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DOI

[10.2139/ssrn.2949875](https://doi.org/10.2139/ssrn.2949875)

Publication date

2017

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Leone, C. (2017). *Of private law, market regulation and telling them apart in the EU*. (Centre for the Study of European Contract Law Working Paper Series ; No. 2017-04), (Amsterdam Law School Legal Studies Research Paper; No. 2017-28). Centre for the Study of European Contract Law, University of Amsterdam. <https://doi.org/10.2139/ssrn.2949875>

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OF PRIVATE LAW, MARKET REGULATION AND TELLING THEM
APART IN THE EU

Candida Leone



CENTRE FOR THE STUDY OF EUROPEAN CONTRACT LAW

Centre for the Study of European Contract Law
Working Paper Series
No. 2017-04

Of private law, market regulation and telling them apart in the EU

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Of private law, market regulation and telling them apart in the EU

The convenors of this conference¹ have called us to reflect on the interaction between private law and other forms of market regulation.

This paper seeks to engage with the theme of the conference, and with the organizers' research theme, "coherent private law", at two main levels. On the one hand, it connects to the question of private law and market regulation by zooming in on one specific manifestation of private law- unfair contract terms under European harmonised rules- which is arguably already *regulatory private law*. Rather than discussing the impact of public law rules on private law adjudication, then, the paper seeks to show how public law *rationales* impact private law rules when the latter are adopted and "used" as a regulatory instrument. On the basis of this observation, the paper then explores what options are available for private lawyers to claim a residual relevance of their subject and its principles in a context which seems to put all these consolidated ideas under increasing strain.

Part I introduction

I.1 Foreword and outline

The call for this conference mirrored one underlying tension which private lawyers are faced with. While for a long time we have conceived of private law as the main source of rules complementing- and sometimes limiting- private autonomy in the free market, we have not been trained to consider private law an instrument for the *regulation* of the market.

As we were reminded this morning by Alexander Hellgardt, although it is possible to conceptualise private law as a form of (market) regulation, this is not the way in which traditionally private law looks at itself. The traditional defining function of private law, in other words, is non-regulatory. The law of contracts, torts and property has for centuries secured existing rights, helped create new ones and, crucially, reacted when protected rights were violated. In stark contrast to the *steering* attitude of regulation,² private law was first of all an ex-post mechanism.

The current constellation calls private lawyers to reconsider their position on this issue. Is private law indeed just another form of (market) regulation, or is it, also or mainly, something else?

I argue that only if we answer this question in the second direction, and only by facing the related question of *in which ways* private law is not about market regulation we can meaningfully ask normative questions about the effects that "public" regulations should or should not have between private parties.

¹ The paper was written as the basis of my contribution to Leiden University's research conference "Private law and market regulation – interaction, interference or inconsistency?" on December 2, 2016. Only minor amendments have been made to align the contents with case-law that has since appeared. I would like to thank the organizers of the conference for giving me the chance to develop my thoughts on this and several members of my research centre, the University of Amsterdam's Centre for the Study of European Contract Law, for their valuable comments.

² In a relatively classical definition, regulation can be identified as *the intentional use of authority to affect behaviour of a different party according to set standards, involving instruments of information-gathering and behaviour modification*- see J. Black, *Critical reflections on regulation*, Australian Journal of Legal Philosophy 2002 p 1.

I.2 Private law and market regulation or *regulatory private law*?

As previous papers will have highlighted, from the perspective of regulation the question is first, to identify whether legal rules are needed to foster or prevent certain behaviours, second, to select the kind of rules best suited to achieve the aims pursued by the legislator.³ All techniques bring their specific benefits and shortcomings, which can be articulated in terms of costs, effectiveness, spill overs/side effects and so on. Not only has private law for a long time stayed away from these considerations, also legislators have for a long time not considered private law as a prominent part of their regulatory toolbox. This state of the art has been challenged in more and less visible ways at the national level in the course of the past century; more importantly, the separation has arguably been ignored by the European “legislators” when setting their foot in private law harmonisation.⁴

Part II Exploring European private law as market regulation

II. 1. European private law as regulation

This paper focuses on European private law, and on one particular piece of legislation belonging to the field. Unlike national private laws, European private law does not have a tradition preceding the “pan-regulatory” era. It has made its first appearance as late as in the 80s and has since its inception been characterised- some would say, tainted-⁵ by its close connection to the EU’s (internal) market-building efforts. Already for some time, some of the main experts on European private law have started talking of its *regulatory function* in tight relation to the specific features of its institutional embedment.⁶ To these features one should immediately add the crucial role of the Court of Justice of the European Union. Although there is no space for an in-depth discussion of the issue in this paper, that the fact that the European Court of Justice - by far not a traditional civil law court - is entrusted the interpretation of EU secondary law containing private law rules is by no means irrelevant to the way in which these instruments are being developed.⁷

More recently, the idea of European Regulatory Private Law has gained centre stage⁸ in the discussion. The notion postulates that private law rules stemming from the EU are essentially concerned with the regulation (sometimes self-regulation) of different, partially segregated markets, which while pursuing loosely coherent *objectives* cannot be seen to be establishing or to follow any general principles such as the ones characterising national (private) legal orders. Not all the tenets

³ as succinctly explained by H. Collins, *Justifications and Techniques of Legal Regulation of the Employment Relation* in H. Collins, P. Davies, R. Rideout *Legal regulation of the employment relationship*, Kluwer Law International, 2000.

