimes, bidders are unaware of the invitor's intention not to conclude the deal if no offer reaches the amount he has set for the object. It may also be common that the invitor's minimum acceptable price (reserve price) is not disclosed to bidders before/at the time they bid. Consequently, if bidders offer prices lower than the reserve price they actually bid for nothing.

6.4.2 Summary of national findings

None of the countries under examination provide for special regulation on the subject of hidden reserve prices in B2B e-marketplaces. With regard to generic legal instruments regulating this issue, two streams of countries may be distinguished.

[275] As quoted from Dutch report, Question 21, Annex I.
[276] As reported from Poland, see Polish report, Question 21, Annex I.

The first stream encapsulates the majority of Member States, in which the fixing of hidden minimum reserve prices would be considered as unfair (Belgium, France, Greece, Latvia, Slovenia, Germany, Italy, Lithuania, Poland, Portugal, Czech and Slovak Republics)

In two countries only, it appears that the setting of hidden reserve prices may be allowed under their legal system (Austria, Hungary).

6.4.3 The unfairness of practice

The legal basis on which the unfairness of setting reserve prices may be founded differs slightly between the Member States of this stream.

Accordingly, in a number of Member States the unlawfulness of hidden reserve prices stems from *generic principles and rules of local contract law* (Belgium, Denmark France, Greece, Latvia, Slovenia, Germany, Italy, Lithuania, Portugal).

In two countries, the *Czech and Slovak Republics*, hidden reserve prices would be undermined on the grounds of their respective commercial codes.

6.4.3.1 General contract law principles

6.4.3.1.1 Good faith in the pre-contractual phase

The e-market participants' deceit on a principal element of the transaction (the price which the counter-party is prepared to accept) violates the principle of good faith that in principle underpins also the pre-contractual phase. Such a basic rule is recognised by a good number of countries (Belgium, France, Greece, Slovenia…).

In *Belgium* and *France* for instance, according to the theory of incidental fraud parties have to abstain from any malicious behaviour aiming at harming the rights or interests of counter-parties. It is generally acknowledged that the incidental fraud covers malicious manoeuvres which would have prevented the other party from concluding the agreement. However, it also addresses deceitful conduct which has an influence on the T&C of the agreement. For instance, malicious withholding of certain information, all the more when such information is crucial for the counter-party to take a decision (e.g. price of a good) contravenes good faith in the pre-contractual phase[277].

Also in *Slovenia*, the setting of hidden reserve prices is considered as negotiating without the

[277] Cass. 8 juni 1978, *R.C.J.B.* 1979, 525 as mentioned in the Belgian report, Question 21 and 23, Annex I; Cass. Civ. 24 février 1999 as quoted in the French report, Question 21 and 23, Annex I.

intention to contract[278]. Consequently, a party can be held liable for damages suffered by the other party, especially if the invitor fails to disclose such additional condition intentionally (which is the case here) or with gross negligence.

In the same vein, the *Greek legal system* stipulates that parties must perform their obligations in good faith (*bona fides*) and in line with the transactional usages[279]. The good faith principle obliges actually the invitor to make at least known to e-market participants that a reserve price exists. It is however not necessary to disclose the exact amount of the reserve price.

6.4.3.1.2 The information and transparency duties

For a number of countries, the prohibition of hidden reserve prices can be concluded from basic rules of the civil law. Such rules require from contractual parties to make their counter-parties fully aware of the T&C governing the contractual relationship (Germany, Italy, Lithuania, Portugal).

Thus, any condition, such as a hidden reserve price, which is not disclosed to participants, may not be used against the participants in an auction.

6.4.3.2 Special regulation on auctions

For a few countries only, opaque practices on the price at which a good is put up for auction may be caught by special legislation on auctions (Poland, Latvia).

Article 2081 of the *Latvian Civil Code* for instance states that *"sale at auction of movable property by private procedure shall be considered to have occurred even though at the auction no one has bid higher."* Thus, it can be inferred that in such case auction will be regarded as concluded even if the preliminary set price is not outbid.

Also, Article 72 §2 of the *Polish Civil Code* indicates that a contract is concluded by means of an auction at the moment of knocking down a bid. Therefore, the invitor is bound by the results of the auction; it actually loses the right to choose the contracting party from among the bidders or the right to refuse to execute the contract with the winning bidder, unless the terms of the auction (announced to the bidders before the auction takes place) stipulate otherwise.

Considering this rule and save contrary provisions, the invitor cannot refuse to execute the agreement even if the best offer did not reach the amount it has set for the object (reserve price)[280].

In the same vein, the *UK Sales of Goods Act of 1979* stipulates that an auction may be notified as

[278] Art. 20 of the Slovenian Civil Code.
[279] Art. 288 of the Greek Civil Code.
[280] According to the Polish legal doctrine, W. Kocot (*Wpływ Internetu na prawo umów*, Warszawa 2004, p. 311 as quoted in the Polish report, Question 23, Annex I.

subject to a reserve price. In this respect, it is not necessary to reveal what the exact price is.

6.4.3.3 Law on commercial practices

In the *Czech and Slovak Republics*, the auction opening may be considered as a public tender[281].

In public tenders, the invitor is bound by its call for submitting the offers according to the T&C that it defines by itself. This means that, if the invitor has stipulated in the T&C to conclude the contract with the bidder offering the highest price, it is bound by its promise.

In this respect Section 266 of Commercial Code stipulates the following:

"*1. A demonstration of will shall be interpreted according to the intention of the acting person, if this intention was known or must have been known to the party to which the demonstration of will was addressed."*

2. If it is impossible to interpret the demonstration of will under paragraph 1, the demonstration of will is interpreted according to the meaning, which a person in position equal to the position of the person to which the demonstration of will was directed, would have assigned to such demonstration."

On the other hand, if the auction opening does not meet the legal requirements of a public tender or of a public promise, the invitor has not a legally enforceable obligation to contract with anybody.

However, in these situations, the right of the bidders to damages is not excluded.

On the contrary, according to the *Irish auction rules,* the invitor that places the good on the website "without reserve" is contractually bound to sell to the highest bidder[282]. The *Finnish* Transaction Act contains a similar provision[283].

6.4.4 Fair practice?

Under a number of countries, reference should be made to the principle that the placing of a good on an auction is regarded as an invitation to offer, which is not binding (*Austria, Hungary, and Sweden*).

Therefore the offeror is not obliged to enter into a contract if no offer reaches the amount he intended to receive for the given product.

This practically implies that bidding for nothing can be considered as a business risk of the bidder. In

[281] Section 281 and ff. of the respective Commercial Codes or Section 850 and ff of the respective Civil Codes.
[282] *Tully v Irish Land Commission* (1961) 97 ILTR 174 as mentioned in the Irish report, Question 23, Annex I.
[283] Transaction Act § 8, as mentioned in the Finnish report, Question 16 and 23, Annex I.

the Netherlands the real estate transaction practice is based upon the same principle[284]. However, in *Sweden*, it must be taken into account that an invitor which decides not to sell the offered goods may be held liable towards the purchaser and - depending on the agreement with the operator - also towards the operator[285].

6.4.5 The e-market practices

In the majority of Member States this issue is not tackled in the investigated e-marketplaces (*Austria, Cyprus, Czech Republic, Denmark, Finland, France, Greece, Italy, Lithuania, Luxemburg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden*). This can be due to the fact that a) the auctioneers of the scrutinised e-marketplaces do not set a reserve price or that b) the auctioneers set a reserve price but do not notify this to the e-market participants.

However, a few examples have been reported where T&C inform the participants that the products may be auctioned with minimum reserve prices. Therefore such practices comply with the requirement of the respective national regulations on the issue of reserve prices. This is at an average level the situation in *Belgium, Estonia, Ireland, Latvia and the Netherlands*.

On an e-marketplace operating from *Belgium*, for instance, it is indicated that *a "Reserve Price" is the minimum price at which a Seller is willing to sell an item. If an offer is made at or above this price, the Seller is obliged to sell. The Seller can also set a price below the Reserve Price to open (Opening Price) or stimulate bidding, but is only obliged to sell if the Reserve Price is met. The Reserve Price is not disclosed to bidders, but Buyers will be notified when the Reserve Price has been met."*

T&C of practices reported from *Estonia* set out that reserve prices shall not be disclosed to the participants but that participants shall be informed about this fact. In these cases, the reserve price could be as maximum a twice of the initial price. After the failed bidding the seller has the right to make an offer to the best bidder to buy the item under the reserve price.

Also in a number of cases monitored in *Ireland*, it appears that T&C provide that certain assets may be auctioned with minimum reserve prices and/or subject to the seller's right of confirmation. It is further provided that the invitor may reject any bid that is not commensurate with the value of the item being offered.

The T&C of e-marketplaces operating from *Latvia and the Netherlands* indicate similar provisions.

[284] Supreme Court 11 December 1991, NJ 1992/177.
[285] As quoted in the Swedish report, Question 23, Annex I.

In the same vein, T&C of an e-market operator offering its services from *Hungary* lays down that e-market participants shall acknowledge the organiser's (invitor's) right not to conclude the deal with any of the participants. The said contractual rules stipulate also that the invitor is entirely free to conclude a deal with the best bidder or not. These provisions are in compliance with the Hungarian legal requirements following which the setting of hidden reserve prices is allowed.

6.5 Defects of Transaction

6.5.1 The issue

E-markets have as objective that transactions are concluded between the parties who meet or interact in the e-market. It may happen that specific problems arise in the performance/execution of the contract in the same way as such problems may happen in any other e-commerce/distance selling agreement. Defects of such transactions may constitute a breach of contract for one of the parties. In some legal systems, it is probably required that the e-market itself undertakes a certain responsibility regarding the smooth performance of the transactions it supports. Other legal systems may allow for an e-market operator to exclude all and any liability regarding fair execution of these transactions.

Against this background, the issue examined in the sub-sections below is whether it would be considered as unfair if e-market operators exclude their liability in the following cases:

Case 1: The goods/services transacted through the e-market are defective.

Case 2: The goods/services are not delivered at all or in the agreed time.

Case 3: E-market business partners acting as buyers fail to pay or do not pay in time.

Case 4: E-market business partners transact on stolen goods (assuming that buyers acquire them in good faith).

Case 5: E-market transaction involve goods/services that are prohibited from electronic trading.

Case 6: E-market participants fail to conclude the contract being the object of the transaction (e.g. sales contract).

6.5.2 Case 1: Defects of goods/services

In all Member States, it is not unfair if the e-market operator excludes its liability in case that defective goods or services are transacted through the e-market.

All over the EU, it appears that a general contract law principle establishes that a contract can generate legal consequences only for and between the parties to the contract. Normally, a contract shall only be of advantage to, and not to the prejudice of third parties[286].

Almost all legal systems under examination seem to accept that the e-markets operator shall be considered as a third party, not participating in the transactions between the participants. Liability for defects in goods and services exchanged on the e-market platform applies only between parties negotiating or concluding the purchase agreement or other specific contract.

Consequently, liability claims arising from the purchase or - other - contract against the operator by e-market participants cannot be founded on contractual grounds but only on tort law.

For example, in the *Czech* and *Slovak Republics*, the operator can exclude its liability for defects of the goods/services caused by itself, unless it has guaranteed the state of goods or services exchanged on the e-market in its T&C [287].

In practice, however, it may be difficult to base the e-market operator's liability on tort law. The reason behind is that all legal systems under examination require to establish the necessary causal link between the activities or role of the e-market operator and the defects in goods/services transacted through the e-market, a task that may not be easy for the harmed party[288].

On the other hand, a few countries contain certain reservations in their legal system with respect to this principle (*Italy, Lithuania*). In *Italy* for instance, the operator – under certain conditions – may be liable for damages deriving from defects of the goods transacted, under Decree 224/1988 regarding product liability. This may be the case wherever the operator may be considered as the importer into the EU of the goods, or where the manufacturer is not identified and the operator fails to disclose the manufacturer's identity to the damaged party[289].

Similarly, the *Lithuanian* Civil Code stipulates that the auction operator may be held liable for due performance of obligations of the seller when the operator does not disclose the identity of the seller

[286] Article 1001 of the Maltese Civil Code as reported in the Maltese report, Question 26, Annex I; article 1165 of the Belgian Civil Code; see also Belgian doctrine: KAESMACHER, D., en VERPLANCKE, P., *"E-business: aspects juridiques", J.T.* 2001, 187-188; article 1257 of the Spanish Civil Code as reported in the Spanish report, Question 25, Annex I.

[287] Pursuant to Section 420 and ff. of the Czech and Slovakian Civil Code and to Section 373 and ff. of the Commercial Codes: "*the party in breach of its legal duties stipulated by the Civil Code, Commercial Code, or contract is obliged to compensate the damage caused to the other party, unless proved that the breach was caused due to consequences excluding the liability.* Under the Slovakian jurisdiction, the contract between the operator and invitor can be considered as an agency contract, which does not, however, prescribe the liability of the agent for the defects of the above mentioned goods or services, Question 25, Annex I.

[288] As mentioned explicitly in the Austrian and Lithuanian reports, Question 25, Annex I.

[289] Article 3.3 of the Guidelines on on-line auctions, no. 3547/c of June 17th, 2002, issued by the Ministry of Productive Activities, as quoted in the Italian report, Question 25, Annex I.

to the winner of an auction[290]. However, it would still be possible for the operator to exclude its liability for these events as they do not constitute gross negligence. In the same way, under *the UK law*, the auctioneer can exclude its liability on this issue, provided that: a) the identity of the vendor is notified and/or b) the auctioneer warrants that the vendor has good title to the goods or services being sold.

On an average level for all Member States, the operator's limitation of liability for defective goods/services will not be considered as unfair, provided that: a) the e-markets T&C regulate the liability issue very clearly and b) such limitations are communicated to e-market participants. In case of disputes involving also the e-market operator, the judge will have the discretion to assess the (un)fairness of such limitations of liability[291].

6.5.3 Case 2: Delay or failure in delivery

For all Member States, the same reasoning as in the previous section is applicable in this case.

Since the e-markets operator is a neutral, third party that has not provided any guarantees regarding the delivery of the good being the object of the e-market, an exclusion of its liability for this issue is fair[292].

The observations mentioned in the section above with respect to *Italy* and *Lithuania* could also be relevant under this issue.

6.5.4 Case 3: Late or failure of payment

On an average level, it can be admitted that the e-markets operator can exclude his liability in case the buyer does not pay or pays with delay for the good it has bought through the e-marketplace.

The comments outlined in the previous section apply in this situation as well.

6.5.5 Case 4: Transactions over stolen goods

In the majority of Member States, the e-markets operator may lawfully exclude his liability in this respect, on the same legal basis as in the previous cases.

A number of jurisdictions require an additional condition for the lawful exclusion of liability of the e-

[290] Article 6.420 of the Lithuanian Civil Code as quoted in the Lithuanian report, Question 25, Annex I.
[291] As quoted in the Slovakian report, Question 25, Annex I. It may be inferred that, the same rule is actually valid for the majority of the countries under scrutiny.
[292] *Inter alia*, as per Finnish report, Question 25, Annex I.

market operator (*Finland, Greece, Ireland, Italy*). In these countries, it is required that the operator has acted in good faith (*bona fides*). Provisions of the criminal law may have to be taken into consideration in this respect. For instance, according to the *Greek penal law*, the operator could be held liable in the event that he knew or ignored by gross negligence that the goods were stolen[293].

We assume that the list of the countries having reported this additional condition is not exhaustive and that this rule may actually be relevant to more that the pre-stated legal systems. Also, it seems to be a fundamental principle of criminal law in most EU countries that the good faith of the e-market operator will be presumed unless proof of the contrary[294].

6.5.6 Case 5: Unlawful distance-selling

In the majority of Member States, the e-market operator can lawfully exclude his liability in case of transactions over goods that are prohibited from electronic trading (*Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain*).

As mentioned in the above section, in a few countries the operator's good faith may be additionally required to assess the operator's limitation of liability as fair. As mentioned previously, such condition may be relevant to more countries than the pre-stated ones[295].

