

ABSTRACT

Contracts of indeterminate duration: Art. 77 CESL A comment from the perspective of German law

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Unlike the Common Principles of European Contract Law or the Draft Common Frame of Reference in their respective provisions concerning contracts of indeterminate duration, art. 77 CESL adds that such a contract can by default be terminated by either party upon giving a reasonable period of notice **not exceeding 2 months**. Art. 77 (2) CESL furthermore makes this provision mandatory for b2c contracts. Deviations to the detriment of the consumer are prohibited.

The CESL like German law distinguishes between the substantive controls of individually and non-individually negotiated contract terms. Therefore this contribution will assess four different situations in relation to art. 77 CESL: an individually negotiated clause in a b2c contract and likewise a non-individually negotiated one; same as an individually negotiated clause in a b2sme contract and likewise a non-individually negotiated one. By way of example it can be mentioned that art. 85 CESL labels certain clauses regarding the termination of contracts of indeterminate duration as presumably unfair in b2c contracts. Traders' possibilities to deviate from art. 77 (1) CESL are limited, for instance, by the principle of good faith (art. 2 (1) CESL) for individually negotiated provisions and the general definition of unfairness of art. 86 CESL applies for non-individually negotiated provisions.

The consumer and trader protection in these different situations will be assessed and compared with German law – again the regime for individually and not individually negotiated contract terms.

The drafting of the CESL, only applicable for b2b cases involving a SME would have been a good opportunity to raise protection for SMEs specifically and explicitly, by way of distinguishing them from other traders. According to the current reading of the proposal this does not seem to be the intention.