⁴ For an early impression on this point, see M. W. Hesselink, *The Structure of the New European Private Law*, vol 6.4 *Electronic Journal of Comparative Law*, (December 2002), <http://www.ejcl.org/64/art64-2.html>.

⁵ See C.U. Schmid, *The Thesis of the Instrumentalisation of Private Law by the EU in a Nutshell*, in C. Joerges and T. Ralli (eds.) *European Constitutionalism without Private Law: Private Law without Democracy*, Joseph Beuys/Bono 2011.

⁶ F. Cafaggi, H. Muir Watt *The Regulatory Function of European Private Law*, Edward Elgar 2009.

⁷ See on the role of the CJEU in consumer protection and internal market adjudication, the by-now classic contribution by Unberath, Johnston, 'The double-headed approach of the ECJ concerning consumer protection' (2007) 44 *Common Market Law Review*, Issue 5, pp. 1237–1284

⁸ through an ERC project being carried out at the European University Institute by a team of researchers led by H.-W. Micklitz, which has over the last few years produced an impressive range of scholarly contributions. See their website: <https://blogs.eui.eu/erc-erpl/>.

and implications of the ERPL theory are necessarily equally shared among scholars in the field,⁹ but at its core the project helps to make sense of an emerging “system” of private law which differs in very remarkable ways from the private laws which have been adopted and developed in the Member States.

It is, therefore, a relatively¹⁰ uncontroversial move to look at the Unfair Terms Directive, one of the most visible products of European private law harmonisation, as an instance of “regulatory” private law in action. In first instance, it seems good to identify the main significance of this characterisation as (typically) entailing that the legislator’s intervention is justified by the identification of a market failure. Previous presentations will undoubtedly have pointed out that although this is not the only possible justification for regulatory intervention, market failures are a more common and less controversial argument employed by legislators when intervening through the regulation of economic behaviour.¹¹

In this case, the targeted failure seems to be residing in the market for mass contract terms.¹² While it would be incorrect to read the whole phenomenon of judicial control of unfair contract terms in Europe through the narrative of regulatory private law, the context in which the Directive has been first adopted and then interpreted seems to warrant adopting this hypothesis on a provisional basis.¹³ The fact that the hypothesis seems to provide a valuable instrument to making sense of the way in which the Directive has developed over the last two decades, in turn, seems to support it.

Although several different approaches to the problem have been put forward in different strands of (prevalently legal-economic) scholarship, the prevailing understanding in the European debate is that the market for standard terms in consumer contracts does not work if left on its own. Consumer choices do not reward providers offering “fair” small prints (and do not really punish rogue providers). Professional parties which act as contract drafters, thus, have no incentive to refrain from using standard terms to increase their share of the surplus generated by the contracts they conclude with consumers.¹⁴ This justifies some interference by means of legislation.

⁹ see M. Hesselink, *Private Law, Regulation and Justice*, Centre for the Study of European Contract Law Working Paper Series No. 2016-03, on SSRN.

¹⁰ albeit not entirely. A more detailed justification, in particular against possible competing accounts of the development of European private law, would however exceed the scope of this paper. I do hope that the analysis of part II.2 will show persuasively the reconstructive capacity of the regulatory account.

¹¹ while regulation is in principle relatively agnostic as to the kind of objectives to be pursued, other “socially desirable” or politically determined objectives will often be met by objections based on their likely side-effects in terms of efficiency impairment.

¹² M. Schillig, *Inequality in bargaining power or market for lemons*, *European Law Review* 2007, p. 336, but also previous literature- see Hesselink, *Unfair terms in contracts between businesses* in R. Schulze, J. Stuyck, *Towards a European Contract Law*, Sellier European law publishers, 2011, p. 131 for a reconstruction.

¹³ in the years following the adoption of the Directive, while the debate on its merits and shortcomings flourished, very few contributions tried to justify it in alternative terms. The frequency with which reference was automatically made to Kessler’s classic contribution *Contracts of Adhesion-Some Thoughts About Freedom of Contract*, *Columbia Law Review* 1943 p 629, every time one had to account for the very existence of a non-market failure account seems telling.

¹⁴ a strict justification would require that these terms are not only “generally” tilted towards the professional’s advantage, but that they are so to the extent that they become inefficient, ie that they basically lead to a dispersion/destruction of value on the market due to, in synthesis, low levels of consumer trust.

The finding of a failure in the market for standard terms does not automatically warrant the introduction of unfair terms control, and unfair terms control is hardly the most effective way in which this market failure can be fixed. If the legislator intervenes in this domain with the aim of cleansing the market from inefficient terms or creating a more efficient market, other instruments may be better suited to the task.¹⁵ However, some contributions highlighting the limits of judicial intervention in standard contracts as instrument of regulation have already point out that it can be shaped in a way which increases its effectiveness.