In the same context, the *Italian* law provides that, in case that the prohibition derives from provisions of the Italian administrative/criminal law, the operator could be held liable and be subject to the relevant sanctions regardless of a clause to a contrary inserted in the e-markets T&C. It is also doubtful whether the operator's argument that he was not aware of the type of goods traded on his platform could stand in court proceedings. An exception may be relevant here if the prohibition refers to a very particular type of goods, which cannot be easily distinguished from other similar products[296].

A second restriction stems from the e-commerce legislation in the majority of the Member States (*Belgium, Czech Republic, Estonia, Italy, Sweden*…). Accordingly, it would be unfair to exclude the operator's liability if the transactions taking place on the e-marketplace involve goods the traffic of which is criminally prohibited. In *Sweden*, for instance, the e-market operator cannot exclude itself from liability if it is illegal to sell the products in question (drugs, child pornography, etc.). In

[293] As quoted in the Greek report, Question 25, Annex I.
[294] As per Spanish report, Question 20, Annex I.
[295] Accordingly, in the Spanish legal system, e-market operators shall not be liable as long as they have no knowledge of the illegal nature or illegal origins of the goods put up on trade by e-market participants.
[296] As per Italian report, Question 25, Annex I.

addition, selling of illegal material may constitute complicity in crime[297].

Under this case, reference can also be made to the national legislative frameworks on information society services, since they also regulate the liability of intermediary service providers (hence, e-market operators).

In this respect, for example, the *Slovakian Act on e-commerce Act* stipulates[298]:

(1) Service providers shall not be liable for transmitted information if services of information society consist solely of transmissions of information in electronic communication network, or provision of access to electronic communication network, and service providers

a) have not requested for transmission of information

b) have not selected a recipient of information,

c) have not created or amended information.

(3) Provider of services shall not be liable for automatic temporary saving of information solely for the purpose of making their further transmission in telecommunication network to other service receivers more effective, if service provider

a) does not modify information,

b) adheres to the conditions of access to information,

c) maintains it update in a manner generally accepted and used in the relevant industry,

d) does not use technologies for illegal acquiring and use of information,

e) without further delay prohibits access to saved information or deletes information once aware that the original resource for transmission data was deleted, or access to it was prohibited, or court or body of supervision asked for deletion or prohibition of access to such data.

(4) Provider of services shall not be liable for information provided by recipients of services and saved upon recipient's request to the memory of electronic devices serving for information search, if service provider is not aware of illegal content of saved information or illegal actions of services recipient and takes the action to remedy the illegal status without undue delay; provider shall be liable for such information if recipient acts upon provider's instructions.

[297] As quoted in the Swedish report, Question 25, Annex I.
[298] Act on e-commerce, n°22/2004.

(5) If service provider provides services of information society to the extent of paragraph 1, 3 a 4, provider is not obliged to monitor information and is not allowed to search for information that is transmitted or saved. If provider becomes aware of illegal status of this information, he is obliged to delete them from telecommunication network or at least prohibit access to them. Court may rule to the provider of services to delete the information from telecommunication network even though service provider was not aware of the illegal status of information.

The provision echoes actually a common rule which exists in almost all Member States that have transposed the EU e-commerce Directive. Thus, e-market operators may fairly exclude their liability if they have only undertaken to ensure functions of "hosting" or "mere conduit" for all information exchanged on the e-market platform.

In the same vein in *Latvia*, according to the *Law on Information Society Services*, the e-market operator acting as service provider will be obliged to inform the supervisory state authorities if it becomes aware of any violations of law committed by the e-market participants[299].

6.5.7 Case 6: Failure to conclude an agreement

For the same reasons as under Cases 1-4, the e-market operator may on an average level lawfully exclude its liability in case of failure to conclude the contract being the object of the e-market.

However under one jurisdiction, *Estonia*, the question arises whether the e-market operator can be considered as a broker. In the broker's role, the e-market operator may refuse to disclose the identity of the party to other business partners. In this respect, the e-market operator will in principle be responsible for the due performance of the obligations by the party for which it acts as an intermediary[300]. Same restrictions may be valid for other countries under national rules governing the contract of "agency"[301].

6.5.8 The e-market practices

The e-market practices in the majority of Member States provide for wide exemptions of liability regarding most of the cases described above.

In an example monitored from *Hungary*, the general T&C of the e-marketplace concerned contain clear and express clauses exonerating the e-market operator in all of the six afore-mentioned cases. Similar cases reported from Germany refer to T&C that highlight expressly their deviation from the

[299] Art. 11 of the Law.
[300] Estonian Law of Obligations Act § 669 as quoted in the Estonian report, Question 25, Annex I.
[301] However, this has not been expressly reported in other country reports apart from the Estonian one.

German standard regulatory norms on limitations of liability.

The T&C of another e-market example remind that the e-market operator acts as an intermediary only[302].

Using the same argument (the e-market operator's neutral role), the T&C of an *Italian* e-marketplace indicates that the operator does not take part in any manner whatsoever in the transactions entered into by the users and that, therefore, it can assume no liability in this respect. Moreover, the same provision makes e-market participants aware that the operator cannot guarantee any positive result from the users' participation in the e-marketplace. Similar conditions have been reported in cases from Estonia[303].

In a number of e-markets active in *Poland*, it is quite often that operators impose certain duties on themselves; nevertheless, such obligations can better be qualified as "gentleman's agreement" rather than as really effective obligations. The said e-marketplaces seem to exclude any liability arising from participants' misbehaviour or from the nature of goods/services that are traded on the e-market platform[304]. However, e-market operators accept to "*take up (…) to the extent possible, actions which aim at maintaining the highest standards of business reliability of e-market participants*".

Also, with respect to liability limitations regarding the lawfulness of the e-commerce transactions taking place in the e-marketplace, an example reported from Poland reaffirms the operator's duty to notify relevant competent authorities of any case of crime or offence committed in connection with the use of its services.

On the same issue, e-market operators active from *Germany* choose to include in their general T&C a list of items that will be prohibited from trade.

[302] The clause states as such that: "*the Service Provider only makes the on-line bidding and reporting interface available. It cannot supply the Participants any information concerning the goods and services tendered, nor can it be hold responsible for the content of the specification*".

[303] For instance, T&C of an e-market operator lay down that "*the operator is not liable for the defects of delivery, as well as for illegal or incorrect actions of traders because the operator does not act as broker, agent, commissioner, representative or other kind of participant in these transactions*".

[304] A relevant term reads: "(*the e-market) does not bear any liability for mutual obligations of the participants of auctions organised through the exchange, and in particular (…) does not bear any liability for obligations related to product description, execution or supply periods and payment time-limits*..".

6.6 Unfair price-setting mechanisms

6.6.1 Puffing

6.6.1.1 The issue

The "puffer" either provides bids himself or via proxy participants to keep the auction going and to drive the price down (in a reverse auction, or up in a regular one). Puffers may in principle be either the sellers, the invitors or the e-market operator, depending on the type of auction. By putting a fictious price for consideration by the other bidders, the puffer urges participants (especially, at the final stage of the bidding process when only one participant remains) to increase their bids in order to compete with the price the puffer puts forward. Another practice closely related to puffing is the introduction of non qualified suppliers, which are likely not able to deliver the requested order, in order to influence the final price of the transaction.

6.6.1.2 Summary of national findings

In almost all Member States, the "puffing" constitutes an unfair practice regardless of whether it is initiated by the e-market operator or by e-market participants[305].

The majority of countries under examination have invoked principles of their general civil legislation, especially of contract law, to found the unfairness of puffing[306].

If puffing is the cause of damages suffered by third parties (incl. e-market participants), thisbehaviour may also be sanctioned under tort law. Tort law provisions will especially apply in the absence of any other more specific, contract or special, legal basis to undermine such practice. The fact that national regulation on tort may apply to compensate damages resulting from puffing has explicitly been reported for *Belgium, France, Greece, the Netherlands and Poland.* However, this alternative must in all probability be extended to cover prejudicial behaviour arising from puffing in the other countries under examination as well.

In addition, in a limited number of countries, the puffing can be considered as unfair on the grounds of regulation addressing the "unfair business conduct"[307].

[305] Austria, Belgium, Czech Republic, Denmark, France, Germany, Greece, Lithuania, Sweden…
[306] Austria, Belgium, Czech Republic and Slovak Republics, France, Germany, Greece, Hungary, Lithuania, Luxembourg, Malta, Poland, Slovenia, Sweden.
[307] Czech and Slovak Republics, Finland, France, Hungary, Portugal….

In a few countries, specific regulation tackles expressly or implicitly "puffing" or other similar behaviour that can be detrimental to e-market participants in auction procedures. This is the case in *Ireland, Hungary, Italy and Poland.*

In a number of Member States, puffing may also be sanctioned as a criminal offence[308]. A necessary condition for this is that the behaviour as such falls within the constituent elements of the criminal offence, as the latter is defined at each case in the national legal systems.

6.6.1.3 Puffing as a breach under civil law

6.6.1.3.1 Fraud and malicious inducement to error

In a number of countries, the inducement of e-market participants to conclude a contract at a fictitious price (by submitting artificial bids) shall be caught as fraudulent behaviour - and, therefore, unfair (*Austria, Belgium, Greece, Hungary, Ireland*). The concept of "fraud" may slightly differ in the national legal systems, but, on an average level, it covers:

a) any intentional misconduct of a business partner during the contract performance or in the negotiations stage;

b) that aims at deceiving the counter-party on essential elements of the transaction taking place (or due to take place) while abusing its good faith;

c) aiming at procuring a - primarily economic - benefit to the deceiving party [not essential to establish the civil concept of "fraud"].

Under the *Austrian* legal system, the term of fraud in civil law is defined more broadly than under criminal law. If a contracting party has concluded a contract as a result of fraud, the contract will be considered as invalid on condition that the deceived party, knowing the real facts, would not have concluded the contract. According to the *Austrian civil law*, unlike in criminal law, it is not necessary to prove that the person had the intention to cause damages or to obtain unlawfully an economic benefit to the detriment of the deceived party in order to qualify the practice as a civil fraud.

Along the same lines, in the *Belgian civil law*, puffing may also be undermined as resulting from the puffer's "*intentional fraud*". The concept of fraud in the Belgian legal system prohibits not only manoeuvres which would have prevented the other party from concluding the agreement[309] but also deceitful behaviour having an impact on the terms and conditions of the agreement.

[308] Austria, Czech Republic, Greece, Finland, Lithuania, the Netherlands and Spain.
[309] For instance the withholding of certain information: Cass. 8 June 1978, *R.C.J.B.* 1979, 525

A similar provision is laid down in the *Greek* civil code[310]. In case that a contractual party is induced by error to conclude an agreement (i.e., especially if it was deceived about the essential terms of the contract), the contract shall be declared null and void.

Similarly, the *Czech and Slovak civil codes* contain specific provisions about "*errors in transactions*" that may found the contract's invalidity, provided that:[311]

- the legal transaction has been made in error, and

- the error relates to decisive facts, i.e. to facts which enabled the decision to perform the legal transaction, and

- the party to which the legal transaction is addressed causes/induces such erroneous actions, or had knowledge of the erroneous character of the transaction in question.

A similar provision is encapsulated in the *Finnish Contracts Act* which states that "*a transaction into which a person has been fraudulently induced shall not bind him/her if the person to whom the transaction was directed was himself/herself guilty of such inducement or if he/she knew or ought to have known that the other party was so induced*"[312].

In the same vein, the Swedish Contracts Act states that the performance of an act induced by fraudulent deception shall not be binding on the person fraudulently deceived[313].

In *Hungary*, case-law appears to confirm that a party may successfully contest the fair conclusion of an agreement if it acted under "*misapprehension*". The conditions for founding such "misapprehension" as a lawful cause for the annulment of the contract are:

a) the misapprehension concerns any essential circumstance at the time the contract was concluded and

b) the misapprehension was either caused or could have been known by the counter-party[314].

Additionally, *Irish case law*, which predates the Sale of Goods Acts 1893 and 1980, may be relevant in this regard. This jurisprudence enounces that in case an auctioneer takes fictitious bids in an effort to increase real bids, the auctioneer may be liable to the purchaser[315]. Irish legal doctrine suggests that in such circumstances, the auctioneer might be liable in an action for fraud. The submission of

[310] Article 140 and 147 of the Greek Civil Code.
[311] Sec. 49a of the Czech and Slovakian Civil Codes.
[312] Section 30 of Act 228/1929, as amended.
[313] Section 30 of the Contracts Act.
[314] Art. 210 §1 of the Hungarian Civil Code and decision of the Supreme Court No. Gf.I.31086/1992 published in *BH 1993/373* as quoted in the Hungarian report, Question 27A, Annex I.
[315] *Heatley v Newton* (1881) 19 Ch D 326, C.A.

the additional bids by the e-market participant constitutes an erroneous action as it was unaware of the puffing[316] .

6.6.1.3.2 The principle of good faith

In the majority of countries the good faith principles that also apply in the pre-contractual phase can be invoked to found the unfairness of puffing (*Malta, Belgium, Finland, France, Lithuania, Hungary…*).

It is a fundamental rule of almost all legal systems that parties have the obligation to act in a manner required by *good faith and honesty* and they shall be obliged to cooperate with each other[317]. It is generally considered that a puffer commits an act of bad faith as long as the participants are not notified of the fact that such practice takes place. In this respect, it is possible that the bidder whose bid has ultimately been accepted could later claim that the sale is invalid because the transaction is concluded in circumstances (i.e. the puffing) incompatible with honour and good faith[318].

From the perspective of the *Lithuanian* civil law, the practice of puffing would constitute a breach ofthe *reasonableness principle* which can also be seen as an application of the *bona fides* obligation.

The *Polish legal doctrine* on auctions and reverse auctions confirms the above-stated principles. Accordingly, the basic objective of the auction (reverse auction) relationship is to protect the interests of the entities involved in the auction. In particular, the bidder's trust in the reliable course of the bidding and in the "knocking down" of the most advantageous bid must be respected. According to the theory of *culpa in contrahendo,* that is generally acknowledged by Polish courts, there is a justified need to protect the subjective rights of persons participating in a tender[319].

However, it should also be borne in mind that the above-mentioned rules may be interpreted in a less rigid way in B2B relations[320]. In a business context, professionals are (should be) aware of business risks inherent to procedures sometimes entailing "fierce" competition and aggressive negotiations (i.e., aggressive bidding). The breaches of good faith and/or of conclusion of a contract by error as causes of contract annulment may be considered by courts with more severity in a B2B context. In this regard, decisive factors to assess whether puffing is actually unfair may be, for instance: a) what the average business professional knows or ought to have known at the time of participating at the bidding procedure and/or b) what it could possibly have anticipated as risk on the basis of its

[316] Mahon, *Auctioneering and Estate Agency Law in Ireland* (Dublin Irish Law Log 1990) at page 84.
[317] As confirmed, *inter alia*, in §4 (1) of the Hungarian Civil Code.
[318] Finnish Contracts Act (228/1929, as amended and comment quoted in the Finnish report, Question 27 A, Annex I.
[319] As per legal doctrine and ruling of *Court of Appeals of Poznan*, 23 May 1996, I Acr 212/9, Polish report, Question 27, Annex I.
[320] As also commented in Swedish report, Question 28, Annex I.

experience in bidding procedures.

6.6.1.4 Puffing as a tort

The damage resulting from practices such as puffing may be claimed on the grounds of general rules of tort law, also for e-market participants.

Basically, the economic prejudice or other harm that e-market participants suffer falls within the scope of the tort law provisions, such as of Art. 1382 of the French and Belgian Civil Codes. These clauses stipulate that *"any act committed by a person that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it"*.

For the application of this article, three conditions must be fulfilled:

- a misconduct committed by a party,

- which causes damages to a third party (not a contract party), and

- a causal relationship between the misconduct and the damages.

Similar provisions regarding liability in tort are enshrined in the *Dutch, Polish and Greek* legal systems, without this enumeration being exhaustive.

6.6.1.5 Puffing as unfair business conduct

Malicious inducement to conclude the bidding procedure with the desired price may also fall under the regulation on fair trade practices in certain Member States.

In this respect, according to the Commercial Code of the *Czech and Slovak Republics*, puffing may be regarded as the exercise of rights violating the principles of fair business conduct[321].