While the possible advantages, in this direction, of different mechanisms of collective enforcement (be it by means of injunctions or later actions) are relatively obvious, less has been said of the suitability of other procedural and, even less, substantive rules and standards. It could be - and ultimately would be an empirical question - that even combining several effectiveness-enhancing spins will not make private law regulation catch up with the workings of a well-funded governmental agency.

In any case, it seems essential to stress that the claims concerning private law's shortcomings in terms of regulatory effectiveness say very little as to whether in practice legislators put in place private law rules with (the potential to pursue) a regulatory aim, and even less as to what effects these choices have on the way in which thus-shaped rules work in practice. It is therefore entirely possible that private law is a suboptimal instrument for cleansing the market of unfair standard terms, and yet it is being used as such.¹⁶

II.2 The Unfair Terms Directive in action

Looking at how the Unfair Terms Directive, which is commonly regarded as establishing a set of contract law rules, has been put to work in practice by the Court of Justice, is employed here to study the effects of a "regulatory agenda" within private law. In other words, rather than analysing the interaction between private law rules and techniques and "public law" provisions or standards of conduct, this section looks a regulatory rationale gives shape and flesh to one specific set of private law rules.

This move relies on two assumptions that need to be very briefly accounted for. First, that the way in which the Court of Justice interprets the Directive enjoys a privileged status as to its ability to tell us about the Directive itself. I will just postulate this here, but I am aware that this would require more justification. Second, the paper will concentrate on three salient aspects- substantive standards, consequences of unfairness and the main procedural issues come to prominence in the Court's case-law- and ignore other important issues. I believe these three aspects are interesting to look at for different reasons. On the one hand, civil procedure, with its reliance on private action, is typically stressed as one of the main shortcomings of private law in terms of regulatory effectiveness- regulating the consequences of unfairness in an appropriate way is then also instrumental to

¹⁵ See in general Collins, *Regulating Contracts*, and for a similar argument *The legal regulation of the employment relationship*; on the specific issue of unfair terms legislation in the Member States and its limited impact Micklitz, *Some Considerations on Cassis de Dijon and the Control of Unfair Contract Terms in Consumer Contracts*, in K. Boele-Woelki, F.W. Grosheide (eds), *The future of European contract law*, Kluwer Law International, 2007, p. 387.

¹⁶ to use a common scientific misconception, one may compare this situation to that of bumblebees who, unaware of the laws of physics which would deem them unable to fly, fly nonetheless. The story warns us against too reductionist accounts.

addressing similar shortcomings. In short, these two domains are obvious areas to look at to test the plausibility and effects of the regulatory hypothesis. On the other hand, the substantive standards are a less obvious locus, one may say a harder case to prove. I believe if the hypothesis can be proven plausible in that field, other issues- for instance the exclusion of core terms- can be spared here without losing much information.

Although many private lawyers are by now familiar with the structure and content of the Directive, it seems appropriate to very briefly introduce them here. Within its scope, which is limited to non-negotiated terms in consumer contracts, the Directive contains one main substantive provision declaring that a term has to be regarded as unfair if “contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”¹⁷ The control does not “relate to” the determination of the main subject matter of the contract, nor to the relationship between the goods or services provided and the price paid by the consumer- as long as the terms containing these determinations are drafted in plain intelligible language.¹⁸ A requirement of “plain and intelligible” drafting applies to all (non-negotiated) contract terms contained in written contracts.¹⁹ In case of doubt, the interpretation most favourable to the consumer shall prevail.²⁰ Member states must make sure that terms which are found unfair are not binding on the affected consumers.²¹

The Directive has generated notoriously little case-law for over a decade, but the adverse economic cycles triggered by the 2007-2008 financial crisis have finally “kissed it awake”.²² It is therefore thanks to the many cases which have been decided over a relatively short period of time that the Court has had the chance to quite momentarily develop a number of doctrines quite beyond- or besides- what one would have been able to expect only a few years ago.

II.2.1. Transparency and substantial unfairness

When the directive was adopted, the general clause of article 3 attracted much attention (and criticism), especially due to its reference to good faith. However, enthusiasm and fears alike went considerably down after the Court’s decision in *Freiburger Kommunalbauten*, which seemed to announce a future of judicial restraint. While the stream of cases which has reached Luxembourg in the last few years has shown that the Court is ready to adopt a more decisive role, it has not really revived the excitement that had surrounded the “unfairness” clause in the early days of the Directive. This is all the more remarkable if one considers that in *Aziz* the Court has actually ventured to directly address a question concerning the role of good faith in the unfairness test. The underwhelming effect is probably due to the substance of the Court’s answer, which directs national judges to check whether “the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations”.²³ It seems inevitable to conclude that the answer either ends up in an empty

¹⁷ Art 3(1) Directive 93/13/EEC

¹⁸ Art 4(2) Directive 93/13/EEC.

¹⁹ Art 5

²⁰ except in collective actions, see art 5 (2).

²¹ art 6(1).

²² H.-W. Micklitz, N. Reich, *The Court and Sleeping Beauty: The revival of the Unfair Contract Terms Directive (UCTD)*, CMLR 2014 p. 51.

²³ Case C-415/11 *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164, para 69.

statement- such would be the consequence of focussing on the standard of “dealing fairly and equitably”- or leads to a rather consumer-unfriendly standard. The latter consequence becomes evident if one thinks that in most cases the abstract possibility of negotiating the terms of a consumer contract would not change in any significant ways the consumer’s bargaining power, which makes the consumer’s will vis à vis specific terms basically one with the consumer’s wish to conclude the contract- irrespective of the drafting technique.

The unceremonious downgrading of the “good faith” clause to a signpost for national court’s evaluations or mere acceptance of the status quo should probably not come as a surprise. Some authors have suggested that the account of good faith requirements endorsed by the Court of Justice implies the idea of a “rational consumer”, which administers her time and energy effectively and knows what she faces when entering a contract. What seems undeniable is that the Court does not see much normative content into the notion of good faith.²⁴ Only one such consumer image could fill in with some significance the Court’s hypothetical. However, the Court’s attitude is less problematic if one looks at the regulatory function of unfair terms control- from that perspective, the good faith prong, which requires a consideration of the specific interaction between the parties to a certain contract, is a rather ineffective tool. It can be useful as guidance in individual cases, which are best (or even necessarily) left to national courts, but can do little to help with identifying terms that should be removed from the market. In light of these limitations, it may even be best from an efficiency perspective to leave the test as underdetermined as possible, in order to maintain some degree of threat of enforcement.²⁵

A somewhat better destiny has then met the other part of the test, or “significant imbalance”. Under this heading, the Court - still in Aziz- has held that

“it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.”

In the same case, the CJEU has then proceeded with very specific guidance to the national court, instructing her to examine three suspicious terms. In these instructions, the guiding criteria enumerated above- in particular, the comparison with the otherwise applicable default national legal rules and the remedies available to the consumer in case a term is unduly triggered- are implemented consistently. In the case of one of the terms, establishing custom default interest rates, the court additionally included a *proportionality* test which seems particularly promising- the national court should check whether the interest rate established in the contract “compared with the statutory interest rate [...] is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them”.²⁶

²⁴ or retreats in a somewhat old-fashioned “subjective” understanding of the standard, see I. Barral-Viñals *Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements: Lessons to Be Learned in Spain*, 4 PENN. ST. J.L. & INT’L AFF. 69 (2015).

²⁵ see M. Schillig, *Inequality in bargaining power or market for lemons*.

²⁶ this mirrors the reasoning promoted by Micklitz in *Some thoughts on Cassis de Dijon* .

The reference to background default rules and the remedies available under national rules, as well as the embryonic proportionality test suggested in *Aziz*, make the outcome in a specific case highly dependent on the national legal environment, and therefore (national) market-specific, but rather easy to generalise *within* the relevant market/legal system. Thus, national judicial decisions dealing with a certain term within a specific group of contracts should be relatively apt for being taken into account by drafters in the same legal system and market sector concluding contracts of comparable content- which, even absent direct *ultra partes* effectiveness of the judgments, should contribute to their regulatory impact.

Depending on how one regards these outcomes as to the “substantive” unfairness standard, they may be more or less surprised by the parallel developments concerning the other main control mechanism foreseen by the Directive: transparency. In first instance, the last statement may sound in itself controversial- one may doubt whether transparency, expressed in the directive mainly through the requirement of “plain and intelligible” drafting articulated by art 5, was ever supposed to be treated as a control mechanism on more or less equal footing with the clause of art 3. Early national commentaries suggest that this was at least not the way in which the obligation of clear and comprehensible drafting was expected to work when the Directive was adopted. However, a combination of – structural and relatively contingent – factors has contributed to making transparent drafting one of the key elements in the CJEU’s adjudication concerning Directive 1993/13. In particular, the transparency clause has become central in the adjudication of price-related terms, for which the Court was sometimes not able to tell *ex ante* whether they would be open for scrutiny under the unfairness clause. The transparency obligation has been developed in a string of cases all concerning long-term contracts, and by now we know that the CJEU considers similar requirements to apply when it is used as a material standard of evaluation²⁷ and when it works as a gateway for the possibility to control “core” terms.²⁸ Even more recently, the Court has clarified that in certain cases a lack of transparency can be in itself conducive to unfairness when it misleads the consumer as to the extent of the rights they enjoy.²⁹

The ECJ is clear that the requirement of transparency “cannot be reduced to [the terms] being formally and grammatically intelligible”³⁰: the “system of protection” put in place by the Directive is such that “the requirement of transparency must be understood in a broad sense”.³¹ In particular, whether establishing price modifications, interest rates variation or conversion in a foreign currency, the terms must set out “transparently the *reasons for* and the *particularities of the mechanism*

²⁷ Such is the case, in a strong way –possibly entailing unfairness – for certain terms under the non-binding, but increasingly relevant, Annex, and under certain national legal systems. In a less dramatic way, transparency scrutiny applies to all terms under article 5, possibly requiring courts to undertake pro-consumer interpretation of terms which are found to be unclear.

²⁸ See CJEU case C-26/13, *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282 (hence: *Kásler*) para 69 and case C-143/13, *Bogdan Matei, Ioana Ofelia Matei v SC Volksbank România SA*, (hence: *Matei*), ECLI:EU:C:2015:127 where the Court of Justice is explicit that the scope of art 4(2) and 5 has to be considered as overlapping.