The *Finnish* Act *on Unfair Practices in Business* prohibits in a similar way unfair business practices[322]. This prohibition has a very broad scope and also puffing could be deemed as covered.

In the same vein, the *Hungarian* Act *on the Prohibition of Unfair and Restrictive Market Practices* can be used to found the unfairness of puffing. Pursuant to the Act, it is prohibited to jeopardize fair tender (in particular public tender or invitation to tender) auctions and stock exchange transactions in any manner. This prohibition, however, shall only apply to practices which are not regulated by any other provision of the same law or by any other regulatory act.

[321] Sec. 265 of the Commercial Code.
[322] 1061/1978, as amended.

The situation is similar in *Portugal*: the practice of puffing can be considered as unfair and can fall within the scope of the Portuguese Industry Property Code.

6.6.1.6 Restrictions on puffing by special regulation

In a limited number of countries specific regulation addresses expressly or implicitly puffing or similar behaviour that can be detrimental to e-market participants through auction procedures. This regulation sets forth general principles on fair auction procedure.

In *Ireland*, for instance, the Sale of Goods Acts 1893 and 1980 may be relevant in relation to puffing. It is generally assumed that an e-auction falls under the definition of an auction for the purposes of Irish law. This Act provides, *inter alia,* that it shall not be unlawful for the seller to bid itself or to employ any person to bid at an auction, or for the auctioneer knowingly to take any such bid, if this has been notified prior to the auction.

In addition, the Act states that a seller or a person on its behalf may only bid in an auction where a right to bid is expressly reserved to the seller[323]. Thus, it seems that a seller may expressly reserve the right to bid or to employ a person to do so on its behalf, on condition that this right has been notified and expressly reserved to the seller prior to the auction.

Accordingly, in the Irish legal system, puffing may be allowed upon express notification in the e-market's T&C that the auctioneer itself or through other participant(s) may submit its own bid.

The *UK Sale of Goods Act 1979* contains a similar provision[324].

In the same way, the *Italian* Guidelines[325] provide for certain transparency requirements which must be complied with by the e-marketplace operator. Amongst such e-action rules figure, for instance, the e-market's obligation to ensure correct identification of all participants and to disclose to them the rules which govern the auction procedure. Furthermore, the Guidelines stipulate that the system operated by the invitor shall make it impossible for anyone to register both as a seller and as a buyer. In addition, the e-markets contract shall provide that the participants may not carry out any conduct that may alter the competition (e.g. alteration or attempt to alter the prices or other contractual conditions or, agreement, also implicit, with other participants for the same purposes)[326].

[323] Section 58 of the Sale of Goods Acts 1893 and 1980.
[324] Section 57 of the Sale of Goods Act 1979.
[325] Guidelines on on-line auctions, no. 3547/c of June 17th, 2002, issued by the Ministry of Productive Activities, as quoted in the Italian report, Question 25, Annex I.
[326] art 5.1 e) of the Guidelines.

6.6.1.7 Puffing as a criminal offence

In a number of Member States, puffing can also be prohibited as unfair practice on the grounds of criminal/penal law.

Most likely, in these countries, puffing may be sanctioned as (criminal) fraud (*Austria, Czech Republic, Greece*[327], *Finland,*[328] *Lithuania*[329]). A necessary condition for this is, of course, that all constituent elements of the fraud as criminal behaviour are present in the case of "puffing" as well. As a criminal offence, puffing is more often sanctioned by fines or imprisonment[330].

In other countries, such as the *Netherlands* and *Spain*, puffing may be caught under other provisions of their respective criminal codes than fraud. In the *Netherlands* for instance, increasing the price of products by means of a false message can be considered as a criminal offence[331]. In *Spain*, puffing may be caught as a criminal act only if the bidding procedure is public (i.e. carried out by any public authority)[332]. In *France*, price manipulations of reverse e-auctions through any fraudulent means are considered as a criminal offence[333].

6.6.1.8 Puffing as an acceptable commercial practice

In a few Member States, puffing can be accepted but only under certain conditions, notably the prior notification of the e-market participants that such practice may occur[334].

Thus, *"open"* puffing, meaning puffing conducted by the seller under transparent and non-discriminatory terms[335], is generally legal and acceptable. This is notably the case in the *Finnish* legal system. In *Lithuania*, it also seems that e-participants' previous knowledge of the fact that the price may be kept high by artificial means (puffing) may not justify the annulment of the contract once the bidding procedure is closed[336].

[327] Article 386 of the Criminal Code.
[328] Chapter 36, Section 1 of the Criminal Code.
[329] Article 182 of the Lithuanian Criminal Code.
[330] As per Finnish report, Question 27 A.
[331] Article 334 of the Dutch Criminal Code.
[332] Article 262 of the Spanish Criminal Code.
[333] New paragraph 1 of article L-443-2 of the Commercial Code inserted by the Loi n° 2005-882 du 2 août 2005 en faveur des petites et moyennes enterprises (article 52).
[334] Finland, Ireland and Slovenia.
[335] This is how we interpret the word "open puffing" as quoted from the Finnish report, Question 27A, Annex I.
[336] This is our interpretation from text of the Lithuanian report, §1, Question 27A, Annex I.

The situation is similar in the *Ireland*. As mentioned above, the Sale of Goods Acts 1893 and 1980 indirectly stipulates that puffing can be allowed under the condition that the seller's has expressly reserved and notified the right to do so[337].

Also in *Slovenia*, puffing may be considered as fair on condition that: a) bidders have been made aware of the fact and b) the "self-bidding" is not done intentionally in order to gain benefits.

6.6.1.9 The e-market practices

In the majority of e-markets under scrutiny, the practice of "puffing" is not particularly addressed.

However, certain examples worth of mentioning have been reported from certain countries.

- In e-marketplaces active from *Germany*, operators tend to include a clause in their T&C that prohibits the use of a second membership account or a third party with a view to manipulating the outcome of the sales process.

- Looking at the T&C of e-market examples reported from *Ireland*, it appears that the practice confirms the Irish legal rules regarding puffing. Thus, the e-market operator's "self-bid" shall be notified to participants in order to be legally acceptable. In the T&C of another e-marketplace, it is expressly stipulated that the operator and/or its affiliates or subsidiaries, may bid at the auction either for their own account or on behalf of a third party. Such proxy bids made by the operator shall be considered as bids of a third party.

- An e-marketplace operating in *Luxembourg* specifies that the seller and/or its agents and representatives shall refrain from submitting bids for the seller's own offers.

- The T&C of another e-market example reported from *Denmark* indicate that the supplier shall not invite himself to an auction as an "under-cover supplier".

6.6.2 Auction rings

6.6.2.1 Issue

Before the bidding process starts or while it is running, bidders to an e-auction may make arrangements among themselves with a view to influence the price of the winning bid. Participants may, for instance, bid up the price of each other's items on exchanges. Or, they may agree not to submit bids the value of which exceeds a certain price during the bidding process, with the aim of letting a determined member of the auction ring win.

[337] Section 58 of the Sale of Goods Acts 1893 and 1980.

6.6.2.2 Summary of national findings

In most of the countries under examination, auction rings are prohibited as an unfair practice. In virtually all Member States, the rules and legal principles undermining puffing can apply to sanction collusive conduct as well.

Thus, auction rings constitute an unfair commercial practice pursuant to:

- *generic civil law principles and rules* (Austria, Belgium, France, Czech Republic, Denmark, France, Germany, Greece, Lithuania, Sweden); and/or
- *specific national provisions on unfair business practices* **(**Czech and Slovak Republics, Finland, Hungary, Portugal); and/or
- *special regulation on e-auctions* (reverse auctions) (Ireland, Hungary, Italy and Poland); and/or
- *criminal law* (Austria, Czech Republic, Greece, Finland, Lithuania, the Netherlands and Spain, UK, Germany).

In addition, in the majority of Member States collusive behaviour between e-market participants in e-auctions (reverse auctions) may be sanctioned as anti-competitive. It has been reported that this is particularly the case in *Denmark*[338]*, France*[339]*, Germany*[340]*, the Netherlands, Portugal and Spain*[341]. Nevertheless, it can be assumed that auction rings may be caught by competition rules in other countries as well, on the basis of art. 81 of the EC Treaty.

Given that the examination of the competition aspects of such behaviour is out of the scope of this study, no particular comments are addressed here in this respect.

Only with regard to two Member States, *Ireland and Italy*, it has been reported that auction rings may be regarded as a fair behaviour to a certain extent and under particular circumstances.

6.6.2.3 Some special clauses

The *Spanish* regulation on unfair competition prohibits, *inter alia*, that parties take an economic advantage as a result of a breach of competition rules. Auction rings are primarily caught as an anti-

[338] Section 6 of the Danish Competition Act.
[339] L 420-1 of the French Commercial Code.
[340] Gesetz gegen Wettbewerbsbeschränkungen (GWB).
[341] Article 1 of Act 16/1989 on Defence of Competition; article 15.2 of Spanish Act 3/1991 on Unfair Competition.

competitive behaviour under the *Spanish* legal system[342]. Therefore, sales contacts that result from e-auctions in which malicious collusions between the bidders occur will not in principle be valid (given that the economic benefit of the auction procedure results from an anti-competitive behaviour).

6.6.2.4 Auction rings: legal consequences

In a number of countries, auction rings can be caught as criminal offences. A necessary condition for this is that the constituent elements of the criminal offence (as the latter is defined at each case in the national legal systems) are met by the practice of "auction rings". If auction rings can be qualified as -criminal - fraud, they are usually subject to fines and/or imprisonment.

On the other side, auction rings may give rise to actions for loss and damages under ordinary civil law proceedings. This is the case in *Spain* but also in all countries where general rules of the contract/tort law or of the law on fair trade practices apply. For instance, the *French and Belgian* civil code contains a general provision with respect to tort liability and which provides the right to claim damages[343].

Furthermore in the majority of countries under scrutiny, the practice is subject to imposition of fines as infringing competition rules.

6.6.2.5 The "unfairness" of "auction rings" practices: the exceptions

In a limited number of countries auction rings can be considered as a fair behaviour to a certain extent and under particular circumstances.

In *Ireland*, the practice may not be considered as unfair *per se*. On the grounds of the Irish jurisprudence that has been elaborated around the traditional auction law, two or more persons can agree not to bid against each other[344]. However, if the practice is harmful to the detriment of e-market participants, the auction ring conduct may give rise to damages on the grounds of tort law (deceit). It should be noted that this will be determined on a case by case basis[345].

Under the *Italian* legal system, auction rings may not automatically be caught as an unfair practice under criminal law. This depends, on the circumstances of the particular bidding process that bidders try to influence jointly. However, it should be noted that the conduct of the bidders in itself may not be sufficient to obtain the desired result, since an “external” bidder could simply make a bid

[342] Art. 16/1991 on Defence of Competition and art. 15 §2 of Spanish Act 3/1991 on Unfair Competition.
[343] Art. 1382 of French and Belgian Civil Code.
[344] *Pallant v Morgan* (1953) Ch. 43 and legal doctrine: Mahon, *Auctioneering and Estate Agency Law in Ireland* , page 86.
[345] As per Irish report, Question 27 B), Annex I.

exceeding the price target agreed by the colluding participants[346].

6.6.2.6 The e-market practices

Most of T&C of the e-markets under scrutiny do not specifically deal with collusive conduct.

However, in the very few cases in which such practice seems to be of concern, the respective clauses of T&C appear to abide to the legal rules. Thus, auction rings are prohibited.

In e-markets cases reported from *Hungary*, it appears that e-market operators clearly inform e-auction participants of the risk of fraudulent collusions. Once such practices occur, the penalty affecting all participants (and not only the ones participating in the collusion) is to cancel the e-auction procedure.

For instance, the general terms of one e-marketplace state in this respect that: *"the Organiser may elect to cancel a bid during the Auction, if a Participant ignoring the Business Regulations jeopardises the competition to a great extent with its bid, disturbing the market, or makes it business-wise misleading for the rest of the Participants (e.g. in case of mistyped values, inverted parameters).*

The system will send a notice on such cancellation in a short automatic message to each Participant.

After cancellation, the Auction will continue with unchanged parameters and conditions apart from the cancelled bid."[347]

In the same context, the T&C on an e-marketplace operating from *Ireland* clearly notify the participants of the unlawful character of auction rings: *"All forms of shill bidding (for instance, bidding on an item that you have listed for sale), bid manipulation and collusion between Users are forbidden. Users may not make a bid under* a false name or with an invalid credit card."[348]

[346] As noted in the Italian report, Question 27 B), Annex I.
[347] As per Hungarian report, Question 27B), Annex I.
[348] As per Irish report, Question 27B), Annex I.

6.6.3 Bid shielding

6.6.3.1 The issue

Two bidders agree that one makes a bid at a very high price to discourage other participants to compete. At the same time, the other bidder puts a bid lower than the fair market value of the product. At the very last minute of the process, the bidder with the excessively high bid withdraws its bid, with the only option remaining for the invitor to allocate the object to the second bidder. The consequence of such behaviour is that the product is finally offered (sold) at a lower price than its normal market value.

6.6.3.2 Summary of national findings

As in the case of puffing and auctions rings, most of the national legal systems under scrutiny would prohibit bid shielding as an unfair commercial practice.

The legal landscape undermining this practice as violating fair business conduct consists of:

- *generic rules and principles of civil law, esp. regulation on contracts and torts* (Austria, Belgium, France, Czech Republic, Denmark, France, Germany, Greece, Lithuania, Sweden).
- *specific national provisions on unfair business practices* (Czech and Slovak Republics, Finland, Hungary, Portugal); and/or
- *special regulation on e-auctions* (reverse auctions) (Ireland, Hungary, Italy and Poland); and/or
- *criminal law* (Austria, Czech Republic, Greece, Finland, Lithuania, the Netherlands and Spain).

In a number of Member States, the collusion between two bidders, one of which withdraws its bid at a later stage, is also relevant to the possibility of withdrawing bids that are submitted while the e-auction procedure is running[349]. This is the case in *Denmark, Italy and Poland.*

Only in one country, *Ireland*, the extent of (un)fairness of such practice will in all probability be evaluated on a case by case basis. It seems also that any acknowledgment of compensation to e-participants harmed by bid shielding will also be decided by Irish courts on an *ad-hoc* basis.

[349] This issue was discussed in Chapter 7 above.

Yet, it seems that the latter observation is relevant to the majority of countries under examination: although bid shielding may be unfair *per se*, the probability to allocate damages will depend on the circumstances and the legal basis invoked at each time (i.e., violation of civil or criminal rules, competition infringement, etc.)

6.6.3.3 Bid shielding: an overview of the applicable regulation

In the majority of countries under examination, bid shielding is deemed to be unfair by application of the principles of their general civil law[350]. Such principles may notably be related to the notion of "civil fraud" or to the principle of good faith or to the intentional inducement of the counter-party to erroneous actions.

Bid shielding may also constitute an infringement sanctioned under criminal law in a number of countries and more specifically under the qualification of fraud[351]. Other countries would prohibit bid shielding as unfair commercial practice[352].

In addition, for a number of Member States, bid shielding can be considered as unfair behaviour violating the rules of fair competition, be they the EU anti-trust rules or domestic rules on fair competition[353]. Given that the examination of the competition aspects of such behaviour are out of the scope of this study, no particular comments are addressed in this respect in this chapter.

The application of the above-mentioned legal framework to undermine bid shielding should however take into account the following[354]:

For countries in which the submission of bids bind their bidders, such as *Denmark, Italy and Poland*, the practice of bid shielding would practically be impossible. This means that, once a bidder submits its bid during an e-auction procedure and its price is received by the e-market platform, the bidder cannot withdraw its bid at a later stage. Such rule is valid for the pre-stated countries even if the price of the submitted bid is excessively high[355]. However, the binding nature of each submitted bid may be set aside by a clause of the e-market T&C allowing expressly such withdrawals.