²⁹ *Verein für Konsumenteninformation v Amazon*, C- 191/15, ECLI:EU:C:2016:612. Thanks are due to my UvA colleague Mia Januzovic for timely bringing this decision to my attention as I was drafting this paper.

³⁰ this is confirmed in *Amazon*, which however does not elaborate on the standard to be tested. It seems that the provider would be required to include a mention of the provisions which provide the relevant context for a sufficient comprehension of the term’s meaning.

³¹ *Kásler*, 71 and 72.

[emphasis added]³² which may not be of immediate evidence for the consumer, in a way that allows them to “foresee, on the basis of clear, intelligible criteria, the economic consequences” which the term has in the context of the contract they are concluding. The Court holds the acquisition of information “before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer”, who can on that basis decide whether they want at all to be bound by the contract; additionally, with specific emphasis on long-term contracts, it seems that contract terms can play a further role in providing the consumer a point of reference to later check the legitimacy of the other party’s behaviour during the time of contractual performance.³³

This understanding of transparency, which is in all likelihood more substantive and more constraining than an obligation of drafting in layman language, aligns in two important ways with a regulatory agenda: on the one hand, it tries to secure that the consumer has an operational (as opposed to literal) understanding of the workings of a contract they are about to enter; on the other hand, again it gives drafters quite clear directions as to how complex terms should be formulated, while seeking to undermine the attractiveness of trading strategies which in part *rely* on a combination of unclear drafting³⁴ and discretionary powers or savvy use of market mechanisms. The adoption of the “average consumer”³⁵ notion as the imaginary consumer against whose understanding the term’s transparency should be assessed, albeit generally regrettable,³⁶ is again consistent with an approach that concentrates on the market regulation impact of unfair terms control rather than with the specific relationship at stage.

A final consideration on the ways in which judicial control under the Directive is taking shape concerns the observation that, in general, there seems to be no place for an appreciation of whether the consequences triggered by a certain clause, or in other words the effects of the clause, would or not be justified in the case at stake. The only elements that matters is whether, *ex ante*, the clause was to be seen as acceptable in the context of the contract’s overall balance. This is a regulatory element almost implicit in the option for unfair terms control- if it is the term and not its “actioning” which is subject to control, it follows almost by necessity that the question whether in the case under review the consequences determined by the term were actually justified is not relevant. For instance, in *Aziz* the question whether the acceleration clause included in the contract should be

³² *Matei, Kásler*, but also case C-92/11, *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V.*, ECLI:EU:C:2013:180.

³³ on this, I apologise for referring to my own note *Transparency revisited - on the role of information in the recent case-law of the CJEU*, ERCL 2014. The connections between transparency requirements, pre-contractual information obligations and the obligation to provide information on a durable medium foreseen by some consumer protection Directives should be investigated in more depth.

³⁴ Or unclear explanation of the contract’s operation- see above and below.

³⁵ In this respect, the issue just highlighted at fn 18 is crucial; the Court in *Kásler* (para 74) suggested that the transparency of the terms under review should be examined, *inter alia*, in light of whether the average consumer, having available the information that was (likely) available in the case considered, would have understood. The “average consumer” notion was again used in case C-96/14, *Jean-Claude Van Hove v CNP Assurances SA*, ECLI:EU:C:2015:262.

³⁶ for detailed analysis and critique of the standard, see B.B. Duivenvoorde *The Consumer Benchmarks in the Unfair Commercial Practices Directive*, Springer 2015.

voided did not depend on whether in the case at stake a demand for repayment would be justified by the importance of the debtor's non-performance, but exclusively on the term's formulation.³⁷

II.2.2 Consequences of unfairness

The remedy for unfairness is provided by article 6(1). Though leaving room for technical variations, the Directive requires MS to make sure that unfair terms are not "binding" on consumers. The choice to formulate the provision in a way which did not espouse any existing national terminology provided for diverging interpretations in the first years following the directive's adoption. In the last decade, however, the CJEU has clarified that, in order to achieve the directive's aims, when materially able to do so, courts should be ready to scrutinise terms *ex officio*³⁸ and that terms found to be unfair have to be entirely removed from the contract,³⁹ with no chance of adaptation. Once the term is removed from the contract, the concerned court has to evaluate whether the agreement is "capable of continuing in existence" without the unfair term.⁴⁰ In *Kásler*, the Court has confirmed that the terms found unfair can be replaced by national default rules if this is necessary for the contract to "continue in existence after an unfair term has been deleted".⁴¹ However, the CJEU has recently confirmed, national courts cannot impose any temporal limitations on the effects of the application of EU law.⁴²

The total eradication of terms found unfair, rather than their "reduction" or adaptation by the concerned courts, is justified in plainly regulatory terms:

³⁷ See Sara Iglesias Sánchez, 'Unfair terms in mortgage loans and protection of housing in times of economic crisis: *Aziz v. CatalunyaCaixa*' (2014) 51 *Iglesias Sanchez* in CMLR page 966-967 for the Spanish follow-up decision; also, in the order rendered in case C-602/13, *Banco Bilbao Vizcaya Argentaria SA v Fernando Quintano Ujeta, María-Isabel Sánchez García*, ECLI:EU:C:2015:397, the Court confirmed that this approach should be considered as established interpretation of the Directive.

³⁸ Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 38; Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 31; Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-0000, paragraph 48.

³⁹ Case C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, ECLI:EU:C:2012:349.

⁴⁰ Also on this point the CJEU has been able to make clear that the evaluation has to be made objectively, and should be unaffected by the consideration that voiding the contract altogether might be more convenient for the consumer than upholding it without the invalid term: see Case C-453/10, *Jana Pereničová, Vladislav Perenič v SOS financ spol. s r. o.*, para 32-33. However (paragraph 35), since the Directive only carried out "partial and minimum harmonization", MS are free to enact "in compliance with European Union law, national legislation under which a contract concluded between a trader and a consumer which contains one or more unfair terms may be declared void as a whole where that will ensure better protection of the consumer."

⁴¹ *Kásler*, para 85, relying on precedents (Case C-453/10 *Pereničová* and *Perenič* EU:C:2012:144, paragraph 31, and *Banco Español de Crédito* EU:C:2012:349, paragraph 40 and case-law cited). It is not clear to what extent the same reasoning could be applicable to the replacement of supplementary rule for unfair terms whose invalidation would not have consequences for the contract's existence.

⁴² see joined cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo v. Cajasur Banco, Palacios Martínez v. BBVA and Banco Popular Español v. Irlés López*, ECLI:EU:C:2016:980. After having found frequently used "floor clauses" unfair under the Spanish rules implementing the unfair terms directive, the Spanish Supreme Court in civil matters had decided that consumers would only be entitled to restitution for having paid too high interest rates as of the date of the Supreme Court's own finding. In his opinion, AG Mengozzi argued in favour of a similar limitation, but the CJEU found it incompatible with the Directive. See for an early commentary <http://recent-ecl.blogspot.nl/2016/12/spanish-floor-clauses-clausulas-suelo.html>. I am indebted to the author, my colleague Anna van Duin, for pretty much all the insight I have on unfair terms before Spanish courts.

*"[I]f it were open to the national court to revise the content of unfair terms included in such contracts, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms (see, to that effect, the order in Pohotovost', paragraph 41 and the case-law cited), in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers."*⁴³

The contrast between these considerations and existing national rules and practices, which frequently give judges the task to reshape unacceptable terms into acceptable ones, is quite remarkable.

II.2.3. Ex officio control and remedies

As widely known, Member States retain a large degree of autonomy as concerns the implementation of directives within their legal systems, and in particular as to the procedural arrangements surrounding the actioning of the substantive rules put in place by virtue of EU rules. In the case of the Unfair Terms Directive, this means that the Directive does not directly establish any procedural rules concerning the way in which unfair terms should be challenged or resisted in court.⁴⁴ Over the last few years, however, the Court of Justice has been busy establishing an articulated and demanding set of requirements that national procedural laws have to respect in order to comply with the principles of equivalence of effectiveness.

First of all, it is by now clear that national courts should be ready to scrutinise non-negotiated terms *ex officio*.⁴⁵ It is instructive to take a closer look at the way in which the Court justifies the power of revision in *Mostaza Claro*:

"The system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms [...]"

Such an imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract.

*It is on the basis of those principles that the Court has ruled that the national court's power to determine of its own motion whether a term is unfair constitutes a means both of achieving the result sought by Article 6 of the Directive, namely preventing an individual consumer from being bound by an unfair term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers [...]"*⁴⁶

This power, however, is turned into a duty by the end of the decision:

⁴³ See *Banco Español de Crédito SA v Joaquín Calderón Camino*, C-618/10, para 69.

⁴⁴ except establishing that, as concerns the non-negotiated nature of the relevant terms, the burden of proof is on the professional who wants to claim a certain term has been negotiated (art 3).

⁴⁵ Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paragraph 38; Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paragraph 31; Case C-137/08 *VB Pénzügyi Lízing* [2010] ECR I-0000, paragraph 48.

⁴⁶ *Mostaza Claro* paras 25-27.

The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.

In this case, a local court had been asked by a consumer to annul an arbitration award, on the grounds that the arbitration agreement under which the award had been pronounced had to be considered void. The consumer had not raised the issue in the arbitration proceedings. The other party, but also the German government, had argued that allowing - or requiring - courts to invalidate an arbitral award in cases like the one at stake would “seriously undermine the effectiveness” of arbitration awards.⁴⁷ The court explains that, as with other elements of public policy deriving from EU law, setting aside arbitration awards is required every time it would be possible for courts to pronounce their nullity for violation of national public policy rules. A violation of this obligation, the Court has recently confirmed,⁴⁸ can (under relatively strict conditions) qualify as a violation of EU law giving rise to a claim in damages for the aggrieved consumers.