But even if a membership term allows e-market participants to take back their bids, this does not necessarily mean that bid shielding becomes automatically lawful. In the light of the national laws under consideration, malicious collusions between two or more bidders will still remain unfair if they aim at deceiving other bidders or to cause harm on the bidding procedure and the e-marketplace as a

[350] Austria, Belgium, Czech Republic, Denmark, France, Germany, Greece, Lithuania, Sweden…
[351] Austria, Czech Republic, Finland, Ireland.
[352] Finland, Hungary,…
[353] Denmark, France, Germany, Portugal, the Netherlands and Spain.
[354] Denmark, Ireland, Italy, Lithuania and Poland.
[355] As quoted for Polish report, Question 27 C), Annex I.

whole.

This is also confirmed by the *Polish* legal doctrine, stating that the auction relationship connecting the auction organiser and the bidders imposes specific duties on the organiser. The duties include, *inter alia*: to reliably pursue the completion of the auction and (optionally) to reject a bid breaching the rules of fair competition; also, a bid with too high a price could be considered as unfair[356].

Moreover in *Lithuania* it should be highlighted that the party withdrawing its bid may be compelled to pay the price difference between the value of the bid that it withdrew and the actual price paid by the winning bidder. In addition, the auction organiser is entitled to declare that it will organise a new auction, in which the malicious buyer (i.e. party who withdraw its bid) is prohibited to participate. In this case, it may also be possible to require from the malicious bidder to compensate the auction organiser for all the expenses it will undertake for organising the new auction[357].

According to the *Irish* legal system, bid shielding can be considered as unfair but this must be evaluated on a case by case basis taking into account the given circumstances. In this respect, an action based on tort could be possible[358].

6.6.3.4 Market practices

Most of T&C of the e-markets that have been screened do not specifically deal with bid shielding.

In a number of e-market websites operating from *Ireland*, bid shielding falls in the scope of the following clause:

"All forms of shill bidding (for instance, bidding on an item that you have listed for sale), bid manipulation and collusion between Users are forbidden. Users may not make a bid under a false name or with an invalid credit card."

Not e-market practices but a real-case example has been reported from *the Netherlands*. Accordingly, bid shielding appears to be a frequent practice in the Dutch building industry that seems to preoccupy the Dutch local and national government. Such practices are currently subject to extensive scrutiny by criminal and competition authorities following a recent parliamentary hearing on fraud in the building industry.

[356] As per Polish report, Question 27 C), Annex I.
[357] As per Lithuanian report, Question 17, Annex I.
[358] As mentioned in Irish report; Question 27 C), Annex I.

Moreover, the Dutch government has recently revealed that it would claim damages from the building industry under a civil law suit[359]. It is expected that the courts will accept the well-found of the claim and will award damages to the authorities harmed.

Such cases may also be instructive for bid shielding practices that occur in the e-marketplaces.

6.6.4 Identity theft

6.6.4.1 The issue

A risk of price manipulation may occur through the theft of a participant's real or pseudo-identity (e.g. abuse of the identity of a participant by other participants). For instance, an invitor in an auction submits a bid in the name and on behalf of another participant/member in the e-market to encourage higher bids from other participants. Finally, the invitor concludes the deal with the bidder who has submitted in good faith a higher bid.

6.6.4.2 Summary of national findings

In the majority of legal systems under examination, identity theft in business relations constitutes an abusive and unfair conduct. The legal basis for sanctioning fraudulent use of a third party's (e.g. an e-market participant's) real or pseudo-identity are provisions of the national criminal laws of most Member States (*Austria, Czech and Slovak Republics, Belgium, Denmark, Finland, Italy, Slovenia, Spain…*).

In a number of countries, identity theft is also sanctioned as an unfair business practice on the grounds of basic contract or tort law (*Austria, Czech and Slovak Republics, Hungary, Italy, Lithuania, Malta…*).

According to the business practices at each case, the abuse of a name of an e-market participant by another participant or a third party or the e-market operator itself may also violate rules of the electronic signatures or data protection legislation. However, it is out of the scope of this study to comment on these aspects of name misuse in e-marketplaces.

6.6.4.3 Identity theft as criminal offence

Contrary to the previous practices on unfair price-setting mechanisms (puffing, bid shielding), identity theft is primarily caught in the Member States as a criminal unfair conduct.

[359] *Kabinet wil bouwwereld aanklagen*, de Volkskrant 5 March 2005, as quoted in the Dutch report, Question 27 C), Annex I.

In many cases, depending on the circumstances of the case, the practice may be sanctioned on the grounds of more than one provisions.

Accordingly, in a number of countries identity theft may be qualified under the respective provisions of the countries' criminal provisions on fraud[360]. In the *Czech and Slovak Republics*, for instance, identity theft will be sanctioned as fraud under Sec. 250 of the countries' respective Criminal Codes.

In the same vein, under the *Finnish* legal system, identity theft is defined as a use of another person's identity or identification information without the consent of that person. Such offence can also be sanctioned as -criminal - fraud.

Also in *Ireland* the situation is similar: the criminal offence of identity theft will be caught under the Theft and Fraud Offences Act of 2001.

In other countries the identity theft may also be sanctioned under the criminal offence of theft of name. This is notably the case for *Cyprus and Greece*.

In the same context, Section 434-23 of the *French* Criminal Code criminalizes the use of the name of a third party under circumstances that have resulted or could have resulted in criminal sentences (up to 5 years imprisonment and up to 75,000 euro fine).

Under the *Dutch* legal system, identity theft can be classified as the crime of false representation pursuant to article 326 of the Criminal Code. In the same vein, under the *Belgian* and *Swedish* law, the use of a false name is penalised.

In *Malta,* identity theft can be sanctioned on the basis of more then one legal grounds. First of all this practice can be punished by Article 208 of the criminal code prohibiting the use of a fictitious name or the assumption of any false designation. In addition; the Maltese legal system provides for an "all encompassing" rule in its criminal code (article 209). Because of its general wording, this article may cover all forms of fraudulent behaviour that are not specified in other articles of the sub-section of the criminal code.

Along the same lines, under the *Finnish legal system* identity theft falls within the scope of several criminal offences. As mentioned above, identity theft can be sanctioned as fraud. In addition, this type of action could probably also constitute a data protection offence punishable under paragraph 38 section 9 of the Finnish Criminal Code. Moreover, identity theft can be qualified as a computer break-in which is punishable under paragraph 38 Section 8 of the Criminal Code.

In the same context, the *Belgian legal system* qualifies identity theft as a computer crime and more specifically as "information fraud". According to article 504 quarter of the Belgian Criminal Code

[360] Czech and Slovak Republics, Denmark, Finland, Greece, Hungary, Ireland, Malta, Spain.

computer related fraud implies the manipulation of data with the intention to procure an economic benefit for oneself or for another person.

Under the criminal laws in all the above-mentioned countries, identity theft is sanctioned by the imposition of fines and/or imprisonment[361].

It is noteworthy that most criminal codes of the countries examined punish fraudulent actions even if they are committed outside of the country's territory, if a sufficient link to the country's legislation exists. Such special jurisdictional provisions are especially important in the context of e-market places, given the extra or multi-territorial nature of the subject.

6.6.4.4 Identity theft as unfair behaviour in civil/trade law

A number of countries invoke the grounds of basic contract or tort law to found the unfairness of identity theft[362].

According to the civil code of the *Czech and Slovak Republics* for instance, the name of a natural person or a legal entity is protected against abuse. In this respect the prejudiced party can demand to stop the abuse and to recover the caused damage. Section 12 of the Czech and Slovak Commercial Codes contain a similar provision with respect to the protection of a trade name. The party in breach shall be obliged to remedy the consequences of the use of another party's trade name and must provide for an appropriate compensation. In addition, using another party's identity can also be qualified as "unfair competition" according to the Section 44 of the Commercial Code.

Under the *Irish* and *Dutch* legal system identity theft may also be caught as tort and implies therefore the right to claim damages.

In *Lithuania* it has been reported that if the invitor steals the identity of a participant for bidding purposes after which it enters directly into an agreement with the winner (who has submitted a higher bid in good faith), the agreement with the winner may be declared void. This is because the deal was closed due to a fraud by the invitor which will be obliged to pay damages[363].

In this event, the invitor shall also be liable for contractual breach towards all participants, since he fraudulently altered the outcome of the auction which he was supposed to manage on an equal and

[361] Article 208 of the Criminal Code for instance provides for a sentence of imprisonment of seven months to two years; In Sweden article 154 of the Criminal Act stipulates a monetary fine or imprisonment of 1 or 2 years; Article 504 quarter of the Belgian Criminal Code imposes a fine of 26 euro to 100 000 euro and /or imprisonment of 6 months to five years.
[362] Czech and Slovak Republics, Ireland, Lithuania, Malta, the Netherlands, Slovenia.
[363] Articles 1439 and 1440 of the Lithuanian Civil Code.

fair treatment basis.

Under the *Maltese* legal system, such behaviour of stealing one's identity may be challenged in Court as an act of bad faith[364].

In the legal system of *Slovenia*, identity theft may be prohibited on the grounds of the Electronic Communications Act. This Act states that anyone who uses a false identity or a false address through electronic communications for direct marketing purposes may be imposed to pay a monetary fine[365]. This provision may be used by analogy in the identity theft cases occurring in e-marketplaces.

6.6.4.5 The e-market practices

Contrary to the market practices of the previous unfair price-setting mechanisms, the fraudulent use of e-market participants' identities is tackled quite often in the T&C of e-market operators.

T&C clauses on identity theft actually align with the spirit of law, thus, these practices are strictly prohibited.

Most usually, relevant clauses in T&C of e-markets set forth the e-participants' obligation to disclose correct information about their identities. They also lay down that it is the responsibility of the business partners to ensure that their personal details are exclusively used by themselves or by third parties upon authorisation of the real identity holders.

For example, the T&C of a *Belgian e-marketplace* stipulate that a user cannot make use of the identity of another person or unit. Furthermore, if the data provided by the user are not correct, precise or complete, the e-market operator has the right to end immediately the contract and to refuse any new use of the site. In the example reported from Belgium, it is also explicitly set forth that users remain responsible for any transaction taking place in the e-marketplace under their names until they notify the identity theft to the e-market operator[366].

In cases referred to from *Finland*, T&C do not often make explicit provision of identity fraud as such (since practice is clearly punishable). Yet, e-markets websites clearly set out that registered users are responsible for the acts concluded under their user ID. In the same context, in a case reported from *Ireland* the users may not make a bid under a false name. Also the T&C of a *Lithuanian e-marketplace* stipulate the prohibition to act under the name of another person or to use fake identities while registering.

Along the same lines, *Slovenian e-marketplaces* set out that users are responsible for the appropriate

[364] As per Maltese report, Question 27 D), first paragraph, Annex I.
[365] Articles 190 and 152 of the Electronic Communications Act.
[366] As per Belgian report, Question 27 D), Annex I.

use of access passwords, for the content of messages, for the traffic control, for the messages integrity and for the system performance regarding the coding of messages.

In the same vein, an Italian e-market operator in its T&C imposes on users the obligation to inform it once identity theft occurs. Moreover, it prohibits users to decrypt in any manner html codes, ID codes, passwords and any other material or code included in the website.

T&C of e-marketplaces operating from *Slovakia* state that a seller on auctions warrants that its identity is true and correct. In other words, an act exercised under the name of a bidder is presumed to be its own act. Therefore, the acts exercised under users' registration names are binding upon the users. Moreover, the T&C indicate that in case that incorrect information would be provided during registration, the operator can cancel the said registration.

Similarly, market operators providing services *from Spain* set out in their T&C the obligation of participants to warrant the veracity and accuracy of their data. In the same vein *Hungarian* e-marketplaces indicate that if a user provides information which is untrue or inaccurate, the e-market operator may: a) suspend or terminate the membership of the said user and b) refuse to him all current or future use of the services.

In an example of e-marketplace reported from *Sweden*, the T&C inform participants that the information system may trace the true identity of users of the e-marketplace. Users giving false info may be liable for damages.

6.7 Unfair Limitations of Liability

6.7.1 The issue

In a number of jurisdictions, contractual arrangements which exclude or limit to a minimum the liability of the e-market operator with regard to the operation and the "governing rules" of the e-market may not be accepted.

In the following sections, it will be analysed whether e-market operators may lawfully exclude or limit their liability according to national legislation in four situations:

Case 1: The e-market operator excludes/limits his liability if undertakings from participants during the e-market process are not fulfilled.

Case 2: The e-market operator excludes/limits his liability with respect to the occurrence of technical problems on the e-market.

Case 3: The e-market operator discharges himself from any liability regarding the legal/illegal nature and/or the legal/illegal origins of the goods being traded on the e-market platform

Case 4: The e-market operator sets out in T&C that he undertakes no responsibility with regard to illegal behaviour of participants which primarily aim at influencing the price-setting mechanisms set by the e-market platform (i.e. puffing, bid shielding, bidders collusions taking other forms, etc.).

In the beginning, we briefly discuss how disclaimers are generally perceived in the national legal systems on the basis of the applicable laws and principles, legal doctrine or jurisprudence. It shall be stressed that comments that are made in the first section are valid for all the situations described in the following sections.

6.7.2 Legal value of disclaimers: an overview

In all countries under examination, disclaimers are in principle valid. For both the legal doctrine and jurisprudence, clauses on liability limitations are considered as a fair instrument to delimit one party's responsibilities only to the extent that it is necessary to ensure: a) the due performance of the agreement and b) the fair compensation (if required) of harmed parties once counter-parties fail to fulfil in time the obligations they undertake in the agreement.

Such a principle is underpinned either in the Member States' civil (contract) law (*Austria, Belgium, Cyprus, Finland, France, Greece, Germany, Sweden*…) or in specific regulation, explicitly or indirectly (*Czech and Slovak Republics, Ireland*).

From this perspective, the insertion of disclaimers (even of a wide scope) in the T&C of e-market operators shall basically be considered as fair.

Although liability limitations are considered as a lawful right of e-market operators in general, almost all legal systems subject such a right to specific limitations and conditions. On an average basis, the legal restrictions with regard to the contents and scope of disclaimers reflect common rules in all the Member States which accept such limitations.

However, it will be usually unfair for e-market operators to limit or exclude their liability in all situations described below if the failure or damage results from their own gross negligence or wilful misconduct. The interpretation of the concepts of "negligence" or "wilful misconduct" may vary in a number of Member States but all legal systems appear to acknowledge at least that:

a) the lack of professional care that should normally be observed by an average professional (i.e. the average e-market operator) cannot in principle be excused (negligence);

b) the fault committed with malicious intention (e.g. intention to harm)

must be sanctioned.

Additionally, the majority of legal systems confirm that, also in B2B relations, the contractual party favoured by the disclaimer shall make its counter-party aware of the insertion of such clauses into the contract. Actual knowledge is mostly not required; it suffices if parties disadvantaged by disclaimers are given the opportunity to read such clauses. Also, most countries affirm that such knowledge should be gained before parties enter into the agreement.

These common rules are for instance enshrined in the contractual rules, doctrine or case-law of *Belgium, France, Ireland, Latvia, and Sweden*. For a number of countries, the duty to inform contractual parties is imposed on e-market operators if disclaimers are "surprisingly burdensome" for contractual parties (as discussed above, Section 6.4, for *Czech Republic, Germany, Luxembourg, Malta, Portugal…*).

Also, the majority of Member States acknowledge that disclaimers do not relieve e-market operators from liability they have to undertake on the basis of mandatory provisions of their national legal systems. Such clauses may be of public policy (*ordre public*) or other imperative provisions stemming from the civil, criminal or public administrative law or from good morals. This restriction has explicitly been reported for *Belgium, the Czech and Slovak Republics, France, Poland and Spain*. However, we presume that this is a valid limitation for most of the legal systems under examination, also on the basis of the EU Treaty.

In a non-negligible number of jurisdictions, it is also admitted that parties' freedom to form and delimit their contractual obligations as they wish cannot be exercised abusively. Accordingly, if e-market operators delimit the obligations arising from the e-market contract on the basis of wide disclaimers, in such a way that the agreement is actually deprived from its meaning and object, these disclaimers cannot be considered as lawful.

Consequently, it will be unfair if operators insert clauses in T&C which exonerate them from all and any obligations which, on a reasonable basis and according to business customs, can only be assumed by them (*Belgium, Estonia, Finland, France, Greece*…).