The court’s reasoning in this case is intriguingly ambiguous. It refers to the “deterrent” effect of ex officio control to explain why powers in this direction are to be seen as invested in national courts and then turns to public policy and the Union’s task to raise the standard of living and the quality of life in its territory⁴⁹ in order to convert these powers into obligations which cannot be compressed for the sake of arbitration. In practice, however, it seems that all the arguments deployed are simply instrumental to making sure that the national courts’ function as enforcing agents cannot be too easily circumvented by means of arbitration procedures that, from the Directive’s perspective, are after all likely illegal.⁵⁰ Within the outer limits posed by the principle of *res iudicata*,⁵¹ and with the help of an unusually high number of preliminary reference requests,⁵² the Court of Justice has been “upgrading”- i.e. undoing- the rules of civil procedure (concerning in particular but not exclusively mortgage enforcement) in the Kingdom of Spain throughout the last decade.⁵³

The Directive shows its market-cleansing orientation in a more traditional fashion at article 7, which imposes that MS go beyond the establishment of private law rules, allowing “persons or organizations” (art 7(2)) with a legitimate interest to act in protecting consumers, which includes obtaining injunctions to prevent the (continued) use of terms which are found unfair. Consumer organisations as well as business associations are considered as potential carriers of the required legitimate interest. Indeed, it is easy to see that while unfair terms control in individual proceedings can give relief to certain specific consumers, it is hardly an instrument capable of eliminating unfair

⁴⁷ Mostaza Claro para 33.

⁴⁸ Case C-168/15, Milena Tomášová v Slovenská republika – Ministerstvo spravodlivosti SR, Pohotovosť s. r. o., ECLI:EU:C:2016:602.

⁴⁹ Mostaza Claro para 37: as the aim of the Directive is to strengthen consumer protection, it constitutes, according to Article 3(1)(t) EC, a measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory”

⁵⁰ See now article 18 Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁵¹ see to that effect case C-40/08, Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira, ECLI:EU:C:2009:615.

⁵² see Gomez Pomar and Lyczkowska *Spanish Courts, the Court of Justice of the European Union, and Consumer Law A Theoretical Model of their Interaction*, Indret paper 2014.

⁵³ see Barral-Vinals, *Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements: Lessons to Be Learned in Spain*, Penn State Journal of Law and International Affairs 2015.

terms from entire markets, or- as the Directive undertook to do- from the internal market as a whole. To this end, collective enforcement presents advantages at least under two points of view: first, overcoming individuals' possible lack of appropriate incentives to act; second, delivering a result which is not only relevant in one dispute, but capable of impeding the use of certain terms at large. The legality of such *ultra partes* effect of injunctions brought by consumer associations has been, again, established by the CJEU at the beginning of this decade.⁵⁴ In addition to these points, allowing collective enforcement, in the hands of consumer associations or possibly of public agencies in charge with consumer protection, can help the establishment of practices whereby the standard terms in use in a market can become the object of negotiations "in the shadow of the law", enhancing the bargaining power of consumer advocates.

Part III Private law and the limits of market-enhancement

By looking at the way in which three core aspects of the Unfair Terms Directive have been developed by the court of justice, I hope to have shown the impact that a regulatory agenda injected into private law rules has on the way in which these rules operate. Few private lawyers would have from the beginning guessed that unfairness control would not have been up for the consumer to demand, and possibly even fewer would have bet that the Court of Justice would have developed an increasingly clear notion of "unfairness" making practically no use of the concept of good faith.

This phenomenon has controversial features, from whichever sides one looks at it. For consumer law experts, the emphasis on directing providers towards efficient behaviour seems to reinforce the worries of those who fear an erosion of the "protection" dimension of consumer law.⁵⁵ In this sense, the reference to the "average consumer, who is reasonably well-informed and circumspect" in the context of the transparency test does not do much to help consumers whose understanding and alertness does not match the normatively charged model given shape by the Court and the EU legislator.

For private lawyers, the situation may be even more disquieting. There seems to be no reference in the guidelines developed by the Court of Justice to a reasonable apportionment of the liabilities arising from a dispute, very little attention to the conduct effectively held by the parties in the context of the relationship and no reference- if not by way of delegation- to any idea of developing consistency among different rules and the way they are applied. For instance, if the standard to find a term intransparent is the same whether the assessment is carried out *as unfairness control* or *as a filter towards that control*, how does a finding- for the second purpose- that a term is intransparent relate to the same term's potential unfairness?⁵⁶

⁵⁴ Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, ECLI:EU:C:2012:242: the Directive "does not preclude the declaration of invalidity of an unfair term included in the standard terms of consumer contracts in an action for an injunction, provided for in Article 7 of that directive, brought against a seller or supplier in the public interest, and on behalf of consumers, by a body appointed by national legislation from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same general business conditions apply, including with regard to those consumers who were not party to the injunction proceedings."

⁵⁵ Micklitz, *The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic* (available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013177).

⁵⁶ Where transparency is in the first place interpreted as a standard for the assessment of a term's fairness, In those circumstances, as the Advocate General observes in point 94 of his Opinion, a pre-formulated term on

How to proceed, then? My argument in this last part of the paper is that, if we think that private law as autonomous discipline still has something to say when confronted with the growing imperialism of market regulation and its own rationales in fields which used to be the exclusive domain of national civil codes, it is better to think of it this autonomous space as an *alternative to market-making* rather than as an alternative *tool for market-making*. When private law is used as an instrument of market-making, I have tried to show, it loses much of the flavour which we tend to attach to private law as a subject.

The claim that I would like to advance here is that, within a regulatory framework, certain private law principles may be best visualised as *market correction*. Overcoming market failures, such as the ones allegedly occurring in the market for standard terms, is a matter of market enhancement. By solving certain identified problems, the law seeks to help the market deliver results close to those that would be achievable under perfect competition. The protection of established rights and normatively enshrined principles, on the other hand, as opposed to the furthering of publicly determined goals, can be seen as a limit to the operation of such market mechanisms.

It seems particularly appropriate at this point, in light of the contribution by this morning's keynote speaker, to distinguish the corrective function highlighted here from the *distributive* goals which we have been warned we should not try to pursue by means of private law. The market-correcting role I sketch here seems to be never regulatory in a strict sense, since it is by definition focussed on *reacting* to certain behaviours or situation rather than *steering* or promoting them. It can be regulatory in the sense of setting the limits of market action or market-oriented regulation, but it is hardly ever relevant from a distributional perspective, if not on occasion from a very minimal-entitlement view.⁵⁷

This contribution will end with a few examples of non-market reasonings which have made their way into the adjudication of the Court of Justice concerning unfair terms, which may suggest possible ways in which private law could be (quite literally) entrenched in - an otherwise overwhelming - regulatory rule-making. If the place for private law's autonomous rationality has to be established *outside* of market-making, in other words, what are good areas to look at? I will only look at two examples, with no claim to having established a comprehensive or very persuasive argument.

On the one hand, as welcomed by other authors (but not necessarily hard-core private lawyers) already, the Court of Justice seems to have espoused some non-instrumental (or not merely instrumental) rights reasoning in *Aziz*. In that case, the Court observed that scrutiny had to be particularly high since "the mortgaged property is the family home of the consumer whose rights have been infringed" which means that instruments of consumer protection "limited to payment of damages and interest" are not sufficient protection when a consumer is threatened with eviction

the choice of the applicable law designating the law of the Member State in which the seller or supplier is established is unfair only in so far as it displays certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties.

⁶⁸ In particular, the unfairness of such a term may result from a formulation that does not comply with the requirement of being drafted in plain and intelligible language set out in Article 5 of Directive 93/13.

⁵⁷ the distributional effects of market-enhancing regulation, on the other hand, need not be discussed here.

form their family home in that they are unable “to prevent the definitive and irreversible loss of that dwelling”.⁵⁸

A similar, albeit less spectacular, concern with private law as a mechanism for securing rights rather than an instrument of public policy enforcement can be identified in the Court’s decisions concerning the delimitations between collective and individual proceedings under the Directive. Collective proceedings differ from individual disputes, since in the former context a term’s evaluation takes place in abstracto and not with reference to a specific transaction.⁵⁹ Consistent with this difference, the Court of Justice has recently affirmed⁶⁰ that national civil procedure rules cannot let collective actions automatically pre-empt individual ones. Making consumers dependent on a procedure from which they cannot dissociate themselves and depriving them of the possibility to *ex post* accept the application of an invalid term would be contrary to the requirement of effective protection. From a market regulation perspective, this decision is arguably quite problematic as it undermines the predictive –and thus, guidance - value of decisions taken in collective proceedings.

In a similar vein, the CJEU has recently⁶¹ decided that national civil procedure rules requiring consumer associations to bring actions for injunctions before the courts of the place where the defendant is established, instead of allowing them to sue where the association is established, do not jeopardise the achievement of the purposes of directive 93/13 and do not violate EU law. According to the Court, “it is clear that, as regards the procedural remedies available to consumer protection associations in order to prevent the continued use of unfair terms, they are not in an inferior position *vis-à-vis* the seller or supplier.” Therefore, consumer associations cannot be equated to consumers for the purpose of establishing jurisdiction in the case of injunctions against the use of allegedly unfair terms. In this case, the idea that increasing the effectiveness of actions by consumer associations by making sure that they could easily bring an injunction against the continued use of unfair terms was not enough for the CJEU to equate it to individual consumers, whose protection can justify the Court’s interference with national civil procedures.

These examples hopefully show how *some* non-instrumental, non-market concerns- in this case, quite appropriately, the protection of the rights of individual consumers- can still trump the interests of the Court’s (real and self-perceived) regulatory remit.

Identifying what non-regulatory concerns should be emphasised as “typical” of, or even “essential” to private law is the challenge standing before us. This brings me back to my impertinent challenge to the organizers- what does “coherence” stand for? One could for instance argue that, well beyond the *aesthetics* of private law, coherence is instrumental to the promotion of other principles, such as private autonomy and equality before the law. Do we have non-market arguments to defend private autonomy? And what kind of private autonomy do these arguments leave us with? If all the struggle

⁵⁸ Aziz para 61.

⁵⁹ As we have seen, this means that certain rules -i.e. the consideration of circumstances attending the contract’s conclusion and the interpretation most favourable to the consumer- are only applicable in individual proceedings.

⁶⁰ C-381/14, C-385/14, Jorge Sales Sinués v Caixabank SA, and Youssouf Drame Ba v Catalunya Caixa SA (Catalunya Banc SA), ECLI:EU:C:2016:909.

⁶¹ Case C-413/12, Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL, ECLI:EU:C:2013:800.

has to be put into defending “our own” way of helping the market work, maybe we will just end up being told that market (regulation) knows best what (regulation of) the market needs.