To sum-up, it is usually fair for e-market operators to include in the T&C disclaimers which limit their liability to the minimum, provided that public policy rules of the national legislation are respected. Moreover, e-market operators' disclaimers shall not deprive the agreements concluded with e-market participants from their material object and practical effect. Finally, disclaimers that place e-market participants in an obvious disadvantage or which participants consider as unusual for the specific market or extraordinarily burdensome shall be brought to the participants' attention.

6.7.3 Case 1: Participants' failures or mistakes to the detriment of other participants

6.7.3.1 Summary of national findings

In most of the countries under scrutiny, an insertion of a clause limiting the liability of the e-market operator could be generally deemed as fair (*Austria, Belgium, Czech Republic, Cyprus, Denmark, Finland, France, Greece, Germany, Hungary, Ireland, Italy, Lithuania, Luxembourg*…).

However, in the majority of these countries, the "fairness" or not of such disclaimers may depend on a number of conditions, being:

a) the role of the e-market operator in the organisation of the e-market platform. The e-market operator's duties and functions are in principle set out in contract or may result from business customs.

b) the obligations the e-market operator assumes with regard to the exchanges taking place on the e-market platform between participants (eg *Finland*)

c) failures or damages resulting from the exchanges between participants do not result from the fault or gross negligence of the e-market operator.

d) the content of the disclaimers has been brought to the knowledge of the participants and has been accepted by them

6.7.3.2 Conditions of fairness

It should be pointed out that in the majority of the afore-mentioned Member States, a condition to consider such disclaimers as valid and fair is that the e-market operators act as intermediaries. This means they e are not directly and actively involved in the transactions concluded through their e-marketplaces[367]. Under the legal system of those Member States, the operator must be considered as a neutral party which has only to facilitate "in a passive way" the transactions. In addition, it would quite often be difficult to establish causal links between the activity of e-market operator and the defects in good/services transacted through the e-market. Usually, e-market operators expressly state that they do not participate in transactions concluded by e-market members[368].

In the *Czech Republic* it has been reported that the contract between the operator and the invitor may be considered as an agency contract. The Czech Commercial Code however does not regulate the

[367] This is notably the case for Estonia, Finland, Lithuania, Spain,…
[368] As per Lithuanian report, Question 28, Annex I.

liability of the agent for the defects of the goods and services transacted through the e-marketplace[369].

Taken into account the above comments, the operator who only offers an e-marketplace could limit his responsibility to the functionality as such of the virtual platform. In this sense, it seems that the operator can lawfully exclude his liability regarding the activity of third parties, meaning the participants, even if that activity is related to the operations ruled by the e-market operator[370].

In this regard, on the basis of the *Slovak* Act on Electronic Commerce accepts exclusions of liability inserted by the e-market operator if the operator acts as a "mere conduit". This means that the operator has not:

a) requested for the transmission of information;

b) selected a recipient of information;

c) created or amended information[371].

It should be highlighted that there exists an exception on the lawfulness of the disclaimer under this issue: as reported in *Lithuania,* the disclaimer is not valid if the operator does not disclose the identity of the auctioneer to the winner of the auction[372].

On the other hand, the stipulation of a disclaimer under this issue may be deemed as unfair if e-market operators undertake a number of functions with regard to the services they offer (i.e. the fair "running" of an auction). For instance, operators may assume to monitor transactions and their fulfilment, select winners, and facilitate the organisation of e-auctions and the "play" of the auction through automatic bids mechanisms, etc.[373].

It also appears that the operator cannot exclude its liability for defects in the goods and services that result from the fault or gross negligence of the e-market operator. This is explicitly addressed in the *Czech* and *Slovak* Commercial and Civil Codes stating that*" the party in breach of its legal duties stipulated by the Civil Code, Commercial Code, or contract is obliged to compensate the damage caused to the other party, unless proved that the breach was caused due to consequences excluding the liability*[374]*."* It can be assumed that this reservation can in all probability be found in the legal systems of other countries, with a more or less wide scope.

Another condition for the fairness of a disclaimer constitutes the possibility for the participants to take knowledge of the content of the disclaimers.

[369] Sec. 642 and following of the Commercial Code as mentioned in the Czech report, Question 28, Annex I.
[370] As per Spanish report, Question 28, Annex I.
[371] Article 6 of the Act 22/2004 Coll. on Electronic Commerce.
[372] Pursuant article 6420 of the Civil Code as quoted in the Lithuanian report, question 28, Annex I.
[373] As quoted in the Finnish report, Question 28, Annex I.
[374] Sec. 420 and ff. of the Civil Code and Sec. 373 and ff. of the Commercial Code.

This condition can be considered as an application of the autonomy of will. The party against whom the disclaimer is invoked must have knowledge of the disclaimer and must have accepted it. Parties shall normally become aware of these disclaimers at the latest at the moment of the conclusion of the agreement[375]. This statement has been expressly confirmed by the *French* jurisprudence as well[376].

Finally, in order to assess whether a disclaimer can be considered as unfair, the particular circumstances of the case must be taken into account[377].

6.7.4 Case 2: Non-availability of e-market services / Technical malfunctions

6.7.4.1 Summary of national findings

In a number of Member States, excluding liability for technical problems occurring on the e-markets (e.g. provisional unavailability, break-down of the e-market website) is in principle fair, provided that the limitations discussed above (Sub-section 12.1) are respected (*Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, Portugal the Netherlands, Slovenia, Slovak Republic, Sweden*).

However, for a non-negligible number of countries, it would be unfair to exclude the liability of operators in such situations. The reason is that, in principle, it is the role of operators to ensure the smooth functioning of the e-market services. It is indeed generally assumed that the operational aspects of the e-markets website (a continuous access to the e-marketplace, an easy employment of the several functionalities of the website,…) represents the core obligation of an e-market operator. (*Belgium, Czech Republic, France, Ireland, Poland…).*

6.7.4.2 Denying liability for the provision of core services

As mentioned above, in a number of Member States, the operators are not allowed to disclaim their liability with respect to the provision of the core services related to the use of an e-marketplace. In other words, the operators are obliged to take care of the operational functioning of their e-markets. This limitation is based upon general contract/commercial law principles of the afore-mentioned national legal systems.

According to general contract law principles applicable in *Belgium*, a disclaimer is unlawful when it deprives any reasonable meaning or sense of the agreement intended by the parties, or when it

[375] As per Swedish report, Question 28, Annex I.
[376] See, e.g., Cass. Com. 23 November 1999 JCP G 2000 II 10326.
[377] As per Slovak report, Question 28, Annex I.

undermines the contractual obligation of the debtor. In other words, a contractual minimum has to remain for which the e-market operator is responsible. Such a principle has been confirmed by the Belgian legal doctrine and jurisprudence[378].

Along the same lines, *French courts* have ruled that a disclaimer will not be effective if it deprives the agreement of a material obligation[379].

In the same vein, according to the *Czech* civil and commercial code, an e-market operator cannot exclude his general obligation to comply with contractual obligations or obligations arising from legal imperatives in general[380].

Under the *Irish l*egal system, an explicit provision exists in the Sales of Goods Act requiring service providers to deploy the necessary skills to provide the service, apply these services with due skill, care and diligence,…[381]. However, that this rule is not mandatory. Therefore the e-market operator may restrict his liability in this respect. However if the restriction clause is particularly onerous, it must be brought to the attention of the participant[382].

It should be emphasised that for the situations out of the operator's control (*force majeure*), operators may fairly exclude their liability[383]. This statement has been reported in *Greece* and *Italy*. However, we assume that this principle is relevant to the other countries under examination as well.

According to *Italian* rules, the operator's disclaimer regarding system malfunctions is fair on the condition that the operator has used its best endeavours in order to re-activate promptly the e-market website; also, when it has tried to limit the damages deriving from the technical problem[384].

The *Polish* law provides for a particular regulation in this respect: according to a specific provision of the Act on Provision of Services by Electronic Means, the e-market operator in its role of service provider of electronic communications will be responsible for: a) ensuring a privacy and security of network and data transmitted on it and b) unequivocal identification of parties to the service[385]. Therefore, the disclaimer cannot discharge operators from these minimum duties as imposed by law.

Under the *Spanish* legal system, the exclusion of the liability by the e-market operator is not entirely fair in case the technical problem can be attributed to the operator himself. In practice the operators

[378] Cass. 26 maart 2004 http://www.cass.be; Kh. Hasselt 29 april 2003, *T.B.H.* 2004, afl. 3, 109; Rb. Brussel 22 maart 2000, *T. Aann.* 2000, 155; also, disclaimers must be interpreted in a restrictive way: e.g. Kh. Antwerpen, 18 december 2000, *R.W.* 2003-2004, afl. 3, 109).
[379] Cass. Com. 22 October 1996, D 1997, jur. p. 121 as commented in the French report, Question 28, Annex I.
[380] Sec. 420 and ff. of the Czech Civil Code and Sec. 373 and following of the Czech Commercial Code.
[381] Section 39 of the Sales of Goods and Supply of Services Act 1980.
[382] As per Irish report, Question 28, Annex I.
[383] As quoted in Greek report, Question 28, Annex I.
[384] See Italian report, Question 28, Annex I;
[385] Article 7 of the Act on Provision of Services by Electronic Means as quoted in the Polish report, Question 28, Annex I.

therefore set out alternative mechanisms such as fax in order to enable the continuance of the bids[386].

In *Germany*, experts are still debating the question whether the operator can limit his liability regarding the availability of the service provided through the e-market. However, it seems that the German courts can accept reasonable limitations of the operator's obligation to make the service available or technically efficient[387].

6.7.5 Case 3: Illegal nature or origins of the transaction object

6.7.5.1 Summary of national findings

For the majority of countries the e-market operator can lawfully exclude or limit his liability with respect to the legal or illegal origins of the goods or services traded through the e-marketplace[388].

The fairness of this disclaimer is based upon basic rules of the e-commerce directive as it has been implemented in Member States. On the grounds of this regulation, e-market operators may exclude their liability if they act as "a mere conduit". On an average basis, the condition which must be fulfilled in this respect is that the operator was not involved in:

a) the initiation of the transmission

b) the selection of the receiver of the information

c) the selection of the information

Another legal ground to consider such disclaimers as valid can be found in the general civil law principles: the e-market operator cannot be held liable if it did not have or could not have any knowledge of the illegal activity or information on its e-market. However, it would be unfair if the operator ignores by gross negligence the illegal nature or origins of the transaction object.

It is obvious that, in any case, such disclaimers will practically have no effect if national criminal or administrative provisions apply. The provisions may lay down, for instance, the responsibility of any party, including intermediaries, in the "trafficking" of illegal goods or services.

6.7.5.2 Conditions of fairness

In a number of countries, the operator can legally exclude his liability under this issue under the condition that he assumes in good faith the legal nature or origins of the objects being transacted in

[386] As quoted in the Spanish report, Question 28, Annex I.
[387] As per German report, Question 28, Annex I.
[388] Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Hungary, Luxemburg, Malta, Italy, Latvia, Lithuania, etc.

his platform[389].

Under the *Austrian* legal system, for instance, the operator cannot be held responsible if:

a) he does not have actual knowledge of the illegal activity or information

b) upon obtaining such knowledge or awareness, he acts expeditiously to remove or to disable access to the information[390].

Section 5 of the *Czech* Information Society Services Act contains a similar provision in this respect: the operator will be held liable if he obtains knowledge of the illegal nature of the information put on the website and, consequently, does not disable access to that information. Such liability cannot be excluded by the e-market T&C.

In the *Netherlands* the exclusion and limitation of the operator's liability under this issue is deemed reasonable. This principle is based upon the relevant provision of the e-commerce law. However, good faith participants may expect that e-market operators deploy good efforts to check the nature or origin of the goods put up for e-auctions[391].

In the same vein, under the *Slovenian* legal system, the operator may exclude his liability regarding illegal transactions on his e-marketplace, on the condition that the operator has acted with due professional care and checked the nature of the goods traded through the e-market and is not aware of their illegal nature or illegal origins (i.e. is acting in good faith)[392].

Along the same lines, in *Lithuania*, the trade of illegal goods would be a ground for criminal liability of the operator, but only in cases when the fault of the operator is proven. Usually in e-market examples investigated all e-market operators expressly prohibit participants from trading in illegal goods through their e-markets[393].

However, under the *Swedish* and *Slovak* legal systems, an e-market operator cannot in any case exclude its liability under this issue if the sale of the goods in itself is illegal[394].

[389] Austria, Belgium, Czech republic, France, …
[390] Section 16 of the Austrian e-commerce act.
[391] As per Dutch report, Question 28, Annex I.
[392] See Slovenian report, Question 28, Annex I.
[393] As quoted in Lithuanian report, Question 28, Annex I.
[394] As per Slovak and Swedish report, Question 28, Annex I.

6.7.6 Case 4: Involvement in participants' misconduct

6.7.6.1 Summary of national findings

In almost all countries, the e-market operator can lawfully exclude or limit his liability with respect to the participants' misconduct or erroneous actions during the operation (i.e. puffing, bid shielding, participants' collusion, participants' mistakes).

The clause may pose problems if the e-market operator is an active participant; also, if it is allowed to get involved to the participants' exchanges on the grounds of the e-market T&C or business customs (e.g. through an auto-bid mechanism).

The e-market operator may lawfully exclude his liability about participants' misconduct if he actually remains a neutral intermediary that facilitates the transaction in a passive way only.

However, general contract rules in all countries under examination require that the operator exercises the necessary professional care in order to prevent the occurrence of participants' misconduct on his e-marketplace.

6.7.6.2 Conditions of fairness

If the misconduct is entirely driven by participants, operators may exclude their liability. It should be emphasised that, in most of the cases, this is valid even if operator is the one who fixes the "rules of the game" applicable on the operations of the e-market[395].

Another condition for the fairness of such disclaimers is that the operator is not negligent or that he does not act by malicious intention to favour (though passively) some participants[396].

Furthermore, it is noteworthy that for most of the countries, that the disclaimer will have no practical effect if the participants' malicious conduct is sanctioned as a crime by national legislation[397].

6.7.7 The e-market practices

Most of the e-market examples that have been reported show that e-market operators exhaust all legal possibilities to exclude or limit their liability to the minimum.

It is frequent that T&C of e-market operators include rather broad disclaimers even for the case of

[395] As per Spanish report, Question 28, Annex I.
[396] See national reports from Italy, Germany, Lithuania. However, we assume that the same rule is valid for other jurisdictions as well.
[397] As reported in the Sweden and German reports, Question 28, Annex I.

technical failures or malfunctions of the e-market system (*Belgium, Germany, Slovakia, Sweden, Spain, Poland,...*). In particular, for e-markets operating at a multi-national level, the inclusion of disclaimers that practically discharge e-market operators from any guarantee or obligation with respect to the supplied services is the rule[398]. However, in other cases disclaimers seem to secure e-market operators against any and all liability, whilst on other occasions, liability limits are fairly delimited.

For example, an e-marketplace operating from the *Slovak Republic* denies any responsibility for the continuous operation and availability or soundness of his services. He also lays down that he should not be held liable for any damage caused by technical problems as well as for the synchronisation for the e-market's system time with the world time. In the same vein, cases have been reported from *Belgium* whereby e-market operators providing e-auction services excluded any responsibility even if disturbances in the execution of auctions/negotiated sales occur. On the issue of technical malfunctions, an e-market operator from *Italy* even refrains from guaranteeing the rectification of elimination of technical defects if they occur. In the same vein, an e-market operating from *Slovenia* included in his disclaimer that "the operator is not responsible for the incorrect performance of the e-market operating system, unless in the case of operator's intentional intervention".

On the other hand, some e-marketplaces seem to limit fairly their burden of liability with respect to the system's malfunctions or security, with clauses for instance excluding the operator's liability for any technical errors:

a) only to the extent that such errors are due to causes beyond the operator's control;

b) only insofar as they are due to the navigator's own errors[399].

On other e-market websites, T&C of e-market operators disclaim any warranty with regard to the identity of users participating on the platform. However, the same clauses stipulate sometimes the measures that operators take in order to alleviate identity fraud risks (and, thus, creating evidence that they ask with professional care)[400].

Rare are the situations in which e-market operators include in their disclaimers limitations of liability as regards the illegal nature of goods or services traded through the platform or regarding malicious influence on price-setting mechanism (i.e. puffing). On the contrary, T&C of e-markets usually exclude e-market operators' liability arising from the acquisition of goods or services that are transacted through the e-market platform (*Spain, Ireland…*). Similarly, e-markets providing services from Latvia exclude the operator's liability for the "*substantial existence and quality matters" of the*

[398] See, *inter alia*, disclaimers provided in the French report, question 29, Annex I.
[399] As quoted from Spanish report, question 29, Annex I.
[400] In the light of German report, question 29, Annex I.

goods, the rights and duties of the third persons and other issues relevant to the goods or services".

However, a number of cases were reported from *Spain* in which e-markets disclaim their liability for any illegal nature, illegal origin or inaccuracy of the information stored on their websites. In one case, in particular, it was noted that the e-market operator has the right to restrain the user's access if it considers that the information provided by the participant is illegal or unethical.

In examples reported from the *Czech Republic*, T&C clearly state that the e-market operator does not take part or influences the transactions between users. Other clauses shift the responsibility to the users regarding the legal or illegal nature of transactions over the goods traded on the e-markets. In one situation, for instance, T&C set forth that "the user declares that the goods offered are not goods excluded from electronic trading and that the sale of goods is not illegal". Along the same lines, providers of e-auction services supplied from *Hungary* set forth clearly that the only obligation assumed by the operator is to make available the interface for the on-line bidding and reporting.

On the contrary, in a case reported from *Poland*, the e-market operator undertakes liability for "the quality, security or legality of goods and services offered at the auction".

In the same context, in a number of *Estonian e-markets*, it is clearly specified that operators do not act as brokers, agents, commissioners, representatives of participants in the transactions taking place on the platform. In the same sense, operators disclaim any responsibility regarding the illegal or incorrect actions of traders while they transact in the trading platform. In the same spirit, limitations of liability are reflected in e-markets' T&C in *Lithuania*: providers of e-auction services, for instance, disclaim their liability for all damages incurred by the participants in the e-auction procedure.

In addition, an e-market operating from *the Netherlands* excludes its liability for "mistakes" of participants in the completion and accuracy of the information they convey on products or services transacted in the e-marketplace.

7 CONCLUSIONS AND RECOMMENDATIONS

7.1 Conclusions

7.1.1 Preliminary considerations

The aim of this Chapter is to bring to light overall conclusions regarding the legal state-of-play of e-marketplaces across Europe. More in particular, we will approach the descriptive and comparative findings of the previous Chapters from a critical viewpoint.

The aim will be to assess whether:

a) the unfair trade practices discussed in the previous part as "case studies" pose indeed concerns as to their fairness, and

b) the national legal approaches towards these practices negatively impact the development of the EU Internal Market for B2B e-commerce.

7.1.2 The legal framework of (un)fair commercial practices in B2B e-markets

7.1.2.1 Lack of explicit legal provisions on B2B e-market (un)fair commercial practices

No general B2B e-markets legislation - In the previous chapters, we saw that in none of the EU Member States there is legislation (in the form of legal act, statute or other secondary regulation such as royal decree) governing *the unfair commercial conduct in B2B e-markets*. However, general legislation on (un)fair commercial practices and other business related legal provisions can cover in most cases the abusive conduct in B2B e-marketplaces as well.

No specific B2B e-auction legislation in the vast majority of Member States - Except for France, the definition and operating rules of *electronic auctions - or reverse auctions -* are not determined by a specific legal act either. In the majority of Member States, it is basically the terminology and provisions of the national civil laws or other special laws on the (off-line) auctions and public sales that also apply in the context of e-auctions (including reverse auctions). It may also happen that specific provisions on auction procedures are incorporated in the countries' basic legal instruments, such as civil codes. However, the opinions about whether these rules apply *mutatis mutandis* in the case of auctions held by electronic means are diverging in the absence of any explicit provision to the

contrary[401]. In France, the adoption of the so-called "Loi Dutreil "[402] is the first initiative to regulate e-auctions at a national level by inserting conditions of invalidity for an e-auction in the commercial code and the law foresees a severe punishment in case of price manipulation.

No soft law on B2B e-auctions - In isolated cases only, legal provisions or softer instruments (such as guidelines) address specifically e-auctions[403]. Nevertheless, the binding nature of these rules (unless they are incorporated in a binding legislative instrument) seems to be uncertain.

Interpretation of existing general rules - For a number of countries, definitions and basic operational provisions (even for off-line auctions) are not provided in laws but have been formulated in national legal literature[404], jurisprudence[405] or in the e-markets practices[406] (i.e. in the T&C of the auction operators). Therefore, the qualification of a given behaviour as unfair is often a matter of legal interpretation (through teleological interpretation, analogy, etc.) of basic civil or commercial rules. Express legal provisions undermining or limiting the said commercial practice as unfair do exist in certain countries, but this is not the general rule[407].

Market practices dictate - On the other hand, e-market practices (i.e. contracts and T&C of e-market operators) may address operational rules about e-auctions or other e-market trading models. However,

a) these rules arise from the contractual relationship and have no general applicability or a general binding force at a national or cross-border level;

b) they are not imposed by a legislative authority, but only express the will - and discretion - of contractual parties;

c) they may address *certain* issues of commercial fair trading, but this depends on the discretion and will of their drafters to restrict or extend the content of T&C; and

d) thus, they vary in terms of content, flexibility, scope and the legal protection they can

[401] For example, it has been noted that, in certain countries, specific conditions laid down by law on the organisation of physical auctions (i.e. organisation of auctions in a designated place, in the presence of a civil law notary or bailiff, etc.) may be problematic for their application in the internet environment. In other countries, such as in Poland, there are concerns as to whether the e-auction should be considered as an auction or a public sale. Under Slovenian law, e-auctions are considered by the legal doctrine as falling within the definition and operational rules of "public auctions".

[402] Act n° 2005-882 of August 2, 2005 in favour of small and medium enterprises, Official Journal n° 179 of August 3, 2005, p. 12639.

[403] Being the case in Italy.

[404] Such as in Austria, the Czech and Slovak Republics, Ireland, Poland, Spain…

[405] Such as in Finland, France, (again) Ireland, (again) Poland, (again) Spain…

[406] For almost all countries.

[407] For instance, Finnish Transaction Act on the binding nature of placing a good on auction; Italian guidelines on e-auctions on specific transparency requirements that should be respected by e-market operators, etc.

guarantee.

Lack of transparency as a result - In the absence of specific legislation on B2B unfair commercial practices especially in the area of e-auctions, a combination of the national legal sources mentioned above (general legal framework, case-law, legal doctrine, practices) give rise to varying assumptions. Thus, for the majority of countries, different or even contradictory answers may be provided by these sources about whether the off-line rules on unfair trade practices in B2B e-markets can also apply in on-line transactions.

7.1.2.2 B2B e-markets trading practices subject to a variety of regulation

No legal vacuum - Despite the absence of explicit regulation on (un)fair trade practices in e-markets, there is no complete legal "vacuum" in this area. It is noteworthy that for all the "case-studies" discussed in the Chapters 5 to 11, general legal provisions and principles are put forward to discuss the unfairness or lawfulness of the practices they refer to.

These principles stem primarily from cornerstone provisions of the countries' civil, especially contractual law. Yet, civil legislation is not the only legal source that may apply. To tackle the majority of the commercial practices that seem to raise concerns as to their fairness, principles and provisions of national commercial law, fair trade practices legislation, e-commerce regulation and criminal law have to be taken into consideration. The applicability of these provisions in the concrete case scenarios does not arise automatically but by means of legal interpretation (teleological interpretation, analogy, consideration of the scope and purposes of a specific legislative act, etc.).

a) In many situations, the same issues are tackled from different regulatory angles.

> *For example, a given commercial conduct (i.e. communication of T&C to e-market participants) may be considered as unlawful not only on the basis of the country's contractual law but also of e-commerce legislation.*

b) Often the (un)fairness is assessed on the basis of generic provisions (i.e. contract law) as well as explicit provisions that happen to address a given situation.

> *An example here is the withdrawal of a bid while an e-auction is running. The reasoning about why or why not such withdrawal must be considered as unfair may invoke general national principles of contract law (theory of offer and acceptance); or, it may result from the country's special regulation on auctions, or even from another legal basis. In the same vein, unfair price-setting mechanisms may be undermined on the grounds of the national legislation on unfair trade practices or of contract law (i.e. breach of the good faith principle) but they can also be sanctioned as criminal offences (fraud).*

It is possible that, in order to touch base on the (un)fairness of a given commercial behaviour, it will be necessary to combine different sources (i.e. basic contract law together with national commercial or information society law). This may happen within the same jurisdiction or, most often, at a cross-border level.

> *To give an example, auction rings should be considered as unfair pursuant to generic criminal or civil law provisions in the majority of countries. For a few countries, however, the unfairness of auction rings results from national legal provisions on unfair business practices.*

Diverging solutions? - In our view, these differences at the level of the legal source cannot have any practical importance insofar as all legal grounds finally lead to the same outcome. In other words, if a given behaviour is assessed as unfair in all countries even though the legal bases may differ (civil law, commercial law, etc.), the legal consistency at an EU level is not threatened[408].

7.1.2.3 Varying but not contradictory legal approaches

Common legal principles - Although the legal instruments that prohibit or restrict unfair commercial practices in B2B e-marketplaces may differ from one country to another, they come in general to the same results. In the Chapters 5 to 11 of this Study ("the case studies"), common lines for assessing a specific conduct as unfair have been identified for the great majority of Member States. The legislative basis differs probably, but the essence of the provisions enacted reflects common legal principles. These fundamental principles underpin both the legal system of continental law countries and of common law countries (good faith, free consent of contractual parties, free formation of contracts, legal nature of offers/acceptances, etc.).

In most situations, the responses of the national legal systems are the same as to whether a given conduct must be considered as lawful or unfair. The national legal approaches converge in most of the case studies described in the Chapters 5 to 11. In the majority of cases, the legal conditions that determine a given conduct as fair or unfair may be expressed by different terms in national laws but, in fact, they reflect the same reasoning. Only in isolated cases exceptions diverging from this general common line can be noted.

The table below is a *shortcut* of the approaches of the national legal systems to the commercial practices that have been discussed in the previous Chapters.

[408] However, if the answers diverge considerably from one country to the other there may be some problems for establishing the common denominator at a cross-border level.

Commercial practice	Legal basis	Legal assessment	Exceptions
Unbalanced T&C			
To bind by T&C that have not been communicated.	varying	**unfair**: all M-S	no
To modify unilaterally T&C without notification.	varying	**unfair**: almost all M-S	yes (isolated cases)
To lay down surprisingly burdensome terms	varying	**fair under almost identical conditions**: great majority of M-S	yes (a few)
To stipulate (i.e. in T&C) a surprisingly burdensome term regarding applicable law.	same for most M-S	**fair under almost identical conditions**: almost all M-S	yes (isolated cases)
Parties' initiatives and reactions in e-markets			
To claim that the posting of membership forms on the e-market website and the subsequent completion of them by participants constitute a valid contract.	same	**fair under almost identical conditions**: all M-S	no

Commercial practice	Legal basis	Legal assessment	Exceptions
To withdraw an offer put up on e-auction (reverse auction) or to close the bidding procedure.	varying	*** fair <u>or</u> unfair:** varying approaches	-
To withdraw bids while e-auction (reverse auction) process is up-and-running.	varying	**unfair:** majority of M-S	yes
To ask invalidation/annulment of bids being made by error or being erroneous.	same for most M-S	**fair**: for almost all M-S	probably in isolated cases
To inform e-market participants about e-market operational rules ("rules of the game")	same for most M-S	**unfair:** almost all M-S	probably isolated cases
To set hidden reserve prices	same for most M-S	**unfair:** almost all M-S	yes (isolated cases)

Commercial practice	Legal basis	Legal assessment	Exceptions
To exclude the liability of e-market operators for defects of the transaction between participants or failure of performance.	same for most M-S	**fair under almost identical conditions for all M-S**	probably isolated cases
To submit fictitious bids ("puffing")	varying	**unfair**: almost all M-S	yes (isolated cases)
To make arrangements to influence the price of the winning bid ("auction rings").	varying	**unfair**: almost all M-S	yes under conditions (isolated cases)
To make arrangements about the value of the bids to submit ("bid shielding")	varying	**unfair**: almost all M-S	yes (isolated cases)
To submit a bid under another's identity ("identity theft")	varying	**unfair**: all M-S	no
To exclude the liability of e-market operators for failures or discrepancies of the operational system	varying	*** fair <u>or</u> unfair**: varying approaches	-

The table shows clearly that identical or similar conclusions can be drawn for the majority of the commercial practices discussed. However many exceptions have been noticed.

National deviations on a case-by-case basis - On top of this, it should be stressed that in all jurisdictions, other factors will also be taken into account when a given trade behaviour on a B2B e-market is assessed as fair or unfair. Such factors are, for instance, the factual circumstances of the specific case, the arrangements between the contractual parties, the content of T&C, the legal and trade cultures of Member States when qualifying a certain behaviour as fair or unfair, and so on. Therefore, national deviations on a case-by-case basis from "the common rule" reflected on the table above seem to be inevitable.

Finally, national legal systems converge towards the same solution (given practice fair or unfair) through a variety of legal means. For example, the unfairness of a commercial practice may be justified on the grounds of explicit or general regulation in nearly all Member States. But even if the national law is silent, the given conduct can be assessed in the light of the country's case law or legal doctrine interpreting the general rules. E-market practices are also taken into consideration whereby none of the above-mentioned sources provides an answer. In other words, the comparative assessment in the previous Chapters has shown that the cases where a legal gap occurs in a Member State are rare.

7.1.2.4 Conclusion

The above considerations have shown that unfair commercial practices in B2B e-markets are not subject to a legal '*vacuum*'.

Although there are mostly no explicit special provisions addressing the issue at a national or at the EU level, the existing legal framework is indeed able to tackle such practices in all jurisdictions. On an average level, this national legal framework incorporates statutory provisions (i.e. of the country's civil or commercial law), other regulations (i.e. information society laws), legal doctrine and jurisprudence or even rules stemming from market practices. These legal sources are sometimes used in a complementary manner to assess the lawfulness or unfairness of the given commercial conduct.

Although the national legislation tackling unfair trade practices in B2B e-markets are not harmonised at an EU level, the Member States seem to arrive at the same conclusions regarding the fairness or unfairness of a specific practice. The reason for this convergent reaction towards unfair B2B e-market practices is that the rules applied mostly arise from the interpretation of fundamental rules and principles enshrined in the legal tradition of almost all Member States.

For some of the issues, a certain degree of harmonisation already exists across the EU, e.g. the EU legal framework on information society services, in particular the e-commerce Directive. Accordingly, all Member States evaluate as unfair the failure to communicate to e-market participants the e-market T&C or essential rules governing the operation of the e-market activities.

Although national legal provisions apply to unfair commercial practices in B2B e-markets, their existence and enforceability is not always obvious to the e-market actors due to the general nature of these provisions.

7.1.3 Lessons learnt from the "e-market practices"

The legal analysis of the "case studies" in Chapter 5 is accompanied by a comparison of the situation in practice. In other words, we report examples from e-marketplaces being currently up-and-running in Member States in order to compare how the "e-market practices" seem to be aware of, or to comply with, the legal requirements.

It has to be noted that the monitoring of real examples from the world of e-markets *was not a requirement of the Tender Specifications.* However, we found it worthwhile making a preliminary investigation of the terms and conditions that are most often imposed by e-market operators impose one-market participants. It must be borne in mind that, the research of these practical examples was not meant to be exhaustive. In the analysis of the e-market practices, we tried to look into a representative sample of e-marketplaces as per country. However, no special effort has been taken to evaluate through statistical data the overall compliance of e-marketplaces to rules governing fair trade practices.

Accordingly, we are not in a position to bring forward in this Study any overall conclusions with regard to what extent e-marketplaces comply with legal rules on fair trade practices in their country or at a cross-border level.

On the contrary, we believe that the description of a limited number of practical cases in this Study has provided an insight into the kind of business behaviour which seems to be "commonly accepted" on e-marketplaces today. Other practices that are illustrated in Chapter 5 raise concerns as to their compliance with fair trade practices rules.

In our study, we have regarded as unfair, practices which violate the national legislation, clear administrative and court practices on fair commercial conduct ("fair commercial rules" in the strict sense of the term). Also, we consider as unfair, practices which infringe ethical rules and commercial usages as being recognised in a specific country ("fair commercial practices rules" in the wide sense of the term).

The key conclusions of our investigation of the e-markets situation are the following:

- It is difficult to argue about an "overall compliance" of the operation of B2B e-markets with fair trade practices. In a number of cases, e-market operators appear to align with fair trade rules (i.e. on their obligation to display to e- market participants T&C) whether in other cases this cannot be inferred with certainty (i.e., unilateral modification of T&C without prior notice, surprisingly wide liability disclaimers, surprising penalty clauses, etc.)

- For a number of cases, there has been monitored no particular problem with regard to compliance to the legal rules. However, the lack of "alarming" data should not always be interpreted as indication of e-market compliance with the regulatory framework of unfair trade practices. On the contrary, the absence of any problems in a number of countries is justified by the fact that: i) the e-markets services have not yet been widely used in these countries; b) it is not always easy to locate on the e-markets website the T&C or other documentation (standard contracts, etc.) which are binding on e-market participants.

- Operational rules about auctions and e-actions are not always set out in clear and explicit terms in T&C of e-market operators (e.g., about the bidders and the auctioneer's right to step back from their offers, the existence of a hidden reserve price, etc.).

- Although e-market operators seem to comply with the rules on an average basis in a given country, exceptions can be identified.

- It would be premature to establish on the basis of the findings of this Study a "compliance scorecard" regarding the fairness of e-market practices in each country. Such a deliverable should, in our view, be the subject of a different Study with market focus.

It is also important to know that the European Commission had initiated a feedback mechanism ("Hotline Service") for enterprises which experienced unfair commercial practices. The service was carried out by the information portal *www.emarketservices.com*[409] and become operative as of January 2005. No compliant has been received on this portal as to-date.

[409] Co-financed by the European Commission.

7.1.4 Harmonisation of fair trade practices rules applicable to B2B e-markets at EU level: Is it realistic? / Is it necessary?

7.1.4.1 Adequacy of the legal framework at national level

We discussed above that unfair trade practices deployed in B2B e-markets are not an unregulated field in Member States' jurisdictions. The legal instruments put in place to tackle the unfair conduct in the B2B e-market environment may differ from country to country, but the cases of 'unfairness' can be addressed anyhow.

Most of the situations in the former chapters reflect basic legal issues of civil or commercial law. Practically speaking, also trading partners in the off-line environment would be confronted with questions such as:

- when is the contract concluded?

- what kind of information should be provided before the contract is concluded?

- to what extent may contractual parties step back from an agreement in case they misunderstood the offer/statement of their counter-party?, etc.

The national findings in the former Chapters confirm that the basic legal provisions addressing unfair practices in the real world are also valid, to the extent possible, for the transactions taking place on-line. In the majority of case studies, national provisions governing the traditional commercial relationship are actually used as the starting point to assess the commercial conduct of business players in the e-market environment. In some situations, it suffices to combine these national core legal provisions with the new regulation on e-commerce/information society services (being to a high degree harmonised through the e-commerce Directive) to conclude whether the given commercial practice on the e-market is lawful or abusive.

Against this background it can be argued that, *as a general rule*, the EU national legal systems address adequately the unfair trade practices in B2B e-markets.

7.1.4.2 The deficiencies of the national legal approaches in certain areas

In certain areas, it seems that the general national legal frameworks may not be sufficient to address a number of commercial practices. Such practices are mostly deployed in interactive e-market models, such as the e-auctions and reverse auctions.

The operation of on-line auctions (reverse auctions) differs considerably from the traditional off-line auctions. For the majority of Member States, the national legislation applicable to the traditional (off-line) auctions have been shaped taking into account the physical presence of e-market participants (bidders) at the place of the auction and during its operation. These provisions are difficult to be transposed as such in the on-line environment.

In some countries, it is not clear either whether electronic auctions should be regarded as the equivalent of the traditional auctions and, thus, as subject to the same legal provisions. The conduct of auctions on-line has opened the way to new practices (i.e. the long-lasting procedure of an auction whereby bids can be put up at different intervals, new incentives to fraudulent behaviour, e.g. identity theft) that cannot be entirely covered by existing provisions. On the other hand, various new operational rules are being shaped by the e-market practices (i.e. T&C of the e-market operators) forming 'rules of the market'. The legal basis and justification of these market rules (i.e. withdrawals of bids) is not at all clear.

The table above shows that Member States' laws are divided as to whether it is unfair to step back from the auction procedure (i.e. by closing the bidding process or withdraw the object put up on auction). This is just one example of a number of other operational issues about e-auctions (reverse auctions) on which the local laws and market practices may be divided, such as: (i) how the winning bid is determined; (ii) whether the value of bids of other participants should be disclosed; (iii) whether the identity of other participants has to be disclosed and in which stage of the procedure, etc.

In addition, a number of practices to influence the value of bids of other participants and the final price of the object/service put up on auction (the so-called "price-setting mechanisms") take a new dimension in e-auctions. According to our findings, such practices are regarded as unfair in most Member States. However, the nature of these acts (contract breaches, criminal offences, breaches of fair competition, etc.) and/or the sanctions imposed when they are committed, differ between countries.

Another area in which uncertainty may arise about the limits of discretion and power of e-market operators relates to the limitation or exclusion of their liability. While all national laws seem to accept the inclusion of wide disclaimers in contracts and T&C of e-markets open to business partners, they are divided as to whether e-market operators should however be held responsible in a number of cases. Such situations may be the occurrence of

malfunctions or failures of the e-market operating system or the operator's failure to ensure that the e-market participants respect the operational rules of the e-market.

7.1.4.3 Harmonising the legal framework at EU level: is it necessary?

It was discussed above that national legal systems could adequately cover the unfair conduct of market actors in B2B e-marketplaces. However, with the exception of the EU regulation on e-commerce/information society services addressing certain of these practices in a uniform way, the rest of them are not tackled through harmonised legal provisions at EU level.

But is it really necessary to ensure such harmonisation across member-states' laws and, if yes, to what extent should national rules be harmonised?

It was mentioned above that the legal consistency across Europe is not threatened insofar as Member States' provisions on unfair trade practices in B2B e-markets converge to the same solution. Thus, invention of "new" legal provisions to tackle issues that are already addressed in Member States' laws should be contrary to the basic rules of the EU Treaty if no reasons justify a Community action (art. 5 of the EC Treaty - principle of subsidiarity).

If, in the light of the Study's findings, "reinventing the wheels" may not be justified in this case, are there any other objective reasons that require a minimum consolidation of *existing rules* at EU level?

In our views, such objective reasons exist and are basically:

a) The characteristics of the e-market business model

E-marketplaces have been conceived to encourage the establishment of trading relationships at a distance thanks to the Internet technology. Thus, e-markets are by definition the ideal platforms to boost trade exchanges across the EU internal market and beyond. They represent *a typical international market* whereby the activities of business actors are not hindered by national barriers.

When e-marketplaces enable exchanges at a *cross-border* level, their operators need to be certain that the T&C they impose on e-market participants are not abusive regardless of the law which is at each side of the border applicable on the e-marketplace. On the other side, e-market participants need assurance about the rights and obligations they have on e-marketplaces bringing them in contact with e-market operators and business partners from other countries. To this extent, the national provisions with which e-market actors are mostly familiar cannot guarantee the "fairness" or "unfairness" of a given commercial behaviour at a cross-border level.

In addition, e-markets have brought forward a *new business model*: transactional and operational rules on the e-market platform are quite different from these developed during a physical business relationship. E-auctions are a clear example of that. The sporadic examination of e-market practices in the former Chapters of this Study has shown the divergences, if not contradictions, that exist between the operational rules prepared by e-market operators. Because of its novelty, the e-marketplace is still an immature market: the "rules of the game" of e-marketplaces active in different countries are not consolidated since they lack a common point of reference to uniform legal provisions.

Finally, e-marketplaces represent for the time being an *oligopolistic market.* In general, SMEs do not establish their own e-marketplaces but rather use Internet platforms operated either by consortia of large companies or by independent operators. As a result, they need to have a clear picture on the existing solutions and the "fairness" of the trading rules these few and big players apply. On the other hand, business models, such as e-auctions (including reverse auctions) not subject to streamlined operational rules could in certain cases favour the discrimination between the e-market actors. T&C that e-market operators impose unilaterally and with no reference to a clear-cut legal framework are often abusive or create the perception that they favour abuses.

b) The characteristics of the legal framework

From a legal perspective, the harmonisation of the “rules of the game” at an EU level is a suitable means to eliminate the barriers to the Internal Market. B2B e-markets are currently subject to a number of legal rules which mainly emanate at a national level. On an EU level, only legislation on information society services, on distant selling, and on unfair consumer contracts deals with them; however, since these directives do not address B2B e-markets expressively, they are also subject to correct interpretation.. Our Study has shown that the difference between national legal provisions is often perceived as barriers to the Internal Market by enterprises when dealing with cross-border transactions. This perception could discourage companies, in particular SMEs, from conducting business electronically across borders. A common set of rules, applicable to all B2B e-markets within the European Union could align the diversity of national applicable provisions and provide for harmonisation. As we saw above, also the characteristics of the business model governing B2B e-markets revealed divergences, if not contradictions in the transactional and operational rules on the e-market platforms.

The international aspect of the business models, but even more the characteristics of the legal framework, could justify the use of harmonised or common legal provisions governing the B2B e-markets and transactions for the different Member States. However, from a legal perspective, an initiative of the European Commission should aim at eliminating legal barriers and promoting the

Internal Market. On the other hand, our Study revealed that the necessity for a common legal framework is rather limited. A legislative intervention could for instance be justified in the framework of e-actions or in order to clarify questions on law applicability in cross-border B2B transactions.

From the above it follows that a certain harmonisation of the legal framework at EU level is recommendable; in the next subtitle we will indicate that harmonising the legal framework at EU level to a certain extent is also realistic.

7.1.4.4 Harmonising the legal framework at EU level: is it realistic?

In this section, the question arises as to whether it is realistic that B2B regulation at an EU level could easily be enacted. In our opinion, a harmonisation of the legal framework at an EU level is realistic if it duly takes into account existing initiatives in related fields, e.g. the Common Frame of Reference (CFR) on EU Contract Law. This CFR represents an already existing broader framework for discussion and within the framework of this CFR an Action Plan already has been developed addressing divergences in contract law and identifying possible ways forward.

Whereby contract law provisions have already been enacted or if practices have already been developed under a given initiative, we consider that undertaking harmonisation initiatives from scratch would have no added-value.

In addition, it needs to be taken into account that the proposed harmonisation concerns a *Business-to-Business* environment. In a B2B context, an exhaustive harmonisation does not need to be strived after. Traditionally, B2B transactions are considered being transactions between equally strong parties that do not need legal protection against each other. For this reason, B2B relations are subject to less regulation. Contrary to a *Business-to-Consumer* environment, not all legal issues need to be harmonised in a B2B partnership. In principle, the market itself can play an important role in structuring the rules.

From the above, it can be concluded that a proportioned harmonisation of the legal rules might be realistic. Such harmonisation would comprise a limited number of issues and would take into account the characteristics proper to a B2B environment. In addition, such harmonisation should not be rigid, but would leave open the possibility to adapt to new practices (emerging with the evolution of the business model).

Finally, a realistic harmonisation does also mean that no compelling legal instruments would be used, but that instead the harmonisation takes place by means of soft regulation and the drafting of guidelines. At this point it is noteworthy to remind the importance of self-regulation in promoting fair trade in e-auctions and the earlier recommendations of experts and associations in this field

concerning the development of codes of conduct by the private sector.

7.1.4.5 Finding the right balance between contractual freedom and legal certainty

Our legal study has revealed that legal certainty about the fair trade practices rules in a B2B e-markets environment can currently still be improved. It is clear that each initiative for harmonisation will entail the exercise of trying to find the right balance between contractual freedom and legal certainty.

Legal certainty is essential for the relevant players within a B2B e-market as it will establish trust in the B2B e-marketplace and the transactions taking place by means of it. Legal certainty about the fair trade practices rules in a B2B e-markets environment is currently missing and could only be obtained by restricting the parties' contractual freedom.

On the other hand, the legal rules governing a B2B e-market place are principally based on civil / contract law. The contractual freedom of the parties has a particular importance in a *Business-to-Business* environment (where a regulatory interference is less acceptable). However, to a certain extent contractual freedom -especially in a B2B context- is a barrier to the introduction of stricter coercive regulation and thus affects the possibilities of creating legal certainty. Also, to a certain extent, the legal and administrative cultures of the EU Member States must be respected and a variety of provisions on a national level forms another barrier to establishing legal certainty.

7.2 Main Conclusions

- A lack of *explicit* legal provisions on B2B e-market (un)fair commercial provisions exists, resulting in a lack of transparency.
- Despite the absence of explicit legislation on (un)fair trade practices *there is no complete legal "vacuum"* in this area; a variety of legal provisions of national commercial law, fair trade practices legislation, e-commerce regulation and criminal law must be taken into consideration.
- Although the legal instruments prohibiting or restricting unfair commercial practices in B2B e-marketplaces may differ from one country to another (civil law, commercial law, etc.) they come in general to the same results as to whether a given conduct must be considered as lawful or unfair (national deviations on a case-by-case basis seem to be inevitable).
- Due to the general nature of the applicable national legal provisions on unfair commercial

practices in B2B e-markets, their existence and enforceability is not always obvious to the e-market actors.

- In certain areas (e-auctions and reverse auctions) the general national legal framework may not be entirely sufficient to tackle all unfair trade practices.

7.3 Recommendations

7.3.1 Preliminary considerations

It follows from the above that initiatives to harmonise and regulate the commercial practices in B2B e-marketplaces are to be welcomed. In this Chapter we will put forward some recommendations that result from our findings in the descriptive part of our legal Study. These recommendations should lead to ensuring better transparency and visibility of the market over the existing legal framework. Although some legal initiatives will be described below, in our opinion, the harmonisation and legal certainty of B2B transactions should above all take place through awareness actions and policy initiatives.

It should also be borne in mind that the aim of this Chapter is not to provide "the perfect legal solution" in order to eliminate any and all national regulatory variations in the area of fair trade practices in B2B e-marketplaces. On the contrary, the Study should build on a realistic, market approach directed towards SMEs. Accordingly, "the study *shall encompass* conclusions and *policy* recommendations *for the promotion of a favourable and stimulating environment for SMEs to take part in B2B transactions*"[410]. What is actually envisaged in the sections below is not to present the ideal legalistic approach for achieving a total harmonisation at the level of regulation. We understand that the added value of this Chapter will be to put forward recommendations for strengthening the market confidence in the way business is conducted on e-marketplaces. Therefore, possible actions in three fields (legal initiatives, awareness actions and policy initiatives) as it is analysed below merely aim at offering some contributions to reinforce confidence in B2B e-markets and to promote the participation of SMEs in B2B transactions by offering a favourable and stimulating environment.

This is actually confirmed by the direction that our recommendations must take in this Chapter. As underlined above, these recommendations should primarily address ideas of a *policy-making nature* (essentially by offering guidance to the stakeholders) and not of a legal nature strictly speaking. The legal solutions that we may propose in the following sections should actually be seen as the means

[410] According to the specifications of the tender, p. 27.

for implementing a policy approach serving realistic business objectives and not as the instruments for achieving a harmonisation at a legal level with no practical effect.

The proposed actions described hereunder focus on some essential elements of B2B e-markets: (i) ensuring fair trading within B2B e-markets, (ii) regulating e-auctions and promoting fair trade practices concerning theses e-auctions, and (iii) drafting terms and conditions concerning the governing rules of the B2B markets and the and content of B2B transactions.

7.3.2 The subordinate role of legal initiatives to harmonise commercial practices within B2B e-markets

Our initial recommendation is not to issue specific European compulsory legislation (e.g. by means of a regulation or directive) in order to regulate B2B e-market places in a harmonised way, but to leave open the possibility for substantial self-regulation in this sector. Certainly the use of legislative instruments has important advantages. It could provide a uniform set of rules governing B2B e-markets and transactions and would therefore also offer certainty that to a certain extent market distortions in this field can be avoided. It has been reported that a harmonised legal framework covering B2B e-markets to increase trust in cross-border transactions is still missing and that such framework could probably address common solutions to some legal problems.

Yet, we do not endorse the use of compulsory legislative instruments to ensure the trustworthiness of the e-market model and the deployment of fair commercial practices. This finding is based on the nature of the subject matter for which regulation would be sought. Regulating B2B e-markets by means of European legal instruments could only offer added value if these instruments provide for a clear legal framework and a detailed set of rules. In our view, for B2B e-markets and related transactions the needs are sector-specific and the European legal instruments are less suitable for answering these needs. Drafting and/or amending regulations and directives constitute a long and cumbersome procedure that cannot take into account all the specific needs and therefore should be avoided in this matter.

Below, we will substantiate on one legal initiative with added value: the preparation of European common rules on fair trading on B2B e-markets. The common rules could focus on fair trading rules within B2B e-markets in general or on the regulation of e-auctions in particular.

7.3.2.1 Common rules in the EU on B2B e-markets and fair trading

With respect to the creation of common rules in the EU on B2B e-markets and fair trading, two options exist: the development of standard contract clauses by private organisations or the preparation of European model rules or a model agreement.

Standard contract clauses

First of all, the European Commission could consider to support and promote the development of standard contract clauses by private parties. Such clauses are made available to be inserted in the terms and conditions of e-market operators. Another solution is or to provide these operators with a set of standard terms and conditions governing B2B e-marketplaces.

In our view, the most suitable body to prepare such clauses would be: a) either a *'B2B e-markets Expert Group'* constituted by experts in this field from different Member States and different jurisdictions, or b) another external partner (e.g. a standardisation body) or c) the European Commission. By providing standard terms and conditions, this B2B e-markets Expert Group could act as an 'honest broker', i.e. organising the platform and bringing interested parties (both e-market operators as well as other relevant players in the B2B e-markets) together for the development of terms and conditions.

In the framework of the European Contract Law initiative the Commission's Action Plan of 2003 suggested also the promotion of the use of EU-wide standard terms and conditions[411]. The Commission has recently decided not to pursue this measure for, amongst others, the following reasons:

- If standard terms and conditions are to be enforceable in all EEA legal systems, they need to comply with most restrictive national law. The Commission believes that parties that do not operate in all EU jurisdictions, in particular not in those with the most restrictive national regimes, might not be tempted to use such standard terms and conditions. This would greatly reduce the circle of economic actors that would benefit from such an exercise;

- the increasing speed of legislative change requires standard terms and conditions to be constantly updated;

- the complexity and need for constant review of standard terms and conditions means that keeping standard terms and conditions up to date comes at a great cost in terms of legal fees[412].

The above-mentioned reasons are also relevant for standard terms and conditions for B2B e-markets. Indeed, the enforceability of a set of standard terms and conditions for B2B e-markets could be problematic, even in a *Business-to-Business* situation, if it does not comply with the most restrictive

[411] Communication from the Commission to the European Parliament and the Council, *A more coherent European contract law: an action plan,* (COM)2003)68 final, p. 21.
[412] *First Annual Report on European Contract Law and the Acquis Review*, Brussels 23.09.2005, p.10.

national laws of the countries in which the e-market operator potentially conducts its business. There is even a risk that these European standard terms and conditions would be declared void or unenforceable if submitted to a national court, as national judges will apply their own national rules on interpreting these European standard terms and conditions.

In addition, it should also be borne in mind that standard contractual clauses are rarely adopted and used "as such". This finding is based upon earlier European experiences, as, for example, the standard contractual clauses for the transfer of personal data to third countries.

Thus, failing the elaboration of a set of standard terms and conditions that complies with the most restrictive national regime, this initiative may offer limited added value.

European model rules or a model agreement.

An initiative that in our view would be more successful consists of preparing European model rules or a model agreement on fair trading within B2B e-markets. The application of and ensuring respect for these model rules should not be compulsory within the Member States, but could offer the B2B market players guidance about the principles of fair trading that should govern the B2B transactions on an electronic marketplace.

The use of model rules and model agreements has proved its utility in the past. Reference can be made to the *European Model EDI Agreement* and commentary attached to a Commission Recommendation[413]. In the recitals of this Recommendation challenges similar to the challenges currently encountered in B2B e-markets have been identified as well as some objectives for the use of a 'European Model EDI Agreement'. These objectives are still accurate and valuable and therefore could be transposed to electronic marketplaces:

> "*Whereas a 'European Model EDI Agreement' would contribute to the promotion of EDI by providing a flexible and concrete approach to the legal issues raised by its use of EDI, encouraging cooperation between users for the exchange of EDI messages;*
>
> *Whereas the use of a 'European Model EDI Agreement' would improve the legal framework by providing a uniform approach to the legal issues; whereas it would increase the legal certainty for trading partners and reduce the uncertainty arising from the use of EDI; whereas it would avoid the need for every undertaking, especially small and medium-size companies, to draft their own 'Interchange Agreement' and consequently avoid duplication of work.*"

[413] European Commission Recommendation 94/820/EC of 19 October 1994 relating to the legal aspects of electronic data interchange, Official Journal L 338 of October 19, 1994, p. 98-117.

Such model rules or a model agreement on fair trading within B2B e-markets and the organisation of e-auctions in particular could offer guidance to the users of these markets who, in the absence of any special laws on B2B and e-auctions, generally lack knowledge concerning the legal situation and the applicable rules.

In addition, a model agreement could serve as guidance to potential users of e-marketplaces or electronic auction systems when negotiating the rules of participating and/or concluding agreements. As such the model agreement could be used as a document of reference and, even without using it, a contracting party could rely upon the model rules and refer to them when he is confronted with clearly unbalanced contractual provisions.

These model rules should as much as possible represent the common denominator of the fair commercial principles in the different Member States. Our Study has revealed that, despite the divergences, it is possible to identify some 'common streams' in the way Member States regulate fair trade practices in B2B relations. Furthermore, unfair conduct of business is subject to a combination of legal instruments in the majority of Member States.

In practical terms, the proposed model agreement or model rules on fair-trading may not be issued alone. It may be more efficient that this agreement is, annexed to a Commission Recommendation or a Commission Notice. For example the European Model EDI Agreement, already referred to, was attached to a Commission Recommendation. This Notice or Recommendation would then serve as a means for the Commission to put forward guidelines on fair trade practices in B2B e-markets and promote the use of the model agreement attached to it. The success of this legal measure will however depend of the user-friendliness of the model agreement, as well as of the awareness and policy actions that will be undertaken with a view to promoting the initiative as described below.

7.3.3 Reinforce the validity of B2B transactions through guidance and awareness actions

We saw above that, nowadays, B2B e-markets are still characterised by a lack of awareness and confusion concerning their functioning. This lack of awareness and confusion exists in various areas.

In the absence of a specific legal framework for B2B e-market auctions, the relevant players are not aware which general rules they need to apply. In general, it appears that they ignore that trade practices deployed on e-markets are covered by general rules and that the unfair business conduct can be sanctioned on the basis of these rules. This situation creates legal uncertainty and thus a market obstacle. In addition, as a consequence of the international nature of e-markets, the parties concerned usually ignore which law governs trade relations evolving on these platforms. Therefore, questions of international private law arise frequently. On the other hand, B2B e-markets represent still an

immature trade model. Accordingly, the conduct of business through e-markets has not yet taken place in a balanced way and a set of consolidated rules of practice is still lacking. Finally, it is also often argued that B2B e-markets are governed by the power of oligopolists. These items have been discussed more in depth in the Section of "Conclusions" (Section 7.1). Building awareness about the e-market business model and the rules underpinning it is therefore of utmost importance for the successful development of B2B e-marketplaces.

Such awareness building can take various forms. It can primarily consist of drawing up handbooks concerning the critical issues related to B2B e-markets. Promoting the wide dissemination of these handbooks is also essential. It may be combined with the organisation of seminars, conferences and educational campaigns directed especially towards SMEs. Furthermore, a brochure could be distributed with an excerpt of the handbook, together with information concerning the organised seminars and conferences.

7.3.3.1 Handbook on fair trade practices within B2B e-markets

A first awareness action could consist of drawing up a handbook for market participants/operators on B2B e-markets and fair trading. Such handbook could comprise a set of best practices that will reflect the contents of the European Commission Recommendation or Notice (to which the model rules on B2B e-markets and fair trading have been attached). It should provide for an in-depth explanation of and commentary on the model rules attached to this European Commission document.

The drafting of a handbook comprising best practices may be based on an in-depth study on the best practices in a B2B e-market environment at a country level.

Awareness could only be guaranteed if, next to the publication of this handbook, the necessary efforts are also undertaken for promoting the wide distribution of the handbook. Here, the European Commission can endeavour to encourage a wide dissemination and use of the handbook.

7.3.3.2 Handbook on e-auctions and fair trade practices

Another awareness action concerns the drafting and publication of a handbook on auctions / e-auctions and fair trade practices concerning these e-auctions. Such handbook on (e-)auctions and fair trade practices would provide market players concerned with guidelines about both the acceptable and unfair commercial practices concerning (e-)auctions. The handbook should therefore cover the mechanism of the auction itself (type of auction, conditions and modalities to participate, etc.), as well as the principles governing the transactions that take place by means of the auction (price setting mechanisms, placing bids, concluding contracts, etc.).

7.3.3.3 Standard contract clauses for B2B terms and conditions

As a third awareness action the European Commission could take the initiative to ensure the publication and the wide dissemination of standard clauses for terms and conditions concerning the governing rules of the B2B e-auctions.

The publication and especially the dissemination of such 'B2B T&C' will only be successful if it is supported by the eMarket Services portal and if it is a.o. combined with networking at the level of Member States. The realization of this also has to be coupled with setting up dedicated seminars, workshops or conferences that will enable market players to actively participate in the drafting of these standard clauses under the guidance of an expert team. The follow-up of such activities may be ensured through the organisation of an annual conference on B2B e-market practices and the legal framework. Amongst the objectives of such an open event would be to monitor the market reaction to the implementation of these T&C, as well as to discuss the need of their revising in the light of market experiences.

7.3.4 The added value of policy initiatives

In the previous titles we suggested legal initiatives and awareness actions to reinforce fair-trading on B2B e-markets and, consequently, to promote trustworthiness of B2B transactions. For greater efficacy, these initiatives should be combined with a number of dedicated policy initiatives.

In our opinion, policy initiatives form the third pillar of the successful development and reinforcement of B2B e-markets and B2B transactions and can be considered essential to the success of any possible action. By ensuring input from, and interaction with, existing organisations having relevant expertise in this field, the policy initiatives can contribute to the credibility of any action undertaken by the European Commission in the fields of the harmonisation and regulation of the commercial practices in B2B e-marketplaces.

7.3.4.1 Interaction on fair trade within B2B e-markets

In our view, the European model rules, as well as the handbook for market participants and operators on B2B e-markets, will only be effective and thus successful if during its preparation interaction with the concerned parties is ensured. The concerned parties should not only comprise the e-market operators, but also the other relevant players in B2B e-markets, such as the potential users of the markets.

In our view interaction with the expert group working on the 'Common Frame of Reference (CFR) on EU Contract Law is essential. The CFR already sets the scene for a broad debate on Internal Market barriers that result from the divergence of national contract laws, and on the need for further-reaching Community action in this area. In addition the CFR seeks information on potential practical issues that would hamper the uniform application of Community and national contract law across the EU. Therefore, we consider that the CFR should be involved when drafting European model rules on fair trading and a handbook for market participants / operators on B2B e-markets comprising a set of best practices.

7.3.4.2 Interaction on regulating e-auctions and promoting fair trade practices

Amongst the proposed awareness actions, we have suggested the drafting of a handbook on e-auctions and fair trade practices. Our Study on the unfair commercial practices within B2B e-markets has shown that these markets sometimes have to cope with anti-competitive behaviour deployed by their participants. This is for example the case of unfair price-setting mechanisms that are often used in practice in B2B e-markets, such as auction rings.

Given that other rules than these governing the unfair business conduct may be relevant in this case, such as competition rules, the preparation of handbooks (such as the handbook on e-auctions and fair trade practices) will require co-operation with other European Commission services.

Accordingly, competition-related issues should be handled through the involvement of the Competition Directorate General. E-market participants could have a right of action before the DG Competition if there is a risk of infringing the articles 81 and 82 of the EC-Treaty. The experience in this field could be useful when the introduction of a separate right of action would be considered for the enforcement of fair commercial practices in B2B e-markets[414].

In addition, because of the often close relation between 'unfair commercial practices' and 'unfair competition', interaction with DG Competition might be necessary to distinguish civil law questions from competition law questions. This qualification is important for issues when the applicable law determines the competent authority to deal with actions in the respective fields.

[414] The question whether a right of action would be an efficient instrument in this field falls outside the scope of this Study. This question should in our view be further investigated.

7.3.4.3 Arbitration mechanism for the operation of B2B e-markets

In this Chapter, we suggested the drawing up, publication and wide dissemination of standard contract clauses for terms and conditions and a related handbook. We also suggest linking these actions to an important policy initiative and thus strongly encourage the setting up of an arbitration mechanism to address disputes resulting from the operation of B2B e-markets. Bearing in mind the EU's promotion of alternative dispute resolution techniques as a mechanism for addressing consumer protection issues in an electronic commerce environment, it seems valuable to consider the prevalence of such techniques for *Business-to-Business* relationships in general and within B2B e-marketplaces in particular.

As indicated in our Study the barriers to the widespread adoption of B2B e-marketplaces are both market-related (a lack of awareness and trust concerning the e-market business phenomenon) and of a legal nature (the applicability of specific rules / administrative practices in e-marketplaces, the lawfulness of the operating procedures). In addition, it is noteworthy to mention that amongst the market players involved in B2B, confusion remains about the fairness of trading rules in B2B e-markets.

The existence of an efficient arbitration mechanism to address disputes concerning the governing rules of the B2B e-markets and the contents of B2B transactions might substantially reduce these barriers. We consider that such a mechanism would in particular have a strong added value in the context of cross-border transactions inherent to the functioning of B2B e-markets.

Alternative Dispute Resolution (ADR) can offer the B2B market players, who normally would have recourse to the national jurisdiction of a Member State, a valuable alternative to address disputes resulting from the operation of B2B e-markets. This alternative is more relevant to e-marketplaces than to other trading forms, since e-markets are most often expanded at a cross-border level and thus regulated by various jurisdictions. A mechanism that offers an alternative to the application of the principles of international private law (often lacking transparency for the market players) and that embodies the necessary expertise concerning fair practices and the application of terms and conditions in B2B e-markets might increase confidence in this trading form.

The initiative for setting up an arbitration mechanism to address disputes resulting from the operation of B2B e-markets can be taken by the European Commission who could also operate the ADR system or who could entrust its operation to an independent and neutral organisation. In order to preserve the independence and neutrality of this arbitration body, we consider that its organisation should not be left to the e-market operators themselves.

In this field, another policy initiative would consist of ensuring interaction with other Directorates-General working on ADR. The contribution of these services would be useful to the setting-up of the arbitration mechanism for B2B e-markets without “reinventing the wheels” whereby useful lessons can be drawn from experience in other policy fields.

The setting up of an arbitration mechanism to address disputes could be completed by some other policy initiatives. Some initiatives we could recommend consist of setting up a 'hotline' or a mediation service that market players may consult for advice, recommendations, etc. In addition, a mechanism could be established for monitoring complaints of e-market participants / operators, especially in the case of SMEs.

For these policy initiatives the European Commission should identify an entity or service in charge. In our view, this entity or service could be identified within the framework of the eMarket Services portal.